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DEUS EX MINISTER: *DJOKOVIC V MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT SERVICES AND MULTICULTURAL AFFAIRS* (2022) 397 ALR 1

I Introduction

Djokovic v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs ('*Djokovic*')[1] considered the legality of the exercise of the personal power or 'God-like power' under s 133C(3) of the *Migration Act 1958* (Cth) ('*Migration Act*').

'God-like power' is a term used to describe the 'non-delegable, non-reviewable and non-compellable' discretion afforded to the Minister by provisions of the *Migration Act*.[2] These powers were originally intended as a 'compassion[ate] and humane response' to balance the strict statutory visa criteria.[3] However, throughout the years, the God-like powers have expanded to include the refusal and cancellation of visas, such as s 133C(3).[4] Christopher Evans summarised the overall difficulty with judicial review of the God-like powers:

> The [*Migration Act*] is unlike any Act I have seen in terms of the power given to the minister to make decisions about individual cases. I am uncomfortable with that not just because of a concern about playing God but also because of the lack of transparency and accountability for those ministerial decisions …[5]

This case note reiterates the breadth of the personal power conferred on the Minister and highlights that there is nothing novel about the Court's approach in *Djokovic*. *Djokovic* is simply a restatement of the accepted wisdom in Australian administrative law — that the opinion of judges on what are considered public policy matters

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1 (2022) 397 ALR 1 ('*Djokovic*').

2 Lauren Bull et al, *Playing God: The Immigration Minister's Unrestrained Power* (Report, 2017) 6.

3 Ibid 2.

4 Ibid 10.

5 Commonwealth, *Parliamentary Debates*, Senate, 19 February 2008, 31 (Christopher Evans, Minister for Immigration and Citizenship), quoted in Samuel C Duckett White, 'God-Like Powers: The Character Test and Unfettered Ministerial Discretion' (2020) 41(1) *Adelaide Law Review* 1, 29–30.

is restricted to an assessment of their legality, not their merits. Despite its seeming banality, however, the decision in *Djokovic* still warrants discussion as it highlights the inadequacy of existing accountability mechanisms against the increasing use of the Minister's so-called God-like powers as a populist tool.

II Background: No Vaxx for Novak

The applicant, Novak Djokovic, was granted a Class GG Subclass 408 Temporary Activity Visa. On 5 January 2022, he arrived in Australia to compete in the Australian Open Tennis Championship.[6] Upon arrival, he was questioned by officers of the Department of Home Affairs ('DHA').[7] Djokovic indicated to an officer that he had not been vaccinated against COVID-19.[8] Among other supporting documentation, Djokovic provided evidence as to the reason for his non-vaccinated status, namely, his recent COVID-19 infection.[9] Despite this, however, the DHA still decided to cancel Djokovic's visa under s 116(1)(e)(i) of the *Migration Act*.[10] The provision stipulates for a *delegable* power to cancel a visa if an officer is satisfied that:

> **116 Power to cancel**
>
> (1) …
>
> …
>
> (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;[11]

The DHA officer provided reasons for the decision, saying that

> [u]nder the *Biosecurity Act 2015* [(Cth)], there are requirements for entry into Australian Territory. These requirements include that international travellers make a declaration as to their vaccination status … [p]revious infection with COVID-19 is not considered a medical contraindication for COVID-19 vaccination in Australia.[12]

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6 *Djokovic* (n 1) 3 [1].

7 Ibid 3 [2].

8 Ibid 10 [47].

9 Ibid.

10 Ibid 3 [3].

11 *Migration Act 1958* (Cth) s 116(1)(e)(i) ('*Migration Act*').

12 Chris Johnston and Rosa Torrefranca, 'Cancellation Court! Djokovic Rallied To Secure Release before the Ministerial Discretions Proved a Winner' (2022) 44(3) *Law Society of South Australia Bulletin* 24, 24.

