Spirited Away: Institutionality, the IRB and the case of Maliny Victoria Jesurasa

by

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Abstracts

English

This thesis takes the case file of a Sri Lankan asylum seeker found in the archives at the Federal Court of Montreal in March of 2007 and submits it to a textual analysis. In so doing it operates on three levels. First, it elaborates something of the life of this person, the trials she faced both in Sri Lanka and Canada. Second, and most significantly, it observes the effect of the Immigration and Refugee Board of Canada on the telling of her story, its particular adjudicatory techniques. It is concerned with how this particular institution 'thinks'. Third and finally, it gestures at some possible implications of this analysis in jurisprudential terms. At its most abstract this thesis argues that *institutionality* is a key feature of the adjudicatory project which is too frequently overlooked.

French

Cette thèse est centrée sur le dossier d'une réfugiée Sri Lankaise, qui a été trouvé dans les archives de la cour fédérale de Montréal en Mars 2007 et fait ici l'objet d'une analyse de texte. Trois points ont été dégagés par cette analyse. Premièrement, celle-ci décrit quelques points de la vie de cette personne et les problèmes qu'elle a rencontré au Sri Lanka et au Canada. Deuxièmement, cela décrit l'influence du Commissariat de l'immigration de du statut de réfugié du Canada sur la manière dont son histoire est narrée, ainsi que les techniques juridiques de ce commissariat. Troisièmement, ce travail envisage les implications possibles de ce cas sur la théorie du droit. Au niveau le plus abstrait, cette thèse argumente le fait que l'institutionnalisme est un trait important dans les processus juridiques et qu'il est trop souvent négligé.

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Look with all your eyes, look![1]

(Jules Verne)

[1] See Georges Perec *Life A User's Manual*, trans. by David Bellos (David R Godine, 2000).

1. Introduction

Metaphor: Law as Distillation

I can't honestly say I remember, but the chances are it was cold: this was early March in Montreal after all and it usually is. I wandered south out of the Latin Quarter down through Chinatown and, as the buildings became gradually either taller or older down through the business district. The Federal Court building was just on the corner there, after the road works and next-door to that ludicrously overpriced café with the pasta in the window. Through the revolving doors I found a man in a uniform sitting at a desk in the centre of a large room beneath a coat of arms which along with the metal detector marked this unmistakably as a government building, wielding the force of law. A few garbled words in French and I was pointed in the direction of the registrars' office – *juste là bas*, through that door on the left. I asked to see the case file for a recently adjudicated asylum claim, any one at all as long as it was in English, and I remember that the lady on the other side of the counter only ducked away for a moment or two, presumably plucking the first one she could find from the nearest shelf, before reappearing case swaddled in her arms.

Confronting that first case in the little grey room they put me in was a genuinely bemusing experience. The file itself looked like nothing I had ever seen during the course of my law degrees. A great big blue folder with a massive jumble of papers in it – about six hundred pages all told – bound together into various smaller bundles and arranged in no particular order that I could determine at the time at any rate.[2] And

[2] The Jesurasa case file (December 2003 – February 2007), Montreal, Archives of the Federal Court of Canada (IMM-2850-05). Although I refer extensively to the file from this point on, I do not provide citations for these references. The reason for this is twofold. First, there is no internal logic to the file. Documents do not appear in any particular order and are not always numbered. Any attempt at referencing, therefore, would require me to impose a logic of my own which would require extensive elaboration either here or in an appendix. Second, the benefit of doing so seems to me to be outweighed by the detriment. On the basis that (a) all my references are at least locatable to the specific document in which they are contained and that (b) any reader who wished to look at the folder itself would already have taken the trouble to go to the Federal Court and request that it be recalled from the

so naturally enough perhaps my eye was drawn to the small brown folder that had been precariously attached to the larger one by a rubber band, but was now sitting there on the side, almost embarrassingly small by comparison to its big blue brother. The brown folder contained exactly twenty pages, comprising two identical copies of the decision in the case of *Jesurasa v The Minister of Citizenship and Immigration (2006)*[3], an application for judicial review that had been decided only a week or so previously and the final chapter in a story that had commenced some two and a half years before.

I actually looked at quite a number of other complete files during my time at the Federal Court – always asylum cases, always in English – but for some reason none of them had quite the same impact as this first one.[4] I experienced it as a kind of shock, and in retrospect perhaps that is not all that surprising. It seems to me that there was something very symbolic about the two folders that were plucked for me at random from the archives at the Federal Court that morning in March of 2006. From blue folder to brown, the reviewing judge's words represent the culmination of a tremendous process of distillation: a process which we like to call law. Desmond Manderson writes the following of Argentinian master of the short story Jorge Luis Borges, "Borges is alcoholic. The Arabic *al-kuhl* first of all referred to a process of distillation. It is Borges' relentless purification towards an essence that produces such a giddy effect upon his readership."[5] The reviewing judge here was alcoholic too. Or

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central archives in Ontario where it was sent once I was done with it, I do not think it necessary to litter this thesis with extensive referencing merely for the purpose of saving this already very hypothetical reader a little extra time.

[3] *Jesurasa v The Minister of Citizenship and Immigration* (2006), F.C. 234, online: Federal Court (Canada) http://decisions.fct-cf.gc.ca/en/2006/2006fc234/2006fc234.html.

[4] It is worth noting the almost random way in which this case was selected. It was not chosen on the basis that it constituted a miscarriage of justice. If nevertheless it did constitute such a thing, we could reflect upon the possible implications of that fact. Is it merely a case of good fortune from my perspective and exceptionally poor fortune from Ms. Jesurasa's? Or rather, are such miscarriages perhaps endemic? Meaning that the very random way in which this case was chosen is in some ways what is most illuminating about it.

