

Credit :

UTokyo Online Education, Refugee Recognition

- Understanding the Essentials 2019 Allan Mackey

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Inclusion under Article 1 A (2)

A structured approach – The Chart

Step 4- “The Risk (*or well founded fear*) Box- “real chance”

Step 5 - “ The Reasons box” for RC51 claims- “*for reasons of..*”

Step 6 - “ The Decision box” – make “Issues based” conclusions.

Step 7 - “ Exclusion and Cessation Box”

Step 8 - “ Decision Writing Box”- sound and “Issues based”.

**Before looking at the major Steps in detail
some vital background is essential: ...**

Inclusion under Article 1 A (2) - Vital background:

Refugee and complementary protection law is markedly different from almost all other areas of the domestic law so familiar to lawyers and judges in their respective jurisdictions. Because so much of this extensive and specialised field of law has only developed in the last 25 years...

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Inclusion under Article 1 A (2) Vital background;

AND many lawyers and judges will have had little or no formal training in it. Thus they will, understandably perhaps, seek firstly to rely on traditional principles of domestic administrative law overlooking the whole international context.

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Inclusion under Article 1 A (2) Vital background:

It is vital therefore to set out the differences and explain the specific, rather unique, character of refugee and protection law. Unless these, and the combined effects of several of them, are understood the risk of flawed decision-making is highly elevated.

Let's go through the main differences:-

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Inclusion under Article 1 A (2) Vital background:

- a. One party is a non-national individual claimant while the other is a state;
- b. The factual substance of every claim will be difficult to check and thus reference to sound country information (COI) about the country of origin will be needed;
- c. The focus of the case is significantly on the future, not the past.

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Inclusion under Article 1 A (2) Vital background:

- d. The core treaties, such as the Refugee Convention, the ICCPR, and the ICESCR are **living instruments**;
- e. Refugee and protection decision-making is international **rights-based, not domestic privilege (ie, immigration) based**;

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Inclusion under Article 1 A (2) Vital background:

- f. The surrogate nature of protection obligations arise from international treaty obligations;
- g. The act of recognition, made by domestic assessors and/or judges, in their determination of claims for refugee and/or international complementary protection status, **is declaratory in nature and not constitutive**. Thus fundamentally different decision-making principles are applicable, in assessing refugee/international protection claims, from those applied in immigration applications or appeals; (This is the most essential point to understand in RSD and I will come back to it!)

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Definition declaratory, not constitutive explained:

“A person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined. Recognition of his refugee status does not therefore make him a refugee but declares him to be one. He does not become a refugee because of recognition, but is recognised because he is a refugee”*...

*UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status*, para 28

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Inclusion under Article 1 A (2) Vital background:

- h. Judicial independence and impartiality can be put under pressure from anti-refugee/migrant or societal pressures;
- i. Many claimants will have vulnerabilities inherent in their situation, thus the psychological and trauma affecting them must be considered;

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Inclusion under Article 1 A (2) Vital background:

- j. Claimants will logically* often have difficulties in presenting corroborative evidence and careful attention will be needed, both as to the use and abuse of “supporting” documentation, including web-sourced material; and
- k. Cross-cultural awareness and challenges and working through interpreters are the norm.

* As refugees are, in most situations, fleeing persecution, often from State actors, bringing evidence of their background , and predicament should not be expected.

A structured approach

“The structured approach...”

Step 1-is the practical point of unfounded claims etc

Then we move to the core issues
of RSD and : Step 2
Credibility and COI.

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Firstly, some preliminary assumptions :

1.The word “credibility” and its usage?

**The confusing use of the term “credibility” -(in English--but
is it the same in Japanese??)**

And the need for “CONTEXTUAL DISAMBIGUATION!”- Is it

- The “credibility” of the whole claim for recognition , or just
- The credibility of the past and present evidence of the claimant?

Only the latter is valid in this context!

The first usage does cause real problems!