Following this decision, Djokovic was taken into immigration detention.[13] Given that Djokovic was refused immigration clearance, he was not considered to have entered Australia and his visa was, therefore, cancelled 'prior to entry'.[14] This had the effect of limiting his appeal options to the Federal Circuit and Family Court of Australia ('FCFC').[15] In his application, Djokovic submitted that the DHA officer's decision 'was affected by a variety of jurisdictional errors'.[16] These included:

- failure to give the requisite notice under s 119(1);[17]
- error in the purported formation of the state of satisfaction in the decision to cancel the visa;[18]
- error in failing to consider the evidence of the applicant's medical contraindication;[19]
- failure to consider representations made by Djokovic in response to the notice;[20]
- illogicality / irrationality as to extenuating circumstances; and[21]
- procedural unfairness and unreasonableness.[22]

On 10 January 2022, Judge Kelly issued consent orders in favour of Djokovic based on grounds of procedural unfairness and unreasonableness.[23] The order was that the DHA officer's decision be quashed[24] and that Djokovic be released immediately from immigration detention.[25] The Minister for Home Affairs conceded that the officer's decision to proceed with questioning and to cancel Djokovic's visa was unreasonable, on the basis that:

13 Ibid 24.

14 Ibid.

15 Ibid.

16 Novak Djokovic, 'Applicant's Outline of Submissions', Submission in *Djokovic v Minister for Home Affairs*, MLG35/2022, 8 January 2022, 3 [9].

17 Ibid 7–9 [24]–[29].

18 Ibid 9 [30]–[32].

19 Ibid 10–11 [33]–[35].

20 Ibid 21–4 [77]–[91].

21 Ibid 24–6 [92]–[98].

22 Ibid 26–34 [99]–[132].

23 Order of Judge A Kelly in *Novak Djokovic v Minister for Home Affairs* (Federal Circuit and Family Court of Australia, MLG35/2022, 10 January 2022) Notation [A].

24 Ibid [1].

25 Ibid [3.1].

(1) at 5:20am on 6 January 2022 the applicant was told that he could have until 8.30am to provide comments in response to a notice of intention to consider cancellation under s 116 of the *Migration Act 1958* (Cth);

(2) instead, the applicant's comments were then sought at about 6:14am;

(3) the delegate's decision to cancel the applicant's visa was made at 7.42am;

(4) the applicant was thus denied until 8.30am to make comments;

(5) had the applicant been allowed until 8:30am, he could have consulted others and made further submissions to the delegate about why his visa should not be cancelled.[26]

On the same day, counsel for the Minister for Home Affairs informed the Court that the Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs ('Minister') — the respondent in the present proceedings — may consider whether to exercise a personal power of cancellation pursuant to s 133C(3) of the *Migration Act*.[27] Unlike the delegable power under s 116(1)(e)(i), there was no requirement upon the Minister in exercising his powers under s 133C(3) to afford Djokovic procedural fairness.[28] It was as a courtesy to the Court that Judge Kelly was informed that the Minister was considering this course of action. It was then fortuitous that this enabled Djokovic to make representations to the Minister against the taking of this course of action, an opportunity the Minister was under no legal obligation to furnish.

Late Friday afternoon, on 14 January 2022, the Minister eventually exercised his personal power to cancel Djokovic's visa under s 133C(3) of the *Migration Act*.[29] The Minister did so on the basis that Djokovic's presence in Australia may be a risk to the health of the Australian community in that it could foster disregard for the need to isolate following the receipt of a positive COVID-19 test result.[30] Thereafter, Djokovic sought urgent interim relief in relation to the Minister's decision.[31] The urgency was due to Djokovic being scheduled to play in the Australian Open the following Monday.[32]

On the same day, the FCFC transferred the proceedings to the Federal Court of Australia.[33] This was confirmed by O'Callaghan J the following day and, as a result,

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26 Ibid Notation [A].

27 Ibid Notation [C]; *Djokovic* (n 1) 2–3 [6].

28 *Migration Act* (n 11) s 133C(4); *Djokovic* (n 1) 4 [8].

29 *Djokovic* (n 1) 4 [9].