[5] Desmond Manderson, *Proximity, Levinas and the Soul of Law* (McGill-Queen's University Press, 2007) at 98 [Manderson, "Proximity"].

more precisely the law was. Six hundred pages of judgments, transcriptions, memorandums, emails, and newspaper clippings: all this and more the legal process had reduced down to just one thousand, one hundred and six words; if you include the title. Only two hundred and twelve of which were deemed necessary by this point to convey the so-called "facts" of the case. I am going to insert them here now so that you can read them almost as innocently and a-contextually as I did the first time I opened that little brown folder, in all their original potency. Try to hold on to your initial impressions.

FACTS

The Applicant is a 23 year-old Sri Lankan Tamil. Her mother died in June 1987 and her father in February 1988 during military operation in her village. In August 1991, her brother was hit by a shell and became handicapped. In 1995, the Applicant and her sister were allegedly harassed by members of the Liberation Tigers of Tamil Eelam (LTTE). The Applicant and her sister were insulted and threatened by LTTE members for refusing to join the movement.

The Applicant submits that in 1996, soldiers of the Sri Lankan army questioned, humiliated, harassed and slapped the Applicant and her brother, as they were suspected of being members of the LTTE. After her sister left the family house, the Applicant remained alone with her handicapped brother.

In February 2002, a ceasefire was signed between the Sri Lankan Government and the LTTE. In May 2002, the Applicant was asked again to join the LTTE. She refused and fled to Gurunagar in January 2003. In the end of April 2003, the LTTE kept urging her to join the movement. At one point, they allegedly tried to take her by force.

> The Applicant's aunt decided to send the Applicant to Canada. She arrived on December 17, 2003 and claimed refugee protection at the airport.[6]

The "analysis" that follows these paltry "facts" is virtually redundant. A synopsis of the reasoning in the first instance decision is dashed through in bullet point form before some, though not all, of these points are considered in the briefest possible terms. The reviewing judge never offers anything even approaching a reason for his various determinations. He merely states his view and moves on. "The personal situation of the Applicant was not unreasonably assessed" he says. "The country conditions in Sri Lanka were evaluated on the basis of the documentary evidence as a whole". "The [Refugee Protection Division] did not err in finding that the Applicant would not be more at risk in Sri Lanka given the impact of the tsunami." And finally, "for these reasons, the application for judicial review is dismissed." A decision: the law's logical end point, the apotheosis of its long distillatory project, its essence. If the small blue folder has the potency of a vodka, then this moment surely comprises the ethanol.

♪1: Reason no. 6

♪2: 'reasons' - good one mate!

Levels: Person, Institution, Institutionality

This thesis operates on three levels. First, it tells the story of an asylum seeker who came to Canada in December of 2003 seeking refuge from Sri Lanka and who finally had that claim refused in February of 2006 in the judicial review decision we have just mentioned. But if it does tell *her* story, it does so only obliquely. I have never met her. Though in the process of writing this thesis I have sometimes been tempted to feel that somehow I *know* her, in fact I have only ever had access to her story through the lens of the institution which recorded it. More than it is about a person, therefore, this thesis is about an institution: the *Immigration and Refugee Board of Canada*

[6] *Supra* note 3.

(IRB) to be precise. That is the second level. Here Robert Barsky's analysis of the Board as it struggled to find its feet in the early years after its inception has been of considerable inspiration.[7] He too looked to the archive, in particular the transcripts of the hearings of two refugees, as a lens through which to view the institution itself. In a key passage he writes:

> We can learn nothing about the normal life of this person except in very empirical terms (employment, address, and so forth); and other than the few events related to persecution, we cannot have access to the lives of these claimants as refugees either. The hearings, however, have turned out to be revealing in an unexpected way; they have permitted us to read backwards, to evaluate the institution more fully than the refugee.[8]

Our net here will be cast somewhat wider. We will not merely be looking at the transcripts of Ms. Jesurasa's hearings, we will be looking at the whole institutional record: the entire big flue file. The point however is essentially the same. Though we may learn a little about a person along the way, the main focus of our analysis will be the IRB itself.

Distillation is not fermentation. Fermentation is gradual and it is natural. It is about *change*: the progressive conversion of sugar to alcohol, yeast or some other biological enzyme acting as the reagent. Distillation is different. It works in discrete stages and it is utterly synthetic. It is about *reduction*, *loss*: the step by step separation and removal of unwanted substances with particular flavours at particular moments in order to obtain a purer sample using purpose built apparatus. In its consideration of the IRB, this thesis bears that out. Step by step it reverses the distillation process. Rather than treating the big blue file as one continuous text, it divides it into seven

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[7] Robert F. Barsky, *Constructing a Productive Other: discourse theory and the Convention refugee hearing* (Amsterdam/Philadelphia: John Benjamins Publishing Co,1994).

[8] *Ibid*. at 165.

distinct parts – documents or collections of similar documents – and allocates a chapter to the consideration of each one. In each chapter we are concerned first with what is lost and second with the particular institutional apparatus which caused that loss. Mary Douglas writes, "institutions create shadowed places in which nothing can be seen and no questions asked. They make other areas show finely discriminated detail, which is closely scrutinized and ordered."[9] How was it that the reviewing judge came to use the particular words we read above to describe the "facts" in Ms. Jesurasa's case? Of what institutional forces are they the function? If all the oaky tones of the big blue folder were eventually stripped down to the ethanoic potency of the small brown one, what was excluded, when and how? During the course of its long distillatory project, which places does the IRB cast into shadow, and which does it throw into relief? To what ends? According to what politics? By which techniques? These are the sorts of questions that concern us here. Using the archive to reflect on them, we will "read backwards, to evaluate the institution more fully than the refugee."[10]

But the implications of our analysis are even broader still. We are concerned not merely with the IRB – a particular institution – but also with *institutionality* more generally, with the role of the institution itself in legal adjudication. This thesis has a jurisprudential agenda too. That is the third level. By now the positivist fantasy of law as a system of rules – a-contextual and general – which are applied largely unproblematically[11] by judges to particular cases, the facts of which having been 'found' similarly unproblematically by sufficiently rigorous analysis in advance, has been subject to about as many and diverse critiques as it is possible to imagine. Nevertheless, for the main part these critiques have shared at least one important characteristic. They have maintained an extraordinary faith in rules. As Manderson

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[9] Mary Douglas, *How Institutions Think (Frank W. Abrams lectures)* (Syracuse University Press, 1986) at 69. [Douglas, "How Institutions Think"]

[10] Barsky, *supra* note 7.

