

EXPLANATORY STATEMENT

Migration Act 1958

CLASS OF PERSONS DEFINED AS FAST TRACK APPLICANTS 2016/010

(Paragraph 5(1AA)(b))

1. This Instrument is made under paragraph 5(1AA)(b) of the *Migration Act 1958* (the Act).
2. The purpose of the Instrument is to define a class of persons who are fast track applicants for the purpose of paragraph 5(1)(b) of the Act.
3. Paragraph a) of the Instrument operates to define a non-citizen person who was born in the migration zone between 6 November 2013 and 4 December 2014; and who is a child of a person who is an unauthorised maritime arrival (UMA) who entered the migration zone on or after 19 July 2013 and that UMA was taken to the Republic of Nauru under section 198AD of the Act; and who has made a valid application for a protection visa, as included in a class of persons defined as fast track applicants.
4. Paragraph b) of the Instrument operates to define that a non-citizen person who is an unauthorised maritime arrival who entered the migration zone on or after 19 July 2013 and who was taken to the Republic of Nauru under section 198AD of the Act; and who has made a valid application for a protection visa, and who is the parent of a person who has been included in the class of persons specified in paragraph a) of the Instrument, as included in a class of persons defined as fast track applicants.
5. Paragraph c) of the Instrument operates to define that a non-citizen person who is an unauthorised maritime arrival; and who has made a valid application for a protection visa, and who is the brother or sister of a person who has been included in the class of persons specified in paragraph a) of the Instrument, as included in a class of persons defined as fast track applicants.
6. 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.

7. In accordance with subsection 18(1) of the LIA, consultation is unnecessary as the Instrument is the result of an agreement reached with Senator Ricky Muir in the lead up to the passage of the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* following representations made by Senator Muir on behalf of the persons affected by the Instrument.
8. The Office of Best Practice Regulation has advised that a Regulatory Impact Statement is not required (OBPR reference number 16102).
9. The Instrument, IMMI 16/010 commences on the day after registration 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 2016/010

(Paragraph 5(1AA)(b))

Legislative Instrument IMMI 16/010

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 and 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 a written notice under subsection 46A(2) determining that subsection 46A(1) 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 made under paragraph (1AA)(b).

The Instrument specifies the following class of persons to be fast track applicants:

- Non-citizens born in the migration zone between 6 November 2013 and 4 December 2014 to a parent who is an unauthorised maritime arrival who entered the migration zone on or after 19 July 2013 and was taken to the Republic of Nauru under section 198AD of the Act; and
- The person's non-citizen parent, who is an unauthorised maritime arrival who entered the migration zone on or after 19 July 2013 and was taken to the Republic of Nauru under section 198AD of the Act; and
- Any non-citizen brother or sister of the person, who is also an unauthorised maritime arrival; and
- Who has made a valid application for a protection visa.

As a result, if the Minister lifts the relevant application bars such persons will be able to submit an application for a Temporary Protection visa or a Safe Haven Enterprise Visa in Australia and have their application assessed under the fast track assessment process established by Schedule 4 of the *Migration and Maritime Powers Legislative Amendment (Resolving the Asylum Legacy Caseload) Act 2014*.

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 non-citizens born in the migration zone between 6 November 2013 and 4 December 2014 to a parent who is an unauthorised maritime arrival who entered the migration zone on or after 19 July 2013 and was taken to the Republic of Nauru under section 198AD of the Act as fast track applicants. The Instrument also defines the non-citizen's immediate family members including the person's parents and any brothers or sisters as fast track applicants, provided that such persons also

satisfy the other criteria specified in the Instrument. It allows all members of a family unit 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 that a person specified as a fast track applicant in Part 1 of the Instrument, as well as their immediate family members, will have their claims for protection processed in Australia under the Fast Track Assessment Process. By including the person's immediate family members, such as his or her parent, brother or sister, the 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 recognized 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 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.

Review of a decision relating to non-refoulement obligations

To the extent that the Instrument engages international obligations relating to the review of non-refoulement decisions, the impact on human rights has already been assessed in the Statement of Compatibility to the *Migration and Maritime Powers Legislative Amendment (Resolving the Asylum Legacy Caseload) Act 2014*.

Conclusion

The 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, Minister for Immigration and Border Protection