30 Ibid 31 [58].

31 Ibid 4 [11].

32 Ibid.

33 Ibid [13]. See *Federal Circuit and Family Court of Australia Act 2021* (Cth) s 153(1).

the Federal Court gained jurisdiction over the matter.[34] Chief Justice Allsop then directed that this jurisdiction be exercised by a Full Court.[35] In view of its urgency, the application was heard on Sunday, 16 January 2022.[36]

III The Case

A *Applicable Law*

Section 133C(3) of the *Migration Act* provides:

> **133C Minister's personal powers to cancel visas on section 116 grounds**
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> …
>
> (3) The Minister may cancel a visa held by a person if:
>
> (a) the Minister is satisfied that a ground for cancelling the visa under section 116 exists; and
>
> (b) the Minister is satisfied that it would be in the public interest to cancel the visa.[37]

The power of cancellation under s 133C(3) is a personal power that is not capable of being exercised by a delegate of the Minister, but exists only for the Minister's consideration and is exercised personally.[38] The personal power has three main elements: (1) satisfaction; (2) risk to health, safety and good order; and (3) public interest, which are discussed below.

1 *Satisfaction*

The Minister must be *satisfied* of the matters in sub-ss (a)–(b), as set out above. This signifies that the ability to exercise the personal power is contingent upon the Minister holding a requisite state of mind — it is a jurisdictional fact.[39] The Minister need *not* prove that the elements of s 133C(3) are *in fact* made out — only that, in the Minister's subjective opinion, they are. However, the case law makes it clear that satisfaction is 'not an unreviewable personal state of mind'.[40] It must be

34 *Djokovic* (n 1) 4 [13]. See *Federal Court of Australia Act 1976* (Cth) s 32AD(3).

35 *Djokovic* (n 1) 5 [15]. See *Federal Court of Australia Act 1976* (Cth) s 20(1A).

36 *Djokovic* (n 1) 4 [16].

37 *Migration Act* (n 11) ss 133C(3)(a)–(b).

38 *Djokovic* (n 1) 4 [6].

39 Ibid 5 [21], citing *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611, 651 [131] (Gummow J) ('*Eshetu*').

40 *Djokovic* (n 1) 5 [21].

reached on 'proper material or lawful grounds'.[41] In order to do so, the Minister: (1) must act 'in good faith';[42] (2) must base their decision on 'some evidence';[43] and (3) must be reasonable or logical.[44] However, the case law also makes it clear that the Court should only interfere if the decision 'is so lacking a rational or logical foundation'.[45] Section 133C(3), therefore, provides the Minister with a broad power that is extremely difficult to challenge. This difficulty is demonstrated in *Minister for Immigration and Multicultural Affairs v Eshetu* ('*Eshetu*').[46] In that case, Gummow J emphasised that 'where the criterion … turns upon factual matters upon which reasonable minds could reasonably differ, *it will be very difficult to show that no reasonable decision-maker could have arrived at the decision in question*'.[47]

2 *Risk to Health, Safety and Good Order*

The notion of risk involves an assessment of future possibilities.[48] This assessment requires the Minister to draw 'inferences from known facts'.[49] Further, such inferences must be based on 'reasonable conjecture within the parameters set by the historical facts'.[50] Meanwhile, the meaning of 'health and safety' were considered self-explanatory in *Djokovic*.[51] In relation to 'good order', the Court said that the term 'must be construed in the context in which it appears, that is, juxtaposed to the words "the health, safety" of the Australian community'.[52] As such

> it requires there to be an element of a risk that the person's presence in Australia might be disruptive to the proper administration or observance of the law in Australia or might create difficulties or public disruption in relation to the values, balance and equilibrium of Australian society.[53]

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41 Ibid.

42 Ibid 6 [25], quoting *Buck v Bavone* (1976) 135 CLR 110, 118 (Gibbs J).

43 *Djokovic* (n 1) 6 [28], quoting *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Viane* (2021) 395 ALR 403, 408 [17] (Keane, Gordon, Edelman, Steward and Gleeson JJ).

44 *Djokovic* (n 1) 6 [26], citing *Boucaut Bay Company Ltd (in liq) v Commonwealth* (1927) 40 CLR 98, 101 (Starke J).

45 *Djokovic* (n 1) 7–8 [34], citing *Minister for Immigration and Citizenship v SZDMDS* (2010) 240 CLR 611, 648 [130] (Crennan and Bell JJ).

46 *Eshetu* (n 39).

47 *Djokovic* (n 1) 6 [27], citing ibid 654 [137] (Gummow J) (emphasis added).

48 *Djokovic* (n 1) 8 [38].