[11] Excepting, of course, in so-called 'hard cases'. See HLA Hart, *The Concept of Law* (Oxford, Clarendon: 1961).

puts it, the orthodox and the heretic have more in common than we might think: Hart[12] and the Realists[13] did, Dworkin[14] and the CLSers[15] do, as do many Postmoderns,[16] and all their various disciples (in, for instance, the field of refugee law[17]). Though the orthodox and the heretic may disagree on how the game is to be played, they are at least prepared to engage each other on a common playing field. "Both parties would appear to agree, by and large, with the proposition that the legal system ought to be a 'system of rules' in which adjudicators decide cases relatively constrained by relatively determinate standards whose application is justifiable in principle. They disagree mainly over whether this ideal has really been met."[18] But as Barsky puts it, when one comes to look at the archive, the sort of texts with which this thesis is concerned, "appeals to purely legalistic theories tell so little of the story as to be near-impediment." Why? "Because they provide the analyst with unrealistic expectations with regards to the application of rules."[19] As far as these folders are concerned, rules are substantially beside the point. In loudly proclaiming the insufficiency of legal rules, therefore, this thesis will be largely silent on them. Rules take a back seat in order to allow certain other jurisprudential blind spots to be brought to the fore.

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[12] *Ibid.*

[13] See *e.g.* Karl Llewellyn *Jurisprudence: Realism in Theory and Practice* (Chicago: University of Chicago Press, 1962); Jerome Frank *Law and the Modern Mind* (New York: Brentano's, 1930)

[14] See *e.g.* Ronald Dworkin *Taking Rights Seriously* (Cambridge, Mass.: Belknap Press, 1977); Ronald Dworkin *Law's Empire* (Cambridge, Mass.: Belknap Press 1986).

[15] See *e.g.* Roberto Unger *Knowledge and Politics* (New York: Free Press, 1975); Roberto Unger, "The Critical Legal Studies Movement" (1983) 96 Harv. L. Rev. 561.

[16] See *e.g.* Jack Balkin "Deconstructive Practice and Legal Theory" 96 Yale L.J. (1986) 743; Jack Balkin, "Transcendental Deconsruction, Transcendental Justice" 92 Mich. L. J. (1993) 1131.

[17] See *e.g.* Tom Clark, "Rights Based Refuge, The Potential of the 1951 Convention and the Need for Authoritative Interpretation" 16 Int'l J. Refugee. L. (2004) 584.; Hannah Pearce, "An Examination of the International Understanding of Political Rape and the Significance of Labeling it Torture" 14 Int'L J. Refugee. L. (2002) 535; Reinhard Marx "The Criteria of Applying the "Internal Flight Alternative" Test in National Refugee Status Determination Procedures" 14 Int'L J. Refugee. L. (2002) 179.

[18] Desmond Manderson, "Apocryphal Jurisprudence" (2001) 23 Studies in Law, Politics and Society 81 at 88 [Manderson "Apocryphal Jurisprudence"].

[19] Barsky, *supra.* note 7 at 8.

In particular, the purpose is to throw the *institutionality* of law into bold relief, to emphasise the very layered way in which legal adjudication always works. 'Legal' decisions are not merely made by conventional legal professionals: most prototypically of all, judges in their 'application' of general 'rules' to particular 'facts'. The choices made by a whole range of institutional actors at different stages of the process are crucial to the adjudicatory project too. They determine the jurisprudential landscape, the range of what it will be possible for the judge to decide. By excluding these decisions from the province of jurisprudence[20], therefore, we severely inhibit our understanding of how law works. The claim is not that all institutions work in exactly the same way as the IRB, then, but merely that the *institutionality* of law is always a concern. *Institutionality* matters. This thesis explicitly places itself outside of the traditional discourse therefore. Neither orthodox nor heretical, it is rather *apocryphal*.[21]

Structure and Argument

We begin, in chapter 2, on December 17th 2003, the day Ms. Jesurasa first set foot on Canadian soil with the transcript of her interview with an Immigration Officer that afternoon, the document that marks the opening of her file and her life as an institutional object. There our institutional concern is *hospitality*. It will be argued that the IRB is essentially *inhospitable* as regards the people whose cases it comes to adjudicate. The institution's distrust of asylum seekers has important implications in practice. It actively produces the evidence of "deviancy" it claims to regulate and which is required for the eventual rejection of their claims: a self-fulfilling prophecy.

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[20] John Austin, *The Province of Jurisprudence Determined*, New Ed. edition (Cambridge: Cambridge University Press, 1995).

[21] As Manderson puts it, "the apocryphal is not inauthentic but *apokrupto,* hidden from view. And at the same time, whatever interest the apocryphal yet possesses derives from its subversive position, not opposed to the canon but, far more subversively, outside of it." Nevertheless the apocrypha does at least have *something* in common with the orthodox-heretic debate. "The apocrypha remains engaged with the tradition of 'understanding and explaining adjudication', albeit by explicating its difficulties and not by attempting to resolve them." Manderson "Apocryphal Jurisprudence", *supra* note 18 at 87.

Chapter 3 is concerned with Ms. Jesurasa's "Personal Information Form", completed a matter of weeks after her initial interview. Our analysis centres on the IRB's utilization of *categories*. The argument is that its "refugee definition", by its very nature historically and contextually specific, inevitably will not correlate neatly to the experience even of "genuine" claimants. Claimants are thus forced to construct their stories along similar lines. If they are *not* able to do so then their claim risks rejection for being too different. If they *are* able to do so then they risk rejection nevertheless for not being different enough. They are placed in a double bind. In order to be successful they must construct themselves simultaneously as both similar enough to the "refugee definition" and sufficiently different to remain "credible". The IRB assumes no responsibility for refugee uniqueness, even though it is inevitable and a sensitivity to it is required by justice.

