‘Fast tracking’ refugee status determination

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‘Fast tracking’ in Australia: the background

Before the 2013 federal election, the Coalition announced its plan to assess protection claims more quickly. The plan indicated that a Coalition government would introduce a new ‘Fast Track Assessment and Removal’ (FTAR) process, based on the United Kingdom’s Detained Fast Track (DFT) system.

As originally announced, this process involved ‘four key steps’:

- Triaging the Caseload;
- Rapid Assessment;
- Rapid Review; and
- Rapid Removal.

The first step was to identify cases that ‘appear[ed] less likely to be successful in gaining refugee status and can be determined readily’, and which would be referred into the Fast Track process. A case officer would then make a decision within 14 days (‘rapid assessment’). If a negative decision was made at this stage, an immediate review would be initiated by another case officer, to be completed within a further 14 days (‘rapid review’). If the review was unsuccessful, removal was to take place within 21 days (‘rapid removal’).

Under the policy, if a person was unable to be removed, then he or she would ‘be transferred to Christmas Island pending removal. Voluntary removal options will also be offered at Christmas Island’.1

‘Fast tracking’ in Australia: how it operates

The process enacted in the Migration and Maritime Powers Amendment (Resolving the Asylum Legacy Caseload) Act 2014 is quite different from what was originally proposed. The Act effectively divides asylum seekers into three groups, with a different process for each. Two of these groups – fast track applicants and excluded fast track applicants – are subject to fast tracking. The third group comprises all other asylum seekers (essentially,
asylum seekers who have arrived in Australia on a valid visa), who continue to have access to the ordinary refugee status determination (RSD) process. For more information on the ordinary process, see our Refugee Status Determination factsheet.

**Fast track applicants**

The definition of ‘fast track applicant’\(^3\) is set out in the legislation. The term includes all unauthorised maritime arrivals (being those who have arrived by boat without a valid visa) who arrived between 13 August 2012 and 1 January 2014, and were not taken to Nauru or Papua New Guinea for offshore processing, provided that the Minister has allowed them to apply for a protection visa and the person has made a valid application.\(^4\) The Minister can also extend the definition to other classes of asylum seekers by a legislative instrument.\(^5\)

Fast track applicants do not have access to the Migration and Refugee Division of the Administrative Appeals Tribunal (AAT), which replaced the Migration Review Tribunal-Refugee Review Tribunal from 1 July 2015. Instead, applicants who receive a negative decision are referred to a newly established body, the Immigration Assessment Authority (IAA).\(^6\) The IAA is an independent office within the Migration and Refugee Division of the AAT, and comprises the Principal Member of the Migration and Refugee Division, a Senior Reviewer and other Reviewers.\(^7\) The intention is that this is a more limited form of review, generally without an interview and with no new information allowed (see below). Fast track applicants will usually also continue to have access to judicial review. However, the Minister for Immigration has the power to issue a ‘conclusive certificate’ which prevents an initial decision from being changed or reviewed.

**Excluded fast track applicants**

‘Fast track applicants’ can become ‘excluded fast track applicants’ if they have:

- come from ‘safe third countries’ or have ‘effective protection’ in another country;\(^8\)
- previously entered Australia and made a protection visa application which was refused or withdrawn;
- made an unsuccessful claim for protection in another country;
- made an unsuccessful claim for protection to the United Nations High Commissioner for Refugees (UNHCR);
- provided ‘without reasonable explanation’ a ‘bogus document’ in support of the application; or
- made, in the opinion of the Minister, a ‘manifestly unfounded’ claim.\(^9\)

The Minister can also expand the grounds on which someone may be designated an ‘excluded fast track applicant’ through a legislative instrument.\(^10\)

A ‘manifestly unfounded’ claim is defined in the Act. It includes claims that have no ‘plausible or credible basis’; those based on country information that cannot be substantiated by any objective evidence; and those ‘made for the sole purpose of delaying or frustrating’ removal.\(^11\) The Supplementary Explanatory Memorandum to the Act notes that the amendment to the Migration Act concerning manifestly unfounded claims ‘reflects an
interpretation of this concept that is commensurate with the United Nations High Commissioner for Refugees’ position on responding to manifestly unfounded applications.\textsuperscript{12}

Excluded fast track applicants will not have access to any form of merits review, and they will only have access to the more limited form of judicial review by the courts. The Immigration Department will conduct an ‘internal legal check’, but this is a quality assurance process rather than a review of the merits of the claim. The Minister may, however, allow specified excluded fast track applicants to have access to the same review process as fast track applicants through a legislative instrument.\textsuperscript{13}