49 Ibid 9 [39], quoting *Lewis v Australian Capital Territory* (2020) 271 CLR 192, 209 [35] (Gageler J).

50 *Djokovic* (n 1) 9 [39], quoting *MZAPC v Minister for Immigration and Border Protection* (2021) 390 ALR 590, 599 [38] (Kiefel CJ, Gageler, Keane and Gleeson JJ).

51 *Djokovic* (n 1) 9 [40].

52 Ibid, quoting *Tien v Minister for Immigration and Multicultural Affairs* (1998) 89 FCR 80, 93–4 (Goldberg J).

53 Ibid.

3 *Public Interest*

The term 'public interest' has a broad and almost unlimited meaning. In *South Australia v O'Shea*,[54] Brennan J explains that this is because

> [w]hen we reach the area of ministerial policy giving effect to the general public interest, we enter the political field. In that field a Minister or a Cabinet may determine general policy or the interests of the general public free of procedural constraints …[55]

In other words, the determination of what is in the public interest is a 'matter of political responsibility'.[56] There is an assumption that Ministers will be accountable to Parliament and, in turn, to the people. This assumption is based on Australia's system of responsible government. This will be explained in further detail in Part IV(B) of this case note.

B *The Minister's Decision*

There was no statutory obligation for the Minister to justify his decision. Nonetheless, the Minister provided a 10-page Statement of Reasons that were carefully drafted.[57]

In relation to the risk to health, the Minister agreed with Djokovic's submission that the latter 'posed a negligible risk of infection to others'.[58] Despite this, the Minister was still satisfied that Djokovic may be a risk to the health of the Australian community on the basis that the latter has a well-known anti-vaccination stance;[59] and that vaccination is central to, and has proven successful in Australia's COVID-19 response.[60] In essence, the Minister's basis was not that Djokovic himself poses a risk to health. Rather, the risk to health derives from what others' perception of his views on vaccination may be.[61]

The Minister considered 'that the orderly management of the pandemic … is a component of the good order of the community'.[62] This is due to 'the adverse community-wide consequences' of failing to manage the effects of the pandemic.[63] As such, the Minister was satisfied that Djokovic's reputation has — among other

54 (1987) 163 CLR 378.

55 Ibid 411 (Brennan J).

56 Ibid.

57 *Djokovic* (n 1) 22 [103].

58 Ibid 10–11 [48].

59 Ibid 11 [53].

60 Ibid 12 [54].

61 Ibid 12–13 [56].

62 Ibid 14 [63].

63 Ibid.

things — 'the potential to undermine the efficacy and consistency' of Australia's COVID-19 response.[64]

The abovementioned 'health and good order' points were also considered in determining whether it was in the public interest to cancel Djokovic's visa and, therefore, do not require repetition.[65]

Additionally, the Minister considered other factors that are perceived to be part of the exercise of his personal power, namely:

- the purpose of Djokovic's visit;
- the degree of hardship that he and his family will suffer;
- his previous compliance with the Department; and
- the legal and diplomatic consequences of cancelling his visa.[66]

In the end, the Minister was still satisfied that the reasons for cancelling the visa outweighed those against.[67]

C *Issues*

Djokovic raised three grounds in relation to the decision:

1. The Minister's decision had binary outcomes. It was illogical, irrational or unreasonable for the Minister to only consider the effect of Djokovic's presence in Australia, but not the effect of his deportation. It follows that the decision was affected by jurisdictional error.

2. The Minister cited no evidence that supported his finding that Djokovic's presence in Australia may 'foster anti-vaccination sentiment'. Therefore, it was not open for the Minister to find that Djokovic may be a risk to the health and good order of the Australian community or that it is in the public interest to cancel his visa.

3. The Minister did not seek Djokovic's view on vaccination and, instead, relied on media reports. Therefore, it was not open for the Minister to make a finding that Djokovic has a well-known anti-vaccination stance.[68]

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64 Ibid 14 [64].

