A STRUCTURED APPROACH TO THE DECISION-MAKING PROCESS IN REFUGEE AND OTHER INTERNATIONAL PROTECTION CLAIMS

A Flowchart using Established Judicial Criteria and Guidance

OVERVIEW: The core issues are:
What the past and present facts are as found by the judge (i.e. "the accepted facts")?
Using these facts what is the nature of the predicament for the claimant on return and what is the degree of risk of it?
On the totality of the evidence do you recognise refugee or complementary protection status?

Step 1
PRELIMINARY ENQUIRIES

At the outset, the Judge may consider if the claim is so manifestly well-founded or manifestly unfounded (including clearly abusive claims), that a prompt decision can be reached (possibly without an interview) by accepting the credibility of the claim as it is presented. If the claim is:

a. Unfounded - do the facts establish, that the claimant simply does not meet the legal test and thus cannot be recognised for protection? If so, the appeal may be disposed of at this point. **Examples:** On all the facts, is the claimed risk merely remote and speculative? Is the presumption of state protection clearly not rebutted?

b. Well-founded – do the facts which can be said to be incontrovertible (and so do not need to be tested by oral evidence), establish that the person meets the legal test. **Example:** Noting the human rights violations in the claimant's country of origin, status may be recognised because of a particular nationality age, race or gender.

STEP 2
THE CREDIBILITY BOX

Issue 1 - Objectively assessed, what parts of the account are accepted as "credible"?

This assessment will require the judge to assess, with sound reasoning, which (***material***) parts of the claim, as presented, are accepted as credible, or rejected as not credible.

Guidance:

a. Follow the "*International Judicial Guidance of the Assessment of Credibility*" (see www.iarlj.org);
b. Consider documentary evidence (e.g. medical, psychiatric, travel documents) that either supports or tends to disprove the claimant's story;
c. Consider COI (noting guidelines on COI use, eg by IARLJ or UNHCR) to test the evidence;
d. Consider any expert evidence , including an assessment of the weight to be attached to it;
e. If needed apply the "benefit of doubt" principle, by which lingering uncertainty about the credibility of a claimant's evidence, or part of it, is resolved; and then, 'in the round'…
f. Determine & record the material "facts as found" of the claimant's (and other) evidence.

STEP 3
THE HARM BOX

Issue 2 - On the facts as found, does the claimant face serious harm arising from a sustained or systemic breach of internationally recognised human rights, demonstrative of a failure of state protection?

This requires consideration of the 'accepted facts/ profile' of the claimant, the relevant COI and established refugee law, in order to decide if the harm is serious and, if so, if it arises from a sustained or systemic breach of internationally recognised human rights.

Initially, in this assessment, the nature of available "home" state protection to the claimant can be relevant to the question whether there is serious harm. This recognises the most basic principle that refugee law is based on signatory countries to the RC and other IP Conventions agreeing to provide "surrogate protection" to those at risk of serious harm in their own country.

Guidance:

a. Consider relevant COI and other accepted evidence such as expert witnesses and relevant case law, together with other relevant assistance (like Country Guidance cases from the UK).
b. As to the nature of the harm, does it arise from a breach of an internationally recognised human right?
c. How serious is the harm, taking into account any accepted characteristics of the claimant?

STEP 4

THE RISK BOX

Issue 3 – Is the risk of harm on return "well-founded"? Noting the findings made on Issues 1 and 2, prospectively assessed, what is the degree of risk of persecution/serious harm to the claimant on return? The international test for this assessment is whether there is a "real risk/chance" (of being persecuted etc), as against a remote or speculative risk/chance. It is not "on the balance of probabilities", and definitely *not* a criminal standard of proof. This is well-accepted international law, with similar terminology applying the same "real" level of risk. (Thus: "real chance" (Australia and NZ), "reasonable likelihood" (UK), "reasonable possibility" (USA), "serious possibility" (Canada), "considerable probability" (Germany), and "real risk" (Ireland and widely in Europe and by the ECtHR).

Note: In CAT and other complementary protection assessments this level is, internationally, expressed as "a real risk" or being "in danger of". There is no practical difference between the levels of risk required under either status. The "reality of the risk" approach appropriately recognises the unique nature of Refugee law and all other forms of protection in their humanitarian context.

Guidance:

a. Conclusions must be based on the totality of the findings of fact and all the other evidence. The combination of the "accepted facts" from the claimant's account, together with all the other evidence including COI and other witnesses and documentary evidence, constitutes the "facts as found" upon which the risk assessment is made.

b. Ensure that expert evidence is assessed for probative weight.

c. Ensure that the COI is weighed in accordance with accepted COI guidelines (eg of IARLJ/UNHCR).

d. The claimant's subjective fear will almost always be part of their account but the test for the judge is an objective test only. The claimant's subjective fear is not determinative, and is only relevant when consistent with the objective evidence. In this way, the accepted subjective fear can, along with the accepted objective evidence, become part of the totality of the "facts as found".

STEP 5

THE REASONS BOX

Issue 4: If the answer to both Issues 2 and 3 are "yes" then decide:

1. Is the risk of being persecuted for reasons of one, or more, of the five Convention grounds? (*i.e. race, religion, nationality, membership of a particular social group or political opinion*); or

2. If not, can the claimant still qualify for some other form of complementary protection?

Guidance:

a. Use all relevant international and domestic protection-related legislation, UNHCR and other international guidance that relates to the issues of nexus and Convention reasons;

b. Consider relevant case law at the domestic and international level, and relevant academic guidance and commentary, all duly weighted and assessed.

STEP 6

THE DECISION BOX

The conclusion should record clearly, after sound, fair reasoning, that the claimant falls within or outside the inclusion provisions of Article 1A(2) of the Refugee Convention or, alternatively, qualifies, or does not qualify, for some form of complementary protection status.

NB: Note however that the domestic law of some states may allow the judge only to quash an earlier primary decision and require the claim to be re-assessed, in whole or in part.

STEP 7

EXCLUSION and CESSATION BOX

Issues 5 & 6: Determine any Exclusion or Cessation issues.

Even if the claimant falls within the Inclusion clause (Art 1A(2)) there may be "*serious reasons for considering*" possible exclusion of the claimant (as in Article 1E or 1F). Exclusion, particularly under Article 1F, is complex and requires reference to international case law, UNHCR's Handbook and Guidelines, as well as to IARLJ and academic commentaries.

The judge may also need to determine whether any cessation issues arise (as in Article 1C). This, too, is complex and similar resources must be consulted.

Caution must be exercised in applying the exclusion and cessation clauses.

STEP 8

WRITING THE DECISION

Good, sound decision-writing requires a succinct "issues-based" approach, addressing the core issues, with the totality of the relevant evidence and jurisprudence being taken into account. It must also recognise both that "justice must be seen to be done" and that, often, there will be "precedent" or "guidance" value within the decision. For this reason, a separate depersonalised (and, if necessary, redacted) version of the judgment should be made public.

NB. All first-instance decisions should ideally contain a detailed record of the evidence presented and fulsome reasoning should be recorded. First-instance decisions should not be made public.