

EXPLANATORY STATEMENT

Migration Act 1958

CLASS OF PERSONS DEFINED AS FAST TRACK APPLICANTS 2016/008

(Paragraph 5(1AA)(b))

1. Instrument IMMI 16/008 is made under paragraph 5(1AA)(b) of the *Migration Act 1958* (the Act).
2. The purpose of the Instrument is to specify a class of persons for the purposes of paragraph (b) of the definition of ‘fast track applicant’ in subsection 5(1) of the Act.
3. Paragraph 1) of the Instrument operates to define a non-citizen person who is an unauthorised maritime arrival and transitory person who was taken to a *regional processing country* under section 198AD of the Act between the period of 13 August 2012 and 19 July 2013, who is currently in Australia and has made a valid application for a protection visa, as included in a class of persons defined as fast track applicants.
4. Paragraph 2) of the Instrument operates to define a non-citizen person who was born in the migration zone and is a child of a person included in the class of persons in paragraph 1 of the Instrument and that child is currently in Australia and has made a valid application for a protection visa, as included in a class of persons defined as fast track applicants
5. Consultation was undertaken with the Immigration Assessment Authority within the Administrative Appeals Tribunal and with the Minister’s Advisory Council on Asylum Seekers and Detention.
6. The Office of Best Practice Regulation (OBPR) has advised that a Regulatory Impact Statement is not required (OBPR Reference 20066).
7. Under section 42 of the *Legislation Act 2003*, the Instrument is subject to disallowance and therefore a Statement of Compatibility with Human Rights is attached.
8. The Instrument, IMMI 16/008 commences on the day after it is registered on the Federal Register of Legislative Instruments.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Class of Persons Defined as Fast Track Applicants 2016/008

(Paragraph 5(1AA)(b))

Legislative Instrument IMMI 16/008

This Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Legislative Instrument

The Legislative Instrument (the Instrument) is made under paragraph 5(1AA)(b) of the *Migration Act 1958* (the Act). The Instrument specifies classes of persons so that, in accordance with paragraph (b) of the definition of fast track applicant in subsection 5(1) the Act, a person included in that class is a fast track applicant.

A fast track applicant is defined as:

- (a) A person:
- (i) who is an unauthorised maritime arrival who entered Australia on or after 13 August 2012, but before 1 January 2014, and who has not been taken to a regional processing country; and
 - (ii) to whom the Minister has given written notice under subsection 46A(2) of the Act, determining that subsection 46A(1) of the Act does not apply to an application by the person for a protection visa; and
 - (iii) who has made a valid application for a protection visa in accordance with the determination; or
- (b) a person who is, or who is included in a class of persons who are, specified by legislative instrument under paragraph 5(1AA)(b) of the Act.

This instrument specifies the following class of persons to be fast track applicants.

Persons who:

- are unauthorised maritime arrivals; and
- transitory persons; and

- during the period between 13 August 2012 and 19 July 2013 were taken to a *regional processing country* under section 198AD of the Act; and
- have returned from the *regional processing country* to Australia; and
- have made a valid application for a protection visa; or

Persons who:

- were born in Australia or a *regional processing country*; and
- are a child of a person described above; and
- have made a valid application for a protection visa.

As a result, if the Minister lifts the relevant application bars in the Act such persons will have their claims for protection assessed in Australia through the fast track assessment process.

The Instrument is intended to provide access to the Australian protection assessment process for approximately 1000 unauthorised maritime arrivals (UMAs) who entered Australia between 13 August 2012 and 19 July 2013 and were taken to a regional processing country. On 19 July 2013, the former Rudd government announced that these unauthorised maritime arrivals would be returned to Australia to create capacity in the regional processing countries for the transfer of UMAs who arrived in Australia after 19 July 2013. Returns occurred progressively and were completed in October 2015.

The Legislative Instrument will allow members of this class to have their protection claims processed in Australia through the same arrangements as all other UMAs who arrived during the same period but who were not taken to a regional processing country.

Human rights implications

This Instrument has been assessed against the seven core treaties that comprise Australia's human rights obligations.

Best interests of the child

Article 3 of the Convention on the Rights of the Child (CRC) states:

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

The Instrument defines a cohort of persons as fast track applicants. The cohort includes children who were transferred to a regional processing country and children born in Australia following their parents return from a regional processing country. It allows children and their parents to have their protection claims assessed together as part of a single process.

The Government is committed to acting in accordance with Article 3 of the CRC. In making this Instrument, the Minister considered the best interests of the child as a primary consideration.

Family Unity

Article 17(1) of the International Covenant on Civil and Political Rights (ICCPR) states:

No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

Article 23(1) of the ICCPR states:

The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

The Instrument positively engages Article 17(1) and Article 23(1) of the ICCPR. The Instrument provides for parents and their children, including any children born following the parents return to Australia, to have their claims for protection assessed in Australia under the fast track assessment process. This measure will operate to prevent the separation of family members and is consistent with the principle of family unity.

Non-discrimination

Article 2(1) of the ICCPR states:

Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 26 of the ICCPR states:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

To the extent that the Instrument engages the obligations in Article 2(1) and Article 26 of the ICCPR by limiting the definition of fast track applicant to only certain transitory persons, the Government considers that this measure is reasonable and proportionate in achieving a legitimate objective. It is the Government's view that in order to maintain the overall integrity of Australia's border and protection status determination framework, it is reasonable and proportionate for certain transitory persons who fall outside the scope of the instrument to remain subject to regional processing arrangements.

The human rights compatibility of the fast track assessment process is extensively addressed in the Statement of Compatibility for the *Migration and Maritime Powers Legislation Amendment (Resolving the Legacy Caseload) Act 2014*.

Conclusion

This legislative instrument is compatible with human rights because it is consistent with Australia's human rights obligations and to the extent that it may also limit human rights, those limitations are reasonable, necessary and proportionate.

The Hon. Peter Dutton MP, Minister for Immigration and Border Protection