65 Ibid 15 [65].

66 Ibid 16–17 [68].

67 Ibid.

68 Ibid 17–18 [69].

D *Federal Court Decision*

The unanimous judgment by Allsop CJ, Besanko and O'Callaghan JJ dismissed all three grounds. In doing so, their Honours highlighted the accepted wisdom in Australian administrative law that it is the 'legality or lawfulness' of the decision — not its 'merits or wisdom of the decision' — that is the subject of an application for judicial review.[69]

In relation to the third ground, their Honours held that it was 'plainly open' for the Minister to find that Djokovic is against vaccination based on the views that he has expressed publicly and the fact that he had not chosen to be vaccinated for over a year since they have become available.[70] Their Honours further held that the fact that the Minister had not specifically asked Djokovic of his present stance 'only meant that there was no express statement to the contrary of what could be inferred to be his attitude' until his arrival in Australia.[71]

Addressing the second ground, their Honours held that the Minister relied on some evidence in finding that Djokovic's presence in Australia may 'foster anti-vaccination sentiment'.[72] Their Honours alluded to material referred to by the Minister in his reasons that anti-vaccination groups portrayed Djokovic 'as a hero and an icon of freedom of choice'.[73] They also acknowledged that the Minister's reasons included the encouragement, not just of anti-vaccination groups, but also of people who may be uncertain of their views on vaccination.[74] However, their Honours concluded that the encouragement of the latter group did not need evidence — it may simply be inferred 'from common sense and human experience'.[75]

Regarding the first ground, their Honours held that the Minister was not required to consider the two binary outcomes contended by Djokovic.[76] This is because the words of the *Migration Act* directed the Minister's attention to the 'presence' of the visa holder.[77] As such, there was no obligation to consider the consequences of the holder being removed from Australia.[78]

69 Ibid 5 [17].

70 Ibid 19 [74].

71 Ibid 19 [75].

72 Ibid 19–20 [78]–[90].

73 Ibid 19 [79].

74 Ibid 19 [80].

75 Ibid 20 [82].

76 Ibid 21 [95].

77 Ibid 21 [96] (emphasis omitted).

78 Ibid.

IV Comment

A *The Minister's God-Like Power*

The Federal Court noted:

> Another person in the position of the Minister may have not cancelled Mr Djokovic's visa. The Minister did. The complaints made in the proceeding do not found a conclusion that the satisfaction of the relevant factors and the exercise of discretion were reached and made unlawfully.[79]

This demonstrates the Minister's broad discretionary power in cancelling visas, depending on whether he was satisfied that Djokovic's presence in Australia 'may be or would or might be such a risk' to the health, safety or good order of the Australian community.[80] The statutory language of 'may be, or would or might be, a risk to' in s 116(1)(e)(i) suggests a 'speculative and low level of potential risk' that may be sufficient to enliven satisfaction in the Minister.[81] As Djokovic's application was for judicial review, the Court did not consider the merits or wisdom of the Minister's decision; nor did it remake the decision.[82] 'The task of the Court was … to rule upon the lawfulness or legality of the decision by reference to the complaints made about it'.[83] This means that the Full Court did not consider whether Djokovic, *in fact*, was a risk to the 'health, safety or good order' of the Australian community; but merely whether the Minister was satisfied — in good faith, with some evidence, and reasonably — that *there was a possibility* that Djokovic's presence would pose a risk to the health or good order of the Australian community.[84]

In order to achieve a positive outcome in judicial review, Djokovic needed to demonstrate that the decision of the Minister was unreasonable, by 'demonstrating that there has been some form of jurisdictional error'.[85] However, as their Honours noted, '[t]he characterisation of a decision or state of satisfaction as legally unreasonable is not easily made'.[86] This is particularly where reasons that are provided demonstrate 'a justification for that exercise of power'.[87] The Minister in *Djokovic* provided a Statement of Reasons that were 'evidently carefully' drafted, even though he was

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79 Ibid 23 [105].

80 Ibid 5 [20].

81 Johnston and Torrefranca (n 12) 28.

82 *Djokovic* (n 1) 5 [17].

83 Ibid.

84 Ibid [20].

85 White (n 5) 31.

86 *Djokovic* (n 1) 7 [33]. See also: *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332, 377–8 [111]–[113] (Gageler J); *Minister for Immigration and Border Protection v Stretton* (2016) 237 FCR 1, 24 [70(d)] (Griffiths J).

