

# Research Brief 'FAST TRACK' REFUGEE STATUS DETERMINATION

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## The origins of ‘fast tracking’ in Australia

Before the 2013 federal election, the Coalition announced a plan to assess protection claims more quickly. The plan indicated that a Coalition government would introduce a new ‘Fast Track Assessment and Removal’ (Fast Track) process, based on the United Kingdom’s now suspended 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 would be referred into the Fast Track process. These were cases that ‘appear[ed] less likely to be successful in gaining refugee status and [that could] be determined readily’.<sup>1</sup> 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’.<sup>2</sup>

## How was the Fast Track process ultimately implemented?

The Fast Track process was implemented through changes to the *Migration Act 1958* (Cth) (the Act), made via the *Migration and Maritime Powers Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth). The process 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 factsheet, [Refugee status determination in Australia](#).

## Who is considered to be a ‘fast track applicant’?

The definition of ‘fast track applicant’ is set out in the Act.<sup>3</sup> 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.<sup>4</sup> The Minister can also extend the definition to other classes of asylum seekers by a legislative instrument.<sup>5</sup>

The definition was subsequently expanded to include asylum seekers who had been sent to Nauru or Manus Island between 13 August 2012 and 19 July 2013 and later returned to Australia.<sup>6</sup> On 26 March 2019, the definition was expanded again to include people who are reapplying for a Temporary Protection Visa or Safe Haven Enterprise Visa.<sup>7</sup> Applications will be assessed based on the applicant's ongoing need for protection.

### **Who are '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;<sup>8</sup>
- 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 UN 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.<sup>9</sup>

The Minister can also expand the grounds on which someone may be designated an 'excluded fast track applicant' through a legislative instrument.<sup>10</sup>

A 'manifestly unfounded' claim is defined in the Act. It includes (but is not limited to) 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.<sup>11</sup> The Supplementary Explanatory Memorandum to the *Migration and Maritime Powers Amendment (Resolving the Asylum Legacy Caseload) Act 2014* notes that this non-exhaustive definition of a 'manifestly unfounded claim' 'reflects an interpretation...that is commensurate with the United Nations High Commissioner for Refugees' position on responding to manifestly unfounded applications.'<sup>12</sup>

Excluded fast track applicants will not have access to any form of merits review, and they will only have access to a limited form of judicial review by the courts. The Department of Home Affairs 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.<sup>13</sup>

### **Do applicants have any rights of appeal?**

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).<sup>14</sup> 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.<sup>15</sup> 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 has the power to issue a 'conclusive certificate' which prevents an initial decision from being changed or reviewed.

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).<sup>16</sup> While the IAA can ask for new information at an interview, it can only use such information in limited circumstances, as described below.<sup>17</sup>

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.<sup>18</sup>

The term 'exceptional circumstances' is not defined by the Act. The Explanatory Memorandum 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),<sup>19</sup> or evidence of 'significant torture and trauma' which, if known, would have affected the consideration of the claim.<sup>20</sup> 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'.<sup>21</sup>

Second, 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.<sup>22</sup>

Third, the IAA's obligations to afford applicants natural justice and conduct review in a timely manner have not yet been defined. The Explanatory Memorandum to the Act states that 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.<sup>23</sup> As of August 2018, no regulations had yet been passed.

The Principal Member of the Migration and Refugee Division of the AAT can issue practice directions for the IAA,<sup>24</sup> and identify decisions that are to be followed unless clearly distinguishable ('guidance decisions')<sup>25</sup>. These measures are intended to expedite the processing of applications.

The fast tracking procedure before the IAA is also affected by 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.<sup>26</sup> These provisions, combined with the limits on considering new evidence on appeal, significantly distinguish the IAA procedure from the MRD-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). The DFT has now been suspended, following a number of legal challenges.<sup>27</sup> Moreover, the context and the practice of fast tracking procedures in the United Kingdom differed significantly from the Australian model. For instance, the DFT policy included an entitlement to funded legal advice and representation, as well as access to the full review system (including judicial review), albeit in a compressed timeframe. Further, unlike the Australian fast track process, the DFT policy excluded 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 could not be dealt with adequately in detention, and those who clearly lacked the mental and cognitive capacity to understand the process and/or present their claim.

