

What the Djokovic case tells us about Australia's dysfunctional visa cancellation regime

The cancellation of the visa held by Novak Djokovic, and his subsequent transfer to immigration detention at Park Hotel in Melbourne, has rightly drawn attention to Australia's indefinite detention of asylum seekers, many of whom have been found to be refugees, at the same location.

But the case also sheds light on three other areas of concern: Australia's visa cancellation regime, Australia's immigration detention regime, and the breadth of personal powers available to the Minister for Home Affairs.

The Visa Cancellations Working Group, the Asylum Seeker Resource Centre and the Refugee Advice & Casework Centre repeat their calls for an immediate inquiry into Australia's dysfunctional and dangerous visa cancellation regime.

Visa Cancellation Regime

In [2014](#), the Federal government vastly expanded the visa cancellation powers available under the Act, including under ss 116 (general powers) and 501 (character powers) of the Migration Act. Since then, there has been a [huge increase](#) in visa cancellations, including in 'immigration clearance' at the airport. The system is now cumbersome, opaque, and alarmingly prone to error and injustice.

As just one example, the lowering of the risk threshold in s 116(1)(e), so that it captures people who '*may*' or '*might be*' a risk, significantly expands the scope of the cancellation power: there have been [hundreds of visas](#) cancelled on this specific basis since 2014.

Visa cancellation decisions made in 'immigration clearance' at the airport cannot be reviewed on their merits. The only way to challenge such decisions is in the Federal Circuit and Family Court of Australia on narrow legal grounds. This raises highly technical, legal questions that require both knowledge of administrative law and of court procedure. Such proceedings must be commenced urgently, while the visa holder is in detention or perhaps even at the airport, before they are removed from the country.

Djokovic was able to obtain legal advice, commence Court proceedings, and prevent his removal from Australia. But few people have access to the same resources. At the airport, people are given as little as 10 minutes to respond if their visa is being considered for cancellation, often after a long flight or at irregular hours. They are not given access to legal advice or other support. As a result, visa cancellations made under a veil of secrecy remain unchallenged, and visa holders are summarily removed from the country and barred from re-entry.

The significant defects in the process to which Djokovic was subjected highlight the dysfunction of the current cancellation regime.

The Minister's Personal Powers

Despite his success in Court, lawyers for the Minister for Home Affairs have indicated that Alex Hawke, the Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs, is considering whether to use his personal powers under s 133C of the Act to cancel Djokovic's visa again (though other powers also exist). Under that provision, the Minister may personally cancel a visa if a ground for cancellation exists under s 116 and he considers cancellation is in the 'public interest.'

The Minister has no less than [47 personal powers](#) under the Act – more than any other Commonwealth Minister. Since 2014, there has been a [significant increase in decisions](#) made personally by the Minister under the Act: the Minister has personally made [hundreds](#) of negative s 501 cancellation decisions since 2014. Such decisions are immune from merits review.

It is not appropriate that such significant powers to override the decisions of Tribunals and Courts are vested in the Minister.

Immigration Detention

Australia has a system of mandatory immigration detention, which means that any person without a valid visa *must* be detained. There are hundreds of people in Australia's detention facilities, some of whom have been there for close to a decade, and some refugees who the Department, shockingly, acknowledges will remain there indefinitely.

Australia has an ever-expanding immigration detention network, which includes purpose-built detention centres and an unknown number of 'Alternative Places of Detention' or APODs.

Australian detention centres are notorious and a matter of international concern. From Melbourne's MITA (where there have been multiple deaths and hunger strikes resulting in hospitalisations) to Christmas Island IDC (where appalling conditions have led to riots and deaths), the conditions in detention (including its indefinite or prolonged nature) are such that people found to be refugees ostensibly '[choose' to return](#) to the country they may be harmed.

When Djokovic's visa was cancelled, he was detained and taken to Park Hotel, an APOD. The conditions at Park Hotel have received ongoing media attention. There are an unknown number of APODs around the country – including hospitals, hotels and private residences. No information is available on the number of APODs or the conditions within them.

Immigration detention has remained mandatory during the pandemic. This is despite the [obvious risk of COVID infection](#) amongst detainees, and the fact that there are approximately [130 people in immigration detention](#) with an ongoing disability.

What needs to be done next?

Cancellations have life-changing consequences for visa holders, their families and communities – including permanent separation and return to countries where a person might face death or serious harm. The immediate result is that a person is liable for immigration detention and removal from Australia. Former visa holders are also subject to various bars, including on further visa applications or re-entry to Australia for between one and three years.

In his ability to challenge and successfully set aside the cancellation of his visa, Novak Djokovic has been the absolute exception.

The lack of substantive and procedural fairness in the visa cancellation and immigration detention regimes are of immense concern. The damage to individuals and to Australia's international reputation is severe.

There should be an immediate inquiry into Australia's dysfunctional and dangerous visa cancellation regime.