Chapter 4 leaps forward in time by more than a year. Its focus is the transcription of Ms. Jesurasa's determination hearing and the role of *interpretation* in the adjudication process, that is the translation of Ms. Jesurasa's words in Tamil into English and vice versa. It is argued that not only is the IRB's theory of language, of interpretation, inadequate, but that the IRB does everything in its power, moreover, to mask the fact that interpretation has even taken place. With a faith in the metaphysical sanctity of the word that borders on the fetishistic, and erroneously in the belief that interpreters are capable of translating *exactly* what was said, without error, the IRB invests them with a huge power which it then conveniently disappears, laying the blame for any resulting inconsistencies at the claimant's door.

Chapter 5 deals with the first instance decision handed down by the member of the IRB who presided over that hearing just under a month later, in which Ms. Jesurasa's claim was initially rejected. It is concerned with the *narration* of her story therein. It is argued that the majority of the persuasive work is done by the narrative construction of Ms. Jesurasa's 'problems' as minor in character. The judgments made by the presiding board member are so mixed up with her determination of the so-

called "facts" as to be almost impossible to disentangle. This would turn out to be a very effective technique from the institution's perspective because, with 'legal reasoning' and 'factual determination' virtually one and the same, Ms. Jesurasa's lawyer would find it very difficult to mount an effective critique of the decision in the course of his application for judicial review.

Chapter 6 treats to the psychological evaluation report requested by Ms. Jesurasa's lawyer in preparation for the hearing but virtually ignored at first instance. It is concerned with *hermeneutics*, the way in which the institution sees and understands the world. The argument is that the psychological evaluation report, rather than merely evidencing a *different* take on Ms. Jesurasa's story, as the product of a more fully developed hermeneutic, is actually a more objective one. Once again by fetishising text and the word, the IRB shuts its eyes to data which could have been crucial to a positive determination in Ms. Jesurasa's case.

Chapter 7 takes three documents together, the three so-called "memorandums of argument" prepared in the course of Ms. Jesurasa's application for judicial review. This chapter is concerned with the *adversarial process*. It is argued first that although the effectiveness of the adversarial process relies absolutely on formal equality between the competing parties in theory, when it comes to refugee determination in practice that equality will rarely if ever be achieved, and second that if anything the adversarial process is designed to compound such formal inequality. The adversarial process actively diverts the contesting parties' attentions *away* from the substantive merits of the case, encouraging them instead to attempt to establish their very particular and utterly motivated version of the 'truth' as superior by virtually any means necessary.

Chapter 8 brings us back to where we began. We re-examine the judicial review decision, this time with fresh eyes. In the light of everything else we will have read, it is very clearly the product of an entire institutional process, all of the different layers of that process distilled down now into one horizontal legal reality. Above all what is

missing from this final picture, what we lose most of all in law's distillatory project, is the radically human element, the fact that in the final analysis this decision really does affect the life of a person.

2. The Initial Interview: *Hospitality*

Chronologically the first document to appear in Ms. Jesurasa's file is a transcript of the interview conducted by an immigration officer on December 17th 2003, the day she arrived in Canada. Regarded as little more than a formality by the IRB itself,[22] it would hardly be referred to again. Nevertheless, as evidence of Ms. Jesurasa's constitutive experience of legal relations in and with Canada, it could not fail but to be significant. Derrida writes,

> Hospitality consists in doing everything possible to address the other, to grant or ask them their name, while avoiding this question becoming a "condition", a police inquisition, a registration of information, or a straightforward frontier control. A difference both subtle and fundamental, a question that arises on the threshold of "home," and on the threshold between two inflections. An art and a poetics, but an entire politics depends on it, an entire ethics is decided by it.[23]

How we introduce ourselves matters. It says something about how and who we are. But it is not just a matter of first impressions. Though hospitality may begin on the threshold, it does not end there. That is what Derrida means when he says that an entire politics and an ethics depend on it: hospitality is not a moment, it is a *disposition*. This chapter argues first that the initial interview evidences an institution which is inhospitable throughout. Institutions may not have minds of their own but –

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[22] In accordance with s. 100 of the *Immigration and Refugee Protection Act,* S.C. 2001, c.27 (entered into force on June 28 2002) [*IRPA*] which states that "An officer shall, within three working days after receipt of a claim referred to in subsection 99(3), determine whether the claim is eligible to be referred to the Refugee Protection Division and, if it is eligible, shall refer the claim in accordance with the rules of the Board." This transcript *could*, in different circumstances, have become a significant document at later stages in the process. The presiding board member, for instance, might have looked back to it in an attempt to discern any possible contradictions with the story told at the hearing. That is not uncommon. As a matter of fact, however, in this case that did not happen.

[23] Jacques Derrida, *Paper Machine (Cultural Memory in the Present)* trans. by Rachel Bowlby (Stanford University Press, 2005) at 67.

collectively – they do 'think' nevertheless.[24] They operate according to a certain logic, whether or not that logic is explicitly acknowledged. And with a belief in "refugee deviancy" borrowed from the political arena firmly entrenched, when the IRB 'thinks' about asylum seekers it is first and foremost incredulous. The argument then moves on to the effects of this institutional inhospitality. Having observed the IRB's skepticism become embedded into its telling of Ms. Jesurasa's story, we consider the institution's complicity in *producing* the very "deviancy" it claims to regulate.

Refugee Deviancy

The transcript begins as follows:

> Q: Do you have any problems understanding the interpreter?
> A: No.
>
> Q: If you do not understand a question, please say so and I will rephrase it.
> A: Okay.
>
> Q: I am an immigration officer, and I am conducting an examination of you to determine your admissibility to Canada. You are required to truthfully answer the questions I ask you, do you understand?
> A: Yes.
>
> Q: Misrepresenting yourself to an immigration officer is not only grounds for being refused admission to Canada, it is also a criminal

[24] Douglas, *supra* note 9 generally.

offence punishable by five years in prison and a fine of $100,000. Do you understand?
A: Yes.

