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THE AUSTRALIAN IMMIGRATION LAW IN A PUBLIC EMERGENCY: THE INFAMOUS DJOKOVIC CASE

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ABSTRACT

Australian immigration law and policy have often been criticised for inconsistency with international human rights standards. Their arbitrary character is demonstrated in one example from the Australian case law that spurred a global debate on the legitimacy of the public health measures against the COVID-19 pandemic. This is the case of the government's cancellation of the visa of the famous tennis player Novak Djokovic, who entered Australia to compete in the tennis tournament in January 2022. This government's denial interfered with his freedom not to follow public official recommendations and policies. This paper investigates the limits of the government's discretion to take emergency measures for public health protection analysing procedural and substantive aspects of decisions that have struck this famous tennis player. Proceeding from universally accepted theoretical stances on the rule of law and human rights it evaluates a legal basis, argumentation and legal consequences of the decisions of the Australian government and the Federal Court. Eventually, this case indicates that all such decisions may be justified by the public interest, although such unfavourable treatment of a foreigner can hardly be justified. In short, foreigners cannot rely upon guarantees of human rights and the rule of law, because of the ignorance of relevant international standards, vague immigration laws, a broad judicial interpretation of executive powers and a narrow judicial review.

KEYWORDS

immigration, public emergency, pandemic, human rights

INTRODUCTION

Immigration legislations worldwide, especially in developed states, are based on a quest for a sensitive balance between the homeland's protection of public wealth and the respect for internationally recognized human rights of foreigners. A striking balance between those opposing requirements may be achieved with precisely pondered statutory checks and balances that limit the executive powers, and with a consistent judicial scrutiny on executive decisions. Circumstances of a public emergency of any kind have always implied opportunities for evaluate immigration laws because the temptation of governments to undermine this sensitive balance is sometimes too high.

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This paper demonstrates this temptation in the case that attracted global attention during the COVID-19 pandemic, i.e. the expulsion of the on-that-time No. 1 world tennis player Novak Djokovic from Australia in January 2022. In short, the Government denied him a visa to compete at the Australian Open tennis tournament after he had entered Australia, reasoning that his anti-vaccination stance might support the domestic sentiment against the government's strict anti-COVID-19 policy. After being challenged before administrative courts by Djokovic, this government's decision was justified by the Australian judiciary as a lawful exercise of the executive's powers.

However, the legitimacy of this government's action and judicial reasoning has been highly contested in the homeland and worldwide. Many welcomed such a strict approach to the anti-COVID-19 policies for the sake of a legitimate goal of public health protection and the opponents have seen it as a dangerous precedent of arbitrary decision-making that does not meet standards of the rule of law and internationally recognised human rights (Sadler, 2022; Australian Lawyers Alliance, 2022).

This paper assesses the implementation of international human rights standards in the Australian executive and judiciary decisions, utilizing the example of the Djokovic case. It commences with a brief insight into the legal framework of the human rights of foreigners in public emergencies. In the second part, this framework is confronted with administrative and judicial reasoning in the Djokovic case.

HUMAN RIGHTS OF FOREIGNERS IN A PUBLIC EMERGENCY

In the Djokovic case, it cannot be disputed that the Australian government enjoyed quite wide discretionary powers. The binding international human rights standards allow limitations based on foreign citizenship and derogations of human rights based on extraordinary circumstances of a public emergency. When dealing with such persons and circumstances, the augmentation of executive powers and the more flexible approach to states' obligation to respect international human rights, can be justified by a plethora of necessities. Therefore, the government's measures that impair with human rights may be considered to be a conducive means of crisis management.

For instance, in the the International Covenant on Civil and Political Rights (ICCPR, 1996) the prescribed rights and freedoms are recognized to „all individuals“ in Art 2. and to „every child“ in Art. 25, but some of them are reserved to „every citizen“ in Art 25. And the Art. 4. entitles states to „take measures derogating from their obligations...“

However, the same provision imposes a severe caveat to governments, stipulating that such human rights limitations may be legitimate only if „the extent...(is) strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.“ Besides, these limitations must exclusively serve these legitimate goals: public order, public health, morals, national security, public safety, the rights and freedoms of others, and the integrity of the public trial. Furthermore, the same provision in para 2 excludes governments' entitlement of human rights restrictions to the right of life, torture, not to be enslaved, not to be imprisoned because of inability to fulfil a contractual obligation, to be legally recognized as a person, privacy and freedom of thought, conscience and religion (Art. 6,7,8,11,16,17,18 ICCPR).

These requirements must be seen as an essence of the rule of law: The executive decision-making must not be arbitrary and must respect human rights and freedoms to the highest possible degree. Concepts



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used in these provisions are wide, but the meaning of this requirement can be more precisely defined in the case law of international bodies that supervise international human rights implementation. One of the most convincing interpretations of the caveats in limiting and derogating human rights is given in Siracusa's principles. In short, limitations must be strictly prescribed and provided by law, must not jeopardize the essence of the right concerned, must serve the purpose for which it has been prescribed, cannot be applied arbitrarily, must be subject to the possibility of challenge and remedy against its abusive application, and not to be discriminatory. Finally, a legitimate limitation must be necessary, in terms of being based on the ground justifying limitation under the ICCPR, responsive to a pressing public or social need, pursuing a legitimate aim, and proportional to that aim (American Association for the International Commission of Jurists, 1985, A).