**How will the review by the IAA work?**

Review by the IAA is different from review by the Migration and Refugee Division of the AAT (MRD-AAT) in a number of ways. First, while generally an applicant has the opportunity to appear before the MRD-AAT, the IAA will instead conduct a review only ‘on the papers’ (by reviewing the existing documents before the Department).\textsuperscript{14} While the IAA can ask for new information at an interview, it can only use such information in limited circumstances, as described below.\textsuperscript{15}

The IAA can only consider new information in ‘exceptional circumstances’, and if either the new information could not have been provided at the time of the initial decision, or it is ‘credible personal information’ which, had it been known, may have affected the initial consideration of the claim.\textsuperscript{16}

The term ‘exceptional circumstances’ is not defined by the Act. The [Explanatory Memorandum](#) to the Bill indicates that this term is intended to give a broad discretion to the IAA, but may include a material change in circumstances after the original decision was made (for example, rapid deterioration of conditions in the country of origin),\textsuperscript{17} or evidence of ‘significant torture and trauma’ which, if known, would have affected the consideration of the claim.\textsuperscript{18} Examples of circumstances that would not justify consideration include: information available at the primary stage that was ‘not presented for unsatisfactory reasons’; a ‘general misunderstanding or lack of awareness of Australia’s processes and procedures’; or ‘a change in personal circumstances within the control of the applicant’.\textsuperscript{19}

Third, whereas an applicant would usually apply for review by the MRD-AAT, all unsuccessful fast track decisions will automatically be referred by the Minister to the IAA, and relevant material will be provided to the IAA by the Secretary of the Department at or around the time of referral.\textsuperscript{20}

Fourth, a new Code of Procedure will be introduced by regulation to codify the IAA’s obligations to afford applicants natural justice and set out timeframes for review.\textsuperscript{21} It is expected that these timeframes will reduce the time allowed for applicants to respond to questions or clarify matters raised by the Department and/or the IAA. The timelines have not yet been made available.

The Principal Member of the Migration and Refugee Division of the AAT can issue practice directions for the IAA, and identify decisions that are to be followed unless clearly distinguishable (‘guidance decisions’).\textsuperscript{22} Similar provisions were introduced for the Migration
and Refugee Division of the AAT in the *Migration Amendment (Protection and Other Measures) Act 2015 (Cth)*. These measures are intended to expedite the processing of applications.

The fast tracking procedure before the IAA will be affected by new requirements introduced in the *Migration Amendment (Protection and Other Measures) Act 2015 (Cth)*. This Act has the effect of requiring an asylum seeker to provide full and complete information at the beginning of the RSD process, and will penalise late evidence. These provisions, combined with the limits on considering new evidence on appeal, will significantly distinguish the IAA procedure from the AAT procedure.

**The United Kingdom’s DFT process compared**

As noted earlier, the Australian policy of fast tracking is said to have been inspired by the United Kingdom’s Detained Fast Track system (DFT). However, the context and the practice of fast tracking procedures in the United Kingdom are very different from those proposed in Australia. These differences include the following:

- the DFT was said to be justified by a continuing and dramatic surge in asylum applications, and alleged ‘abuse’ of the system. Neither of these justifications is relevant in Australia, where irregular arrivals have been found overwhelmingly to be refugees;
- the DFT policy includes an entitlement to funded legal advice and representation, and access to the full review system (including judicial review), albeit in a compressed timeframe;
- the key selection criterion for the DFT is that ‘it appears that a quick decision is possible’, whereas in Australia fast tracking will apply to all ‘unauthorised maritime arrivals’ arriving on or after 13 August 2012;
- unlike the Australian fast track process, the DFT policy excludes categories of vulnerable asylum seekers, including children, families, pregnant women, victims of trafficking or torture, persons with a disability, persons with a physical or mental health condition who cannot be dealt with adequately in detention, and those who clearly lack the mental and cognitive capacity to understand the process and/or present their claim;
- the DFT policy requires on-going consideration of the need for greater flexibility in the timetable, or removal from DFT into the regular process, where fairness demands it, whereas no such provision is made under the Australian system.

Even with these extra protections, the DFT has been subject to significant criticism in the UK. The Chief Inspector of the UK Border Agency has noted that fast tracking is not as fast in practice as is claimed, and has criticized the ‘significant disparity’ between published timescales and the reality. UK parliamentary committees have also criticized the DFT’s operation, noting that it is likely to prejudice vulnerable groups, such as victims of sexual abuse or torture, who are unlikely to communicate their claims to a stranger in a short time period, especially if they are denied access to legal advice and support services.
The DFT has also been subject to several legal challenges. In 2014, two separate court challenges found parts of DFT to be unlawful. First, the High Court of England and Wales found that the DFT process ‘carrie[d] an unacceptably high risk of unfairness’ because of the limitations on access to legal advice and representation. This risk of unfairness would be exacerbated in Australia given that irregular arrivals in Australia are no longer entitled to funded legal advice or representation. Second, the Court of Appeal of England and Wales held that detention pending appeal did not meet the requirements of clarity and transparency, and could not be justified. More recently, on 12 June 2015, Nichol J of the High Court made a finding that the Fast Track Rules (FTR) governing the DFT appeal process were ultra vires and ordered them to be quashed:

‘In my judgment the FTR do incorporate structural unfairness. They put the Appellant at a serious procedural disadvantage…’

‘…What seems to me to make the FTR structurally unfair is the serious procedural disadvantage which comes from the abbreviated timetable and curtailed case management powers together with the imposition of this disadvantage on the appellant by the respondent to the appeal.’

The UK Government’s subsequent legal challenge to this finding was also rejected by Lord Justice Bean of the Court of Appeal on the basis of inherent unfairness. In the judgment handed down on 29 July this year, the Court found that the FTR system was:

‘…structurally unfair and unjust. The scheme does not adequately take account of the complexity and difficulty of many asylum appeals, the gravity of the issues that are raised by them and the measure of the task that faces legal representatives in taking instructions from their clients who are in detention.’

Concerns

A robust RSD procedure is essential to ensure that Australia complies with its obligations under the Refugee Convention and international human rights law. If the procedure is inadequate, there is a high risk that refugees and other people in need of protection will be returned to face persecution or other significant harm, in violation of international law.

When a separate independent merits review process was developed specifically for irregular maritime arrivals, that process overturned the vast majority of decisions made by the Immigration Department (at times up to 100 per cent, but generally between 70–80 per cent – see Table 1 below). These figures illustrate the importance of proper review of Departmental decisions.

These risks are heightened by the very tight timeframes that are likely to be applied. The process for determining whether a person is a refugee is complex and difficult, and an error can have grave consequences. These risks are now even greater because asylum seekers are no longer entitled to funded legal assistance (for more information, see our Legal assistance for asylum seekers factsheet).
Table 1: Overtake rate of Immigration Department decisions concerning irregular maritime arrivals, by country of citizenship

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<tbody>
<tr>
<td>Afghanistan</td>
<td>n/a</td>
<td>90.7%</td>
<td>92.8%</td>
<td>84.5%</td>
</tr>
<tr>
<td>Iran</td>
<td>100.0%</td>
<td>83.9%</td>
<td>79.1%</td>
<td>62.5%</td>
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<tr>
<td>Sri Lanka</td>
<td>39.5%</td>
<td>72.9%</td>
<td>82.3%</td>
<td>44.0%</td>
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<tr>
<td>Pakistan</td>
<td>66.7%</td>
<td>76.9%</td>
<td>78.9%</td>
<td>83.1%</td>
</tr>
<tr>
<td>Stateless</td>
<td>100.0%</td>
<td>92.3%</td>
<td>88.6%</td>
<td>71.7%</td>
</tr>
<tr>
<td>Iraq</td>
<td>92.9%</td>
<td>82.7%</td>
<td>77.7%</td>
<td>60.0%</td>
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<tr>
<td><strong>Total</strong></td>
<td><strong>67.9%</strong></td>
<td><strong>87.5%</strong></td>
<td><strong>85.3%</strong></td>
<td><strong>66.4%</strong></td>
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The power of the Minister to issue conclusive certificates preventing individual decisions from being changed or reviewed is also very broad, and could be used to prohibit merits review of all decisions refusing to grant a protection visa.

There are also concerns about the appropriateness of the categories of applicants ‘excluded’ from the possibility of any merits review. For example, automatically designating a person who has previously had an application refused by UNHCR or in another country as an ‘excluded fast track applicant’ does not leave room for any change in circumstances, or the adequacy of the processes that led to initial refusal to be taken into account.

One excluded fast track category that is likely to affect many applicants is the provision that excludes a fast track review applicant from merits review if it is believed that a ‘bogus document’ has been provided. This provision reveals a lack of awareness about the nature of refugee flight, including the difficulties refugees face in obtaining identity and travel documents. It may also contravene article 31 of the Refugee Convention and the requirement that Australia implement its treaty obligations in good faith. \(^{41}\)

Finally, there is a real question as to whether the fast tracking system will in fact increase efficiency. Robust merits review is more likely to lead to correct decision-making that can stand up to scrutiny by a court. History shows that attempts to accelerate RSD usually result in more litigation and rarely achieve the desired efficiencies. \(^{42}\)

Updated by Katherine Murray
Endnotes


2 See Migration and Maritime Powers Amendment (Resolving the Asylum Legacy Caseload) Act 2014 (Cth) Schedule 4. This Schedule is to commence on a day to be proclaimed.