87 White (n 5) 32, citing *Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541, 574 [84] (Nettle and Gordon JJ).

not obliged to.[88] As such, the Court did not find the satisfaction of the Minister had been 'reached unreasonably or was not capable of having been reached on proper material or lawful grounds',[89] as the Minister had before him material that could convince him to cancel Djokovic's visa. The Court found that there was a lawful satisfaction for the purpose of the statute, and there was no jurisdictional error in the Minister's decision.[90]

This demonstrates the sheer breadth of the Minister's personal power under s 133C(3), which has led to the power being described as God-like.

B *The Need for a More Robust Accountability Mechanism*

While these broad ministerial powers exist to moderate the strict statutory criteria in appropriate cases, the breadth of the powers can only be accepted if there are sufficient accountability mechanisms to oversee their exercise. The chief accountability mechanism available is Australia's system of responsible government.[91] Such system promotes the primacy of 'political responsibility', that is, Ministers will always be accountable to Parliament who, in turn, will be accountable to the people.[92] According to Stephen Gageler, responsible government is 'premised on a linear concentration of power', which would ensure that the will of the electors would 'always in the end assert itself as the predominant influence in the country'.[93] In other words, responsible government is a form of 'democratic control'.[94] Given this context, it is, therefore, ironic that the exercise of the God-like powers is now characterised as 'authoritarian',[95] and 'creating … both the possibility and perception of corruption'.[96] This can only suggest that the accountability mechanism that responsible government provides is no longer adequate.

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88 *Djokovic* (n 1) 22 [103].

89 Ibid 5 [21].

90 Ibid, citing *Eshetu* (n 39) 651 [131] (Gummow J).

91 RS Parker, 'The Meaning of Responsible Government' (1976) 11(2) *Politics* 178, 178. See also: *Egan v Willis* (1998) 195 CLR 424, 451 [42] (Gaudron, Gummow and Hayne JJ); *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391, 463 [217] (Gummow and Hayne JJ).

92 Parker (n 91) 179.

93 Stephen Gageler, 'Foundations of Australian Federalism and the Role of Judicial Review' (1987) 17(3) *Federal Law Review* 162, 169, quoting AV Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan, 10th ed, 1960) ch 1.

94 Parker (n 91) 179.

95 Andrew Higgins, 'Novak Djokovic through Australia's Pandemic Looking Glass: Denied Natural Justice, Faulted by Open Justice and Failed by a Legal System Unable To Stop the Arbitrary Use of State Power' (2022) 42 *Civil Justice Quarterly* (forthcoming).

96 Senate Select Committee on Ministerial Discretion in Migration Matters, Parliament of Australia, *Inquiry into Ministerial Discretion in Migration Matters* (Report, March 2004) xix.

Indeed, RS Parker has acknowledged that the significant growth of government over the years has continued to present obstacles to the efficacy of responsible government.[97] Christos Mantziaris notes that forms of executive action may 'simply remove the conduct of government from the view of Parliament [and, thus, the people]'.[98] Lauren Bull et al commented: 'we do not know what our government is doing in our name'.[99] This presents an obvious problem as the 'Parliament and the people can only conduct their scrutiny of the executive … if they *know* what the executive is doing'.[100] In the context of the Minister's God-like powers for example, this can happen when the Minister — absent any statutory requirement to do so — does not provide reasons for their decisions.[101] In the past, an attempt has been made at bolstering political responsibility by establishing an independent parliamentary committee to oversee the exercise of the God-like powers by the Minister.[102] This attempt, nevertheless, failed and, to date, has yet to be realised.[103]

With this in mind, courts present an alternative form of accountability that should complement political responsibility.[104] Mantziaris explains:

> While the main arenas for the political responsibility relationship are the Parliament, the electoral process and the public discussion of political affairs, the forum for the executive's legal responsibility is the court and the modern system of administrative tribunals.[105]

Nonetheless, legal responsibility still operates on the assumption that its political counterpart not only holds primacy but also remains adequate.[106] This, therefore, provides an explanation as to why judicial review is of a limited nature. It has been highlighted that the problem with this assumption is that it allows the executive to further escape liability.[107] As such, Mantziaris asserts that

> the proper response of the court should be to look at the way in which both political and the legal responsibility for the relevant activity is performed. Where it sees that neither relationship provides a remedy for an executive

97 Parker (n 91) 179.

98 Christos Mantziaris, 'The Executive: A Common Law Understanding of Legal Form and Responsibility' in Robert French, Geoffrey Lindell and Cheryl Saunders (eds), *Reflections on the Australian Constitution* (Federation Press, 2003) 125, 140.