Q: Any information you provide over the course of an immigration examination could be used in any subsequent legal proceeding. Do you understand?
A: Yes.

This is how Canada welcomes asylum seekers to the country then, with a warning, a threat: answer truthfully or risk having your claim refused, five years in prison and a fine of $100,000. It is only after this opening exchange that the immigration officer goes on to ask Ms. Jesurasa for her name and to commence with the substance of the interview. It needn't be this way of course. Whatever the appropriateness of the threatened sanctions,[25] the primacy accorded to them is interesting in itself. The interview could easily have begun with a simple "Welcome to Canada" and the exchanging of names, details of any potential penalties to follow. But it didn't. The tone is redolent in fact of the "police inquisition" that Derrida denounces. The immigration officer's use of the word "examination" seems far more appropriate than my altogether meeker "interview".[26] More rigorous somehow, the word brings to mind a test or even an inspection. Indeed, "cross-examination" might have been more appropriate still. The flavor here is undeniably criminal. Any information you provide over the course of an immigration examination could be used in any subsequent legal proceeding; you do not have the right to remain silent. And yet at least in the criminal context one is presumed innocent until proven guilty. What this opening passage already suggests is that in the eyes of the legal institution asylum seekers are problems before they are people, deviant before they are deserving.

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[25] I do not want to go into this point here as I am no expert on sentencing, but just to give some idea of the perceived seriousness of the offence, the available prison term here is equal to that for immigration officers who provide false documentation or accept bribes. The possible fine for corrupt officials is only half that. See *IRPA. supra.* note 22, s. 128, 129.

[26] In fact, "examination" is the word used in the *IRPA*. *Ibid.*, ss. 100, 127.

Mariana Valverde traces the emergence of the "deviant asylum seeker", "an unscrupulous, queue-jumping economic migrant also tainted with the suspicion of criminality" as a discursive figure in Canadian politics to the beginning of the 1980s.[27] She observes that since then there has been, "an incremental but steady redefinition through which the 'deserving victim' of international human rights law came to be replaced by the fraudulent or even downright criminal 'bogus refugee.'"[28] To be sure, the figure of the 'deserving victim' undoubtedly persists, but only in a highly romanticized form. Think of media images from the mid to late 90s of homeless, starving and otherwise ravaged Rwandan mothers waiting patiently at refugee camps, complete with swaddled babe in arms. The "deserving victim" must be utterly destitute in order to be recognized as such. And even then, she must wait in line. Today, Sudan's "Lost Boys" have perhaps attained a similarly mythic status.

Despite the fact that the *Universal Declaration of Human Rights* explicitly guarantees a "right to asylum" at article 14,[29] those who actually attempt to enforce this right are immediately labeled 'illegal' for having used 'false papers' in doing so; whether that was the only way of escaping their country of origin or not; no matter how intolerable the conditions there. The stigma which thus attaches itself to the asylum seeker from this act of original deviancy – Ms. Jesurasa's arrival in Canada in the first place – extends far beyond the moment of transgression itself. Indeed, the fundamental 'badness' of asylum seekers and refugees may now be so deeply entrenched in our

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[27] Mariana Valverde, "From Deserving Victims to 'Masters of Confusion': Redefining Refugees in the 1990s" *Canadian Journal of Sociology* (2002) 135 at 138.

[28] *Ibid*. In fact, the figure of the asylum seeker is now arguably tinged in the popular consciousness of much of the West with that of the most amorphous of bogeymen of all: the 'terrorist'. John Upton writing for the London Review of Books, for instance, writes that "the provisions concerning the indefinite detention of foreign nationals in *Anti Terrorism Crime and Security Act 2001* make it plain that the notion of terror has become synonymous in the [British] Governments mind with that of asylum. It is hard not to believe that at least some of David Blunkett's anti-terror strategy is as much concerned with controlling the immigrant population as it is with the war against al-Qaida. Immigrant equals Muslim equals terrorist: a formula which finds its justification and sustenance in the US response to terror." John Upton "In The Streets of Londonistan" *London Review of Books* (Vol 26 2 dated January 24 2007), online: http://www.lrb.co.uk/v26/n02/upto01_.html.

[29] *Universal Declaration of Human Rights*, GA Res. 217A (III), UN Doc. A/810 (1948) 71.

collective psyche that it is largely regarded as a matter of "common sense".[30] It is no longer a matter of very great controversy for instance that asylum seekers are routinely locked up indefinitely in mandatory detention centers across the world.[31] When the same thing happens to a suspected terrorist, the media furor is markedly more pronounced.[32] The point is made particularly well in this highly evocative passage from Pickering's analysis of two so-called 'quality' broadsheets newspapers from Australia:

> According to the [Brisbane Courier Mail] and the [Sydney Morning Herald] 'we' are soon to be 'awash', 'swamped', 'weathering the influx', of 'waves', 'latest waves', 'more waves', 'tides', 'floods',' migratory flood', 'mass exodus' of 'aliens', 'queue jumpers', 'illegal immigrants', 'people smugglers', 'boat people', 'jumbo people', 'jetloads of illegals', 'illegal foreigners', 'bogus' and 'phoney' applicants...In response, 'we' should have 'closed doors'…we should respond 'nationally' with the 'navy and armed services at the ready', 'we' should 'send messages', 'deter', 'lock up' and 'detain, 'we' should not be 'exploited', 'played for a fool', be seen as 'gullible' or a 'forelock-tugging serf.'[33]

This sort of rhetoric is not limited to the Australian context, as Valverde's work shows. The skepticism exhibited by the immigration officer in the following passage seems to derive from all too similar a wellspring of suspicion and contempt. The tone is so unmistakably violent as to border on belligerence:

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[30] Sharon Pickering, "Common Sense and Original Deviancy: News Discourses and Asylum Seekers in Australia", *Journal of Refugee Studies* 14 (2001) 169, at 169. [Pickering, "Common Sense and Original Deviancy"]

[31] For example, the Harmondsworth Immigration Removal Centre in the UK, the Christmas Island, Nauru, Villawood and Woomera detention facilities in Australia and the T. Don Hutto Residential Centre in the US.