Further, the meaning of proportionality is developed in constitutional law theory. According to Alexy, the government's measure that restricts the enjoyment of a certain goal and principle is proportional only if it meets all these conditions: if it is suitable for the promoting of the chosen principle or goal; if it is necessary, i.e. if the chosen measure interferes the least intensively with other legitimate goals or principles; if the chosen principle or goal is more important than the others that have been interfered by this measure; and if the chosen measure interferes less and it is reliable more than others in achieving a chosen goal or principle (Alexy, 2021, 1-10). This complicated and rigorous test can be conducive in cases of restrictions and derogations of internationally recognized human rights, because these rights can be seen as legitimate principles and goals that governments are obliged to achieve, or at least to aspire. Besides, the application of this test has already been routinely applied by international bodies that supervise the obligations of states to respect and promote human rights.

Furthermore, Siracusa narrows the meaning of the concept of „public emergency which threatens the life of the nation“ to a „situation of exceptional and actual or imminent danger“ that „affects the whole population and either the whole or part of the territory of the state and threatens the physical integrity of the population, the political independence or the territorial integrity or the existence of basic functioning of institutions...“ Such an emergency must be officially proclaimed by a state in a procedure that is previously prescribed and must contain all details on rights being derogated, the legal basis for derogation, the period of derogation, reasons and anticipated effects of derogation (American Association for the International Commission of Jurists, 1985, Art.39-50). Just like in cases of human rights restrictions, human rights derogations imply preciseness and subtleness, and thus posit severe caveats to governments. By eliminating the possibilities of abuse of power or arbitrariness, and by insisting on respect of human rights to the highest possible degree, these interpretations aspire to preserve the rule of law.

However, reflections of these interpretations cannot be found in the Australian legal system. Australian constitutional arrangements look quite peculiar: Although being a signatory of all significant human rights conventions, Australia's federal constitution does not contain any human rights catalogue. This lacuna is exacerbated by a lack of legislative enthusiasm to implement international human rights standards and judicial restraint in the application of international law (Kirby, 1993; Kirby, 2011; National Report of Australia, 2020, para 70-73).

Therefore, invoking the rule of law argument may provide the only plausible guidance when the government's actions impair human rights. The weight of this argument cannot be underestimated in the environment shaped by rich common law tradition, successful economy and a high standard of living. Unfortunately for the applicant, it did not work in his case.



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APORIE OF THE FEDERAL COURT'S ARGUMENTATION

The facts and arguments of the case *Djokovic v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs*, the Federal Court of Australia (FCA) have been found in Reasons for the dismissal of Novak Djokovic's application that was published on 20 January 2022. In short, the applicant, the famous tennis player who publicly disclosed his choice not to be vaccinated against COVID-19, legally entered Australia to compete at the Australia Open championship. After some time the Australian Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs cancelled his visa, exercising his discretionary power to do so under s 133C(3) and 116(1) (e) (i) of the Migration Act 1958 (MA 1958 and Migration Amendment Act 2014).

These provisions authorize the Minister to cancel a visa, without affording the applicant procedural fairness, if he finds that „the presence of its holder in Australia is or may be, or would or might be, a risk to ... the health, safety or good order of the Australian community...“, and „that it would be in the public interest“ (FCA, *Djokovic*, 2022, FCAFC 3, VID 18 to of 2022). These provisions entitle the Minister to cancel the applicant's visa, being satisfied that the presence of the “high profile unvaccinated individual” in Australia had posed a risk to the health and good order (para 44-68).

In the outcome of the judicial review, FCA upheld the Minister's decision, reasoning that the presence of the unvaccinated applicant in Australia may boost anti-vaccination sentiment to the extent that his expulsion is in the public interest underpinned by the strict border and COVID-19 vaccination policies. This led to the applicant's confinement in quarantine and expulsion from Australia.

The judicial review in favour of the executive's decision looks well argued, because of implied limited jurisdiction and strong restraint of the FCA „to rule upon the lawfulness or legality of the decision by reference to the complaints made about it,“ excluding the merits and wisdom (para. 17). A routine exercise of a government's sovereign rights against foreigners whose presence may undermine the public interest may hardly be contested, but some arguments look dubious. As a result, FCA justified the Minister's conclusion that the applicant's presence in Australia implied hypothetical jeopardy.

However, the sanction of expulsion looks disproportional to Djokovic's unwanted, but still lawful deeds and intentions: he was detained and expelled, although the legality of his initial entrance and behaviour in Australia was not contested at all. For these reasons, the FCA's argumentation must be under suspicion off the applicant's procedural and substantial human rights violations.