99 Bull et al (n 2) 1.

100 Mantziaris (n 98) 133 (emphasis in original).

101 *Djokovic* (n 1) 22 [103].

102 Bull et al (n 2) 2–3.

103 Ibid 3.

104 Mantziaris (n 98) 136–9.

105 Ibid 136.

106 Ibid 141.

107 Ibid.

> wrong, it must strive to see what it can do to maintain the overall responsibility relationship.[108]

In other words, the emphasis on judicial review should be on the actual efficacy of accountability, rather than on any blind assumption about the primacy and adequacy of political over legal responsibility. However, given the Courts' 'incremental and precedent-bound manner of operation',[109] such a cultural shift would not occur on its own, and would naturally require legislative intervention.[110] Until then, there remains a huge gap between the increasing exercise of executive activity such as the God-like powers and the measures to keeping the executive accountable.

C *Vox Populi(st)?*

Those in favour of the *Djokovic* decision may describe it as a testament to the unyielding strength of Australia's COVID-19 response and border integrity, where rules were not 'bent for the benefit of the rich and powerful'.[111] On the same morning that the first decision was handed down, the then Prime Minister of Australia, Scott Morrison, tweeted: 'Rules are rules, especially when it comes to our borders. No one is above these rules.'[112] Indeed, in the event that Djokovic had won, a 'one rule for them and another [rule] for the rest of us' public chatter would have inevitably ensued.[113] Nonetheless, this (over)emphasis on rules only makes it obvious that it is not the rule of law but, more aptly, the rule of populism, which seems to have subjected Djokovic to deportation.

It is notable that one critic of the Minister's decision regarding Djokovic's fate has said that it had 'no discernible policy' behind it.[114] Other unvaccinated tennis players with the exact same paperwork were allegedly initially allowed into the country without trouble.[115] In relation to previous exercises of the God-like powers, this appears to be a step further in the wrong direction. Andrew Higgins notes that, in detaining asylum seekers — although 'cruel' — there is at least an identifiable policy in that it was designed to curb attempts at making dangerous sea journeys to

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108 Ibid 143.

109 Ibid.

110 A similar cultural shift happened in 1975–82 upon 'the enactment of the federal "administrative law package"': ibid 138.

111 Joshua Jowitt, 'Novak Djokovic: The Legal Problem of Having One Rule for Some, Another for Everyone Else', *The Conversation* (online, 12 January 2022) <https://theconversation.com/novak-djokovic-the-legal-problem-of-having-one-rule-for-some-another-for-everyone-else-174655>.

112 @ScottMorrisonMP (Twitter, 6 January 2022, 8:26 am ACDT) <https://twitter.com/ScottMorrisonMP/status/1478848008363991049>, archived at <https://perma.cc/5F3Q-D7YV>.

113 Jowitt (n 111). See also Higgins (n 95) 3.

114 Higgins (n 95) 12.

115 Ibid 3.

Australia.[116] The *Djokovic* decision, in contrast, was clearly motivated by populist pressure.[117] Put bluntly, it was a golden opportunity for an unpopular government to gain much-needed political mileage months before an impending election.[118] While there is some justification to the Minister's decision that Djokovic's presence in Australia 'may foster anti-vaccination sentiment',[119] one wonders if the decision would have been made at all if such high political stakes were not in play. This is especially salient when considering that, prior to the cancellations, the Prime Minister has publicly indicated that granting a vaccination exemption to Djokovic 'was a matter for the state government of Victoria'.[120] As another critic points out, the federal government 'made a final decision that seems to be in line with community sentiment and, just possibly, the government's internal polling'.[121] In a way, this appears to comply with the orthodox notion that the God-like powers are a 'matter of political responsibility',[122] albeit in its most rudimentary sense. However, one does not need to be an expert in law or political science to perceive how a conflation between democracy and populism can become problematic.