[32] Consider, for instance, the considerable international media attention give to Mohamed Haneef in the wake of the failed Glasgow and London bombings in July of 2007.

[33] Pickering, "Common Sense and Original Deviancy" *supra* note 30 at 172.

Q: What is your full real name?
A: Jesurasa Maliny Victoria.

Q: Which of those is your family name?
A: Given name Maliny Victoria. My father's name is Jesurasa.

…

Q: Have you ever used an alias, gone by a different name, or changed your name?
A: At that time, at my house, they used to call me by the name Ms. Jesurasa.

Q: Any other occasions when you've changed your name or gone by a different name?
A: No.

Q: What name did you use to get on the plane to travel to Canada?
A: Victoria.

Q: Was the name you used to travel to Canada the same name as your real name?
A: The agent in Sri Lanka gave me this name.

Q: That wasn't my question. My question was was the name you used to travel to Canada the same name as your real name?
A: No.

Q: So that means that you lied to me just now. You misrepresented yourself just after I informed you of the consequences of misrepresentation.
A: I did not understand the question.

> Q: The first thing I said to you was that if you do not understand the question, you tell me and I will rephrase it. It is very important that if you do not understand a question you tell me, rather than give me reason to believe that you are being untruthful. Do you understand?
> A: Yes

The aggression here is palpable. It is hard to read the passage without imagining a raised voice on one behalf and a bowed head on the other. The immigration officer accuses Ms. Jesurasa in no uncertain terms of *lying*, a word which implies intentionality, misrepresentation or obfuscation that is deliberate, designed to mislead. He does not seem to entertain even for a second the possibility that wires might have been crossed somehow or that the meaning of his question might accidentally have been lost in translation. Even though both of these would have been the more reasonable assumptions in the circumstances.

By the time the interview began Ms. Jesurasa had been traveling alone for nearly two straight weeks: from Colombo in Sri Lanka she had flown first to Malaysia where she had remained for eight days to liaise with her "facilitator" and arrange the appropriate papers. From there she continued on to Thailand, Japan, America, and arrived finally in Canada on an overnight flight from the US on the morning of December 17th after three continuous days of traveling. Already tired, disoriented and undoubtedly apprehensive, she was forced to conduct her interview via teleconference, the immigration officer asking questions into one end of the line, the interpreter interpreting to her on the other end and vice versa.[34] We will come back to the highly significant matter of interpretation in chapter 4 where we will be able to document its effects in some detail, but for now let us just note the exceptionally difficult circumstances under which this examination was conducted. When seen in this light,

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[34] Interpreters are expensive and understandably difficult to schedule in person at such short notice. Peter Showler, *Refugee Sandwich* (Montreal and Kingston: McGill-Queen's University Press, 2006) at 218.

the immigration officer's accusation seems all the more brutal. A violence which is compounded still further a little later on in proceedings as follows:

> Q: Why are you traveling to Canada today?
> A: Due to the problems in my country.
>
> Q: What do the problems in your country have to do with your traveling to Canada?
> A: I don't understand.
>
> Q: There are problems in Canada, and I'm not leaving here. What do the problems in Sri Lanka have to do with your trip to Canada?
> A: Because of the country environment, and the situation there.

Where a moment ago we saw accusations and aggression, now the immigration officer resorts to sarcasm. Baser somehow, derisive, mocking, sarcasm is mean merely for its own sake. There is a total lack of empathy here.[35] No thought whatsoever seems to have been given to the possibility that Ms. Jesurasa's "problems" might have been genuinely severe, more horrible perhaps than the immigration officer would care to imagine. No thought has been given to the possibility that as a result it might be hard for her to talk about them, that she had been traveling for days on end and was trying to hold a conversation in a language not her own via teleconference, nor that because of her "problems" she might perfectly reasonably have issues with authority figures. None of these things appear even to have crossed the immigration officer's mind. Of course, Ms. Jesurasa *could* have been lying. She *could* have been just one more in the latest "wave" of "queue jumpers", "illegal immigrants", "bogus" or "phoney applicants". That is perfectly possible. But it tells us something nevertheless that she was never given the benefit of the doubt; not even for a second. The presumption right from the start was that, like all asylum seekers, she could not be trusted.

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[35] We will return to the matter of the IRB's lack of empathy later. See *infra* note 136.

We could speculate as to the effects of this institutional skepticism. We might imagine for instance that, confronted with unsympathetic faces from the very start, Ms. Jesurasa was less likely than she might otherwise have been to be genuinely forthcoming in her various interactions with legal officials. Permanently uncomfortable, she might have been more prone to confusion and inconsistency in her narrative than otherwise. This would be especially true, moreover, if we could ascertain that the immigration officer here was not simply some rogue in the system, an unfortunate but inevitable 'bad egg' as the institution would no doubt attempt to explain him away.[36] The findings of Rousseau *et al* in their "Multidisciplinary analysis of the decision-making process of the Canadian Immigration and Refugee Board" from 2002 suggest that in all likelihood he was not. In their analysis this sort of attitude pervades the entire institution, right up to the Board Members themselves. In the course of conducting their hearings:

> Board Members even became provocative at times, repeating the claimant's words and being sarcastic…The members also laughed among themselves…they first took an adversarial stance, then showed scorn for the claimant. These attitudes in turn influenced the claimant's reactions, which ranged from anxiety, demonstrated in the tone of voice and rhythm of speech, to impatience, manifested as disrespect for the rules of the hearing, and finally to total helplessness (crying).[37]

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[36] It is worth noting, however, that they didn't have to. Our immigration officer presumably continues to greet asylum seekers in precisely this fashion even today.

[37] Rousseau *et al.* "The Complexity of Determining Refugeehood: A Multidisciplinary Analysis of the Decision-making Process of the Canadian Immigration and Refugee Board" (2002) 15 *Journal of Refugee Studies* 43 at 60.