## **Analysis of the fast track process**

### **What risks are associated with the fast track process?**

A robust RSD procedure is essential to ensure that Australia complies with its obligations under the 1951 Convention relating to the Status of Refugees (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 Department of Immigration and Border Protection (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 most asylum seekers are no longer entitled to funded legal assistance (for more information, see our factsheet, [Legal assistance for asylum seekers](#)).

*Table 1: Overturn rate of Immigration Department decisions concerning irregular maritime arrivals, by country of citizenship*

Citizenship	2009–10	2010–11	2011–12	2012–13
Afghanistan	n/a	90.7%	92.8%	84.5%
Iran	100.0%	83.9%	79.1%	62.5%
Sri Lanka	39.5%	72.9%	82.3%	44.0%
Pakistan	66.7%	76.9%	78.9%	83.1%
Stateless	100.0%	92.3%	88.6%	71.7%
Iraq	92.9%	82.7%	77.7%	60.0%
<b>Total</b>	<b>67.9%</b>	<b>87.5%</b>	<b>85.3%</b>	<b>66.4%</b>

Source: Department of Immigration and Citizenship, *Asylum Trends 2012–2013*, Table 33.

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.<sup>28</sup>

Finally, there is a real question as to whether the fast track 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.<sup>29</sup>

### **How have courts responded to the fast track process?**

The legality of the fast track process was challenged in a test case brought before the High Court of Australia by an Iranian asylum seeker known as M174.<sup>30</sup> The plaintiff arrived in Australia by boat in October 2012 without a visa and, after being released from immigration detention, claimed to have converted to Christianity. In 2015, the Minister for Immigration

and Border Protection lifted the statutory bar on the plaintiff's capacity to apply for a temporary protection visa, at which point the plaintiff became a fast track applicant. The plaintiff consequently made an application for a temporary protection visa, claiming that he would face a real chance or serious or significant harm if he returned to Iran in the foreseeable future because of his decision to convert to Christianity. In his application, the plaintiff claimed that he had regularly attended a church in Melbourne and consented to the Department's request to contact the church minister. When interviewed by a Department official, the church minister provided information which suggested that the plaintiff had overstated his attendance at church in his application.

In April 2016, the Department official refused the plaintiff's visa application and, in her reasons, explained her finding that the plaintiff had attended church to 'falsely strengthen his claim for protection' and had ceased to attend church regularly as early as 2013.<sup>31</sup> This decision was referred to the IAA for review. Without inviting or sending any further communication to or from the plaintiff, the IAA made the decision to affirm the Department official's decision to refuse to grant a visa. The IAA specifically declined to consider any additional documentation or letters of support from church congregation members, because it was not satisfied that there were exceptional circumstances to justify doing so.

The High Court handed down its decision on 18 April 2018. The High Court unanimously did not accept that the official's decision to reject the plaintiff's application was unfair, but it found that in other instances, where an unfair decision is made by a Department official, the IAA must exercise its powers to remedy the breach. Failure to do so would risk a court finding that the IAA acted unreasonably. Despite ultimately ruling against the plaintiff seeking asylum, this decision is significant in cementing certain safeguards of due process for all asylum seekers undergoing the fast track process.

## Endnotes

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<sup>1</sup> See Jane McAdam and Fiona Chong, *Refugees: Why Seeking Asylum is Legal and Australia's Policies are Not* (New South Press, 2014), 48.

<sup>2</sup> Liberal Party of Australia and National Party of Australia, *The Coalition's Policy to Clear Labor's 30,000 Border Failure Backlog*, 8-9.

<sup>3</sup> See *Migration Act 1958* (Cth) s 5(1).