3 Ibid Sch 4, item 1, inserting Migration Act 1958 (Cth) sub-s 5(1).

4 Ibid. Under the existing provisions, unauthorised maritime arrivals can only validly apply for a visa if the Minister personally allows this to occur: see Migration Act 1958 (Cth) ss 46A.

5 Migration and Maritime Powers Amendment, Sch 4, item 2, inserting Migration Act 1958 (Cth) sub-s 5(1AA)–(1AD). This legislative instrument is disallowable, as a result of a Senate amendment. The Explanatory Memorandum to the Bill indicates that is intended to use this power to extend fast tracking to unauthorised air arrivals: [733].

6 The Minister must refer the decision to the IAA, unlike the current practice of requiring a person to apply for review: see Migration and Maritime Powers Amendment, Sch 4, s 473CA. The IAA is given all the material before the original decision-maker: Migration and Maritime Powers Amendment, Sch 4, s 473CB.


8 Under the Migration Act 1958 (Cth) ss 91C or 91N. Section 91C applies if there is an agreement between Australia and a country that is a ‘safe third country’. Section 91N applies where a person is a national of, or has a right to re-enter and reside in (and has in fact resided in for at least a week), a country which the Minister has declared provides effective protection. These concepts are discussed more generally in Andrea Hadaway, ‘Safe Third Countries in Australian Refugee Law: NAGV v MIMA’ (2005) 27 Sydney Law Review 727; Savitri Taylor, ‘Protection Elsewhere/Nowhere’ (2006) 18 International Journal of Refugee Law 283.

9 Migration and Maritime Powers Amendment, Sch 4, item 1, inserting sub-s 5(1).

10 Ibid Sch 4, item 2, inserting sub-s 5(1AA)–(1AD). The legislative instrument can be disallowed by Parliament, as a result of a Senate amendment.

11 These clarifications were added by a Senate amendment.

12 Supplementary Explanatory Memorandum relating to sheet GH118, [14].

13 Migration and Maritime Powers Amendment, Sch 4, s 473BC.

14 Ibid, inserting s 473DB. See also the Explanatory Memorandum, [891].

15 Migration and Maritime Powers Amendment, Sch 4, s 473DC(3).

16 Ibid, inserting s 473DD. This section was amended in the Senate during the passage of the Bill.

17 Explanatory Memorandum, [915].

18 Supplementary Explanatory Memorandum relating to sheet GH118, [29].

19 Explanatory Memorandum, [916].

20 The Minister must refer the decision to the IAA, unlike the current practice of requiring a person to apply for review: see Migration and Maritime Powers Amendment, Sch 4, s 473CA. The IAA is given all the material before the original decision-maker: s 473CB.

21 Explanatory Memorandum, [894].

22 Migration Act 1958, s 473FB, 473FC.

23 For more information, see our legislative brief on the Migration Amendment (Protection and Other Measures) Bill 2014 (Cth).

24 Migration Amendment (Protection and Other Measures) Act 2015 (Cth) s432A.
Between 2008–2013, the final refugee recognition rate for irregular arrivals by boat ranged from 88% to 100%: see Department of Immigration and Citizenship, *Asylum Trends 2012–2013*, Table 34.

28 See Migration and Maritime Powers Amendment, Sch 4, s 5(1). For example, it is hard to see how the provision of ‘bogus documents’ would make it an easier case to resolve. In fact, this condition is likely to make it more difficult, as the asylum seeker’s identity would need to be established.

29 For pregnant women who are 24 or more weeks pregnant.

30 Above n 26.

31 Ibid, [2.1.1.].


34 United Kingdom House of Lords and House of Commons, Joint Committee on Human Rights, *The Treatment of Asylum Seekers*, Tenth Report of Session 2006–2007, HL 81/HC 60 (30 March 2007) [226]. The Home Affairs Committee expressed concern over the high rate of people wrongly placed on the DFT (around a third), and noted the risk that the model was ‘too dependent on decisions made at a very early stage in the process which might, as further information becomes available, turn out to have been based on mistaken assumption’: United Kingdom House of Commons, Home Affairs Committee, *Asylum*, Seventh Report of Session 2013–2014, HC 71 (11 October 2013) [36], [66].

35 *Detention Action v Secretary of State for the Homeland Department* [2014] EWHC 2245 (Admin), [197].

36 *R (Detention Action) v Secretary of State for the Home Department* [2014] EWCA Civ 1634.

37 *Detention Action v Lord Chancellor* [2015] EWHC 1689 (Admin) [57].

38 Ibid [60].

39 *The Lord Chancellor v Detention Action* [2015] EWCA Civ 840 [37].

40 Ibid [45].