Although the Presiding Member in the case before us here was certainly not as bad as that, as a matter of fact Ms. Jesurasa did cry at her hearing. Several times. So much so on one occasion that a recess had to be called. We do not need to appeal either to hypotheticals or psychology however. The effects of the IRB's skepticism are observable right on the face of the record.

The so-called "Screening Form" was filed on April 14th 2004, several months after the date of the interview we have been looking at here. Its purposes were twofold. First, to determine the length of the hearing to which Ms. Jesurasa would be entitled. Second, to make a "preliminary identification" of the issues considered to be central to the claim. In the course of determining that Ms. Jesurasa should be limited to just a "regular (half-day) hearing", four "issues" were identified, namely "state protection", "internal flight alternative", "identity" and "credibility". But these are not so much "issues" as they are possible grounds for rejecting the claim. She could have sought protection from the Sri Lankan government instead; she could have found somewhere else in Sri Lanka to escape her 'problems'; she is not who she says she is; her story is not believable anyway. The boxes entitled "persecution", "victim of crime", "danger of torture", "risk to life or cruel and unusual treatment or punishment", all "issues" that Ms. Jesurasa might reasonably have claimed were crucial from her perspective, are left glaringly un-ticked. The "claim description" on the reverse side of the form pulls off an identical move. It reads:

> 22 y.o. Jaffna female fearing army and LTTE. PIF speaks of passport seized by immigration – Citizenship and Immigration Canada confirms it has none on file. Immigration notes indicate sister asked for refugee status; this is not written in PIF. There are inconsistencies regarding time frames and circumstances surrounding deaths of parents. Not many specifics furnished in immigration interview. She has 3 brothers and at least 2 of 3 sisters all currently residing in Valvettithurai Sri Lanka.

But this is not a "claim description" at all, it is a plan of attack. The *Oxford English Dictionary* [OED] gives as one definition of the word "screen" – as in "screening form" – "a thing providing concealment or protection."[38] That is precisely the effect here. The institution's distrust, previously limited 'merely' to a few unnecessarily harsh words or tone of voice in an interview, we can now observe being embedded into its very understanding of Ms. Jesurasa's story. The "issues" identified here bear more than a passing relation to those taken up later on in the file and given the opportunity to blossom. This is where the seeds of those arguments were sewn. Thus, at the hearing "credibility" would be described by the presiding board member as the "main issue in this case". Eventually she would determine at first instance that "no credible evidence was submitted to the tribunal which would allow me to conclude, for the reasons alleged in her written and oral testimony or for any other reason, the claimant is a 'person in need of protection'." Similarly, the possibility of a viable "internal flight alternative" would continue to be debated right up to the judicial review decision, whereas the "issue" of whether or not Ms. Jesurasa had in fact been "persecuted" would be left crucially undiscussed.

The IRB's skepticism towards asylum seekers, then, is not merely the inevitable *response* to a broader belief in "refugee deviancy" fostered in politics and the media. The IRB is actively engaged in *producing* that which it purports to regulate. Inhospitable throughout, it transforms asylum seekers into the very "liars" and "deviants" it then goes on to accuse them of being. From the moment she arrived in Canada, Ms. Jesurasa's fortunes had already been largely determined. She was playing a rigged game.

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[38] *The Compact Oxford English Dictionary* 2d ed., *s.v.* "screen".

3. The Personal Information Form: *categories*

Having completed her interview with the immigration officer Ms. Jesurasa's next step was to fill out her "Personal Information Form",[39] a lengthy and somewhat confusing document comprising forty-one questions about her life thus far – name, age, nationality, ethnicity, previous residency, education, family, jobs, convictions, military service, etc – that she was then required to submit to her local Immigration and Refugee Board office[40] within twenty eight days of her arrival.[41] Of the total forty-one, we are concerned primarily with the final two questions here. They evidence the institution's confrontation with a problem which lies right at the heart of legal adjudication, of justice. Manderson expresses it as follows:

> Justice embodies both an aspiration towards 'law or right, legitimacy or legality, stabilisable and statutory, calculable, a system of regulated and coded prescriptions' and at the same time the desire for a unique and singular response to a particular situation and person before us. Justice is both general and unique; it involves treating everybody the same and treating everybody differently.[42]

The key words here are "aspiration" and "desire". Justice is not strictly speaking possible, it is an ideal. It involves an intractable double-bind: the necessity that it maintain a sensitivity to uniqueness at the very same time as it attempt to resolve that uniqueness into a general rule or a predetermined *category*.

The category we are concerned with here is the IRB's "refugee definition". The final two questions of Ms. Jesurasa's Personal Information Form reveal that the IRB has an

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[39] She did so with the help of both a lawyer and an interpreter.

[40] At this stage, that was still in Toronto. After the submission of this form, she would move on to Montréal.

[41] This, it appears, she duly did: the date stamped on the front of the PIF is January 6th 2004.

[42] Manderson, "Proximity", *supra* note 5 at 318.

impoverished mechanism for responding to individual difference. It is only the claimant who succeeds in constructing themselves as simultaneously both similar enough to the IRB's particular "refugee definition" and sufficiently different to remain "credible" who will ever be successful. If they are *not* able to do so then their claim risks rejection for being too different. If they *are* able to do so then they risk rejection nevertheless for not being different enough. Fitting *too well*, their story is suspected of having been fabricated, formulaic. As Derrida puts it, "each case is other, each decision is different."[43] But as far as the IRB is concerned, that is the claimant's problem and not theirs.

Canada's "Refugee Definition"

There have been people in refugee-like situations for thousands of years.[44] And yet it is only relatively recently that we have begun to think of the 'refugee' as a category of *legal* personality. In Canada for instance:

> Immigration and refugee policy...was neither strictly formalized nor strictly enforced until the inter-war period. Prior to that time, the government of British North America, and later the governments of the two Canadas, were far more concerned with increasing the population and encouraging settlement than with limiting the inflow of foreigners.[45]

If World War I marked an awakening to the 'refugee phenomenon', however, with the first internationally recognised refugee definitions following the debates of the

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[43] Jacques Derrida, "Force of Law: The Mystical Foundation of Authority" (1990) 11 *Cardozo Law Review* 919 at 961. [Derrida, "Force of Law"]

[44] Moses and Oedipus spring immediately to mind, but one could no doubt think of countless other examples. See Kim Salomon, *Refugees in the Cold War: Toward a New International Refugee Regime in the Early Postwar Era* (Lund, Sweden: Lund University Press, 1991) at 29.