<sup>4</sup> *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) s 46A.

<sup>5</sup> *Ibid.*, ss 5(1AA)–(1AD).

<sup>6</sup> *Specification of Class of Persons Defined as Fast Track Applicants – IMMI 16/008* (Cth) F2016L00456 (24 March 2016) <https://www.legislation.gov.au/Details/F2016L00456>

<sup>7</sup> *Migration (Fast Track Applicant Class – Temporary Protection and Safe Haven Enterprise Visa Holders) – 19/007* (Cth) F2019L00506 (26 March 2019) <https://www.legislation.gov.au/Details/F2019L00506>.

<sup>8</sup> Whether a fast track applicant falls into these categories is determined by *Migration Act 1958* (Cth) ss 91C, 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.

<sup>9</sup> *Migration Act 1958* (Cth) s 5(1).

<sup>10</sup> *Ibid.*, ss 5(1AA)–(1AD).

<sup>11</sup> These clarifications were added by a Senate amendment.

<sup>12</sup> Supplementary Explanatory Memorandum relating to sheet GH118, *Migration and Maritime Powers Amendment (Resolving the Asylum Legacy Caseload) Act 2014* [14].

<sup>13</sup> *Migration Act 1958* (Cth) s 473BC.

<sup>14</sup> In contrast to review conducted in the AAT, which requires individuals to apply for review, the Minister must refer the decision to the IAA: see *Migration Act 1958* (Cth) s 473CA. The IAA is given all the material before the original decision-maker: s 473CB.

<sup>15</sup> *Migration Act 1958* (Cth) div 8.

<sup>16</sup> *Ibid.*, s 473DB. See also the Explanatory Memorandum, *Migration and Maritime Powers Amendment (Resolving the Asylum Legacy Caseload) Act 2014* [891].

<sup>17</sup> *Migration Act 1958* (Cth), s 473DC(3).

<sup>18</sup> *Ibid.*, s 473DD. This section was amended in the Senate during the passage of the Bill.

<sup>19</sup> Explanatory Memorandum, *Migration and Maritime Powers Amendment (Resolving the Asylum Legacy Caseload) Act 2014* [915].

<sup>20</sup> Supplementary Explanatory Memorandum relating to sheet GH118, *Migration and Maritime Powers Amendment (Resolving the Asylum Legacy Caseload) Act 2014* [29].

Explanatory Memorandum, *Migration and Maritime Powers Amendment (Resolving the Asylum Legacy Caseload) Act 2014* [916].

<sup>22</sup> The Minister must refer the decision to the IAA, unlike the current practice of requiring a person to apply for review: see *Migration Act 1958* (Cth) s 473CA. The IAA is given all the material before the original decision-maker: s 473CB.

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<sup>23</sup> Explanatory Memorandum, *Migration and Maritime Powers Amendment (Resolving the Asylum Legacy Caseload) Act 2014* [894].

<sup>24</sup> See Australian Government, Immigration Assessment Authority, *Practice Directions* (2 July 2017) <http://www.iaa.gov.au/guidance-forms/practice-directions>.

<sup>25</sup> See Australian Government, Immigration Assessment Authority, *Guidance Decisions* (21 September 2015) <http://www.iaa.gov.au/guidance-forms/guidance-decisions>.

<sup>26</sup> *Migration Act 1958* (Cth) s432A.

<sup>27</sup> See eg 'Fast-track asylum appeal system suspended by government', *BBC News* (online), 2 July 2015 <https://www.bbc.com/news/uk-33371814>.

<sup>28</sup> *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January) 1980, arts 26, 31.

<sup>29</sup> *Plaintiff M61/2010 v Commonwealth of Australia* (2010) 243 CLR 319.

<sup>30</sup> *Plaintiff M174/2016 v Minister for Immigration and Border Protection* [2018] HCA 16 (18 April 2018).

<sup>31</sup> *Ibid* [59].