But what makes the situation worse is that the usual subjects of these God-like powers are not influential people like Djokovic, to whom visa cancellation simply constitutes a minor inconvenience. Instead, they are asylum seekers to whom a visa cancellation is the difference between a life of opportunity or misery.[123] Hence, a tweet by the Asylum Seeker Resource Centre, soon after the *Djokovic* decision, is fitting:

> That #Djokovic has just lost before the Federal Court shows how untouchable the Ministers god like powers are. When a multimillionaire tennis player can't

116 Ibid 12.

117 Ibid. See also 'Novak Djokovic: Australian Open Vaccine Exemption Ignites Backlash', *BBC News* (online, 5 January 2022) <https://www.bbc.com/news/world-australia-59876203>.

118 Higgins (n 95) 4; David Cohen, 'Scott Morrison's Stance on Novak Djokovic and the Australian Open: Public Health Strategy or Election Campaigning?', *College Green Group* (Blog Post, 12 January 2022) <https://collegegreengroup.com/scott-morrison-australia-novak-djokovic-tennis-showdown/>; Steve McMorran, 'Some Say Politics at Play in Djokovic Detention in Australia', *The Diplomat* (online, 8 January 2022) <https://thediplomat.com/2022/01/some-say-politics-at-play-in-djokovic-detention-in-australia/>.

119 *Djokovic* (n 1) 17 [69].

120 Shaimaa Khalil 'Novak Djokovic: Is His Vaccine Saga an Unforced Error for Australia?', *BBC News* (online, 10 January 2022) <https://www.bbc.com/news/world-australia-59923332>.

121 David Crowe, 'The Political Cost of Letting Djokovic Stay Was Too High for Morrison', *The Age* (online, 14 January 2022) <https://www.theage.com.au/politics/federal/the-political-cost-of-letting-djokovic-stay-was-too-high-for-morrison-20220114-p59oc4.html>.

122 See above n 56.

123 See generally Bull et al (n 2).

> win against the Minister do you now understand why 70 refugees are still locked up 9 years later. He is their judge & jailer.[124]

V Conclusion

Djokovic is in some ways a simple application of established case law in relation to the God-like powers which reaffirms the limited nature of judicial review in Australia. It reiterated that the Court would not overrule the Minister's decision if such a decision was based on findings of fact supported by logical grounds. While the exercise of the God-like power is reviewable, there is clearly a high threshold to reach for the Court to overrule the Minister's decision.

Under s 133C(3) of the *Migration Act*, the Minister was not required to afford natural justice to Djokovic in exercising his power. The fact that Djokovic was able to make submissions to the Minister in advance of the cancellation was purely a result of informing the Court, as a necessary courtesy, that the Minister was considering this course of action. As such, *Djokovic* invites future arguments as to whether s 133C(3) should be amended to effectively afford natural justice. Additionally, it also invokes a broader discussion as to whether the God-like powers are appropriate at all.

The Minister provided reasons for his decision 'perhaps in anticipation of a legal challenge and the publicity of the case'.[125] However, this does not always happen as there is no requirement in the *Migration Act* for the Minister to do so. As such, the fact that this case was able to go on with the expedition and clarity that it did was really fortuitous. The Minister's reasons considerably aided the Court in determining whether the Minister's decision was supported by logical grounds. Thus, *Djokovic* also invites discussions about future reform in this area — surely the least an individual whose visa is cancelled under this power is entitled to expect are reasons for the decision.

This case note demonstrated that the Court's reluctance to intervene, combined with the current system's inability to offer a robust form of accountability, is a two-ingredient recipe for disaster. It leaves the exercise of the God-like powers to executive whim, susceptible to populist pressure, and with exceptionally limited capacity for affected individuals to challenge a decision that can have enormous impacts on their life (well beyond the consequences experienced in this case by Djokovic).

More succinctly, this case note demonstrates that we need *deus ex* Minister — we need to purge God out of the Minister.

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124 @ASRC1 (Twitter, 16 January 2022, 5:29 pm ACDT) <https://twitter.com/ASRC1/status/1482608328350253059>, archived at <https://perma.cc/SC6W-5UF5>.

125 Johnston and Torrefranca (n 12) 27.