[45] Barsky, *supra* note 7 at 19.

League of Nations Council in 1922,[46] World War II brought about a complete sea change in international refugee policy and a manifest elevation of the matter on the agenda of the West. By May of 1945 some thirty million people had been dislocated in Europe alone,[47] making refugees a problem of completely unprecedented proportions both in practical and ethical terms. In December of 1948 the UN's *Universal Declaration of Human Rights*[48] came into effect, authoring the so-called "right to asylum" at Article 14, and an Office of the High Commissioner for Refugees was set up the following year. But it was not until 1951 that the Article 14 'right', hitherto a mere gesture, was codified in the *Convention Relating to the Status of Refugees*[49] as the principle of "non-refoulement",[50] bringing with it much of the conceptual framework that, for better or worse, remains in place internationally today. As Barsky puts it, "the *Convention*…fundamentally changed the ways in which refugees were assessed, admitted, and treated by signatories to the treaty."[51] Which is to say most of the world: as of March 1st 2006 one hundred and forty-six states, including Canada,[52] were party either directly to the Convention or to the *Protocol Relating to the Status of Refugees*[53] that modified it in 1967.[54]

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[46] Simpson notes that one of the more generous definitions tabled at that time was "any person who does not enjoy or no longer enjoys the protection of his government and has not acquired another nationality." Sir John Hope Simpson, *The Refugee Problem: Report of a Survey* (London, Eng; Toronto: Oxford University Press) 1939 at 7.

[47] Barsky, *supra* note 7 at 22.

[48] *Supra* note 29.

[49] *Convention Relating to the Status of Refugees*, 1951, 189 U.N.T.S. 150 (entered into force 22 April 1954). ["The Convention"]

[50] *Refouler*, in French, means "to expel" or "to return". The principle of "non-refoulement" therefore entails not that refugee claimants have a "right to asylum" *per se*, but rather that they have a right not to be *returned* or *expelled* from a country that they have arrived until their claim has been rejected, and they are found not to have "a well founded fear of persecution".

[51] *Supra* note 7 at 23.

[52] Canada ratified the *Convention* directly in 1969. Rohda Howard, "The Canadian Government Response to Africa's Refugee Problem" (1981) 15 *Can. J. African Studies* 95 at 99.

[53] *Protocol Relating to the Status of Refugees* 1967, 606 U.N.T.S. 267 (entered into force 4 October 1967)

[54] With the *Protocol*, the "*Convention* definition" finally shed its temporal and potentially spatial restriction – intended to limit the applicability of the *Convention* to those affected by the War and

Other than setting out a few basic 'civil rights' which refugees ought to be entitled to while their claims are being processed,[55] however, the *Convention* says nothing whatsoever about the process of determination itself.[56] In practical terms therefore its most significant impact has been by way of the "refugee definition" it put forward. In Canada this definition was incorporated directly into national law in 1976 with the *Immigration Act,*[57] remaining on the books by way of the s96 of the *Immigration and Refugee Protection Act* today.[58] A "*Convention* refugee" is any person who "by reason of a well founded fear of persecution for reasons of (i) political opinion, (ii) race, (iii) religion, (iv) nationality, (v) membership in a particular social group or political opinion," is outside their country of nationality and is unable or, as a result of such fear, unwilling to return to it.[59] By twenty-first century, popular standards this appears rather narrow. The OED, for instance, defines a "refugee" far more broadly as, "a person driven from his or her home to seek refuge, esp. in a foreign country, from war, religious persecution, political troubles, natural disaster etc." Or alternatively and broader, a refugee is "a displaced person" or "a runaway; a fugitive".[60] Both the *Convention* definition's five enumerated 'categories of

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encapsulated in the words "...as a result of events (in Europe)[54] occurring before 1 January 1951…" See Savitri Taylor, "Protection Nowhere / Elsewhere," (2006) *Int'l J. of Refugee. L.* at 284.

[55] eg. employment, education, religious freedom etc. See the *Convention* generally. I say "in theory" because the matter of whether centres such as the notorious facilites already mentioned in Australia, the UK and the USA are in breach of these obligations is very much debatable. See *supra* note 27.

[56] Even the right to an oral hearing has had to be implied. See *Singh v Canada* (1985) 1 S.C.R. 177.

[57] *Immigration Act* S.C. 1976-7.

[58] *IRPA. supra.* note 25.

[59] "The Convention", *supra* note 49 at Art. 1. There is slightly more to the definition than that, in fact, but to go into it here would unnecessarily complicate matters. Those are the crucial points for our purposes here.

[60] *Shorter Oxford English Dictionary*, 5th ed., *s.v.* "refugee".

protection'[61] and especially the requirement of "persecution" have come under considerable academic scrutiny. Matthew Gibney, for instance, argues that neither Iraqis displaced by the US and British war to disarm Saddam Hussein, nor Zairians escaping the deadly Ebola Virus, nor even women who have fled the oppressive misogynist strictures of the Taliban would fall within its ambit.

> For these groups are not on the move because they have been *persecuted*, in the sense that their state has deliberately targeted them for ill-treatment. Under the…Convention, there is no necessary link between refugee status and life-threatening states of affairs, such as situations of generalized violence, like war, or natural disasters or plagues.[62]

The "*Convention* definition" is state-centric, biased towards the West and sexist at the very least. A woman, for instance, is substantially less likely to be successful in her claim for protection in Canada today than a man.[63] While there are undoubtedly many social, economic and other structural reasons for this, it is nevertheless true that *part* of the reason lies in the wording of the definition itself. As Sharon Pickering puts it, "women's experiences of persecution are ignored because the key criteria for being a refugee is drawn primarily of public sphere activities traditionally undertaken