The first impression from the FCA decision is the lack of reasoning on internationally recognized human rights of foreigners, especially those rights that are envisaged by ICCPR. In short, Art. 2 binds Australia „to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind“ and ensure an effective remedy for violations; Art. 18 to respect everyone's freedom of thought; Art. 19 to respect „the right to hold opinions without interference“ that can be limited by rights of others, national security or public order, public health or morals, only if are provided by law and necessary.

In short, the restrictions must be strictly prescribed by law, necessary, appropriate, the least intrusive and proportional to a legitimate aim (Castan, 2013, 406-426). The Australian government could not ignore these guarantees, because the World Health Organisation's declaration of the „public health emergency“ does not fall under the prescribed reason for human rights' derogation under ICCPR Art. 4 para 1, i.e. the „public emergency which threatens the life of the nation and the existence of which is officially proclaimed...“ (Rasevic, 2021, 549-569).



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In their reasoning, both the Minister and the FCA weighted possible outcomes of maximization of the public interest. However, they failed to produce a single word about the appropriateness, minimal intrusion and proportionality of the Minister's measure with the applicant's human rights. Besides, they did not interpret vague notions of legitimate aims in MA: „health, safety, good order and public interest“ following more precise ICCPR's standards of „rights of others, national security or public order, public health or morals“ (para. 36-43). This lacuna in the FCA judgment cannot be justified by the notorious lack of a Bill of Rights in the Australian Constitution and federal laws (FCA 1624, Newall, 1998) because the courts must implement ex officio all applicable laws.

Second, the FCA's conclusion that the Djokovic's presence in Australia „is or may be, or would or might be, a risk“ under the applicable MA's provisions, is based on the false analogy with Newall (FCA 1624, Newall, 1998), where it is found that „is not necessary that the visa holder himself or herself take action to create the risk. It is the presence of the person in Australia that must found the risk.“(para. 41). The implementation of this precedent must be highly contested, because of different personality traits of applicants, and duration and purpose of visa: in contrast to a „high profile unvaccinated individual“ and philanthrope with a diplomatic passport in Djokovic (para.65-68), the thwarted visa holder in Newall was a criminal on probation, sentenced abroad to 6 years imprisonment for assisting after the murder and hiding from justice; Djokovic's visa was issued for a public appearance and lasted a few weeks, while Newall was supposed to reside one year in Australia for private reasons. Everybody is equal before the law, but the presence of a „high-profile individual" obviously must have had a less malicious social impact than that of the convicted criminal. Therefore, it can be concluded that such FCA's sweeping generalisation must have seriously diminished the applicant's prospects for success.

Finally, it can be argued that the FCA deprived the applicant of procedural fairness in the judicial review, just as the Minister did, but this time without any legal ground. The Court's argumentation about the extremely narrow scope of judicial review and strong judicial restraint sits ill with the rule of law, especially with standards of lawful limitation of government's power, respect of human rights, equal rights in judicial proceedings, and predictability of government's actions.

The MA provision that triggers the Minister's discretion, i.e. „the presence ... in Australia is or may be, or would or might be, a risk" is not sufficiently clear and descriptive to be applied without arbitrariness. Nevertheless, the FCA limited its review to highly subjective Minister's speculations of the applicant's hypothetical influence on public anti-vaccination sentiment and allowed him unfettered discretion in interpreting wide and vague terms of MA. This lack of legislative clarity has been criticized by United Nations human rights bodies and academia as a source of the government's "god-like powers"(Duckett White, 2020, 37-38).

Besides, the FCA upheld the Minister's satisfaction that the applicant's presence had become social jeopardy based on hearsay in the media while giving less weight to the applicant's evidence (para. 71-77). The lack of time to fully consider the applicant's defence was not a good excuse because the emergency was caused by the Minister's unpredictable visa cancellation. The lowest level of judicial scrutiny can be confirmed in para. 104: "...where the criterion of which the authority is required to be satisfied 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." Actually, the FCA shifted the whole burden of proof to the applicant and unfairly raised his standard of proof.



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CONCLUSION

The Djokovic case proved to be a good example of gray zone between the legitimate administrative and judicial decision-making and an abuse of power against oppressed individual.

This Australian government's resort to discretionary power against a lawful, but unvaccinated foreigner can hardly be justified by the high pressure of immigration, pandemic concerns, or any other public interest that does not amount to a „public emergency which threatens the life of the nation ... which is officially proclaimed“ (ICCPR, Art 4). Notwithstanding that every state is authorised to deal with unwelcome foreigners as they see fit, this case exposes that they are not equally or at least fairly treated in Australia.

According to Dworkin, resorting to human rights should be effective trumps of an individual against collective goals (Dworkin, 1977, xi-xv), and this has not happened in the Djokovic case.

The status of foreigners shaped by the Australian government's strict border policy and the lack of effective judicial scrutiny looks quite peculiar for a legal system based on impeccable common law traditions. In short, foreigners cannot effectively challenge the executive's powers because of the legislative vagueness, broad discretion of the executive, narrow judicial review and strong judicial restraint. And this is not just about the COVID-19 pandemic. The combination of such unfavourable factors can easily result in an arbitrary exercise of executive discretion in a public emergency and all other emergency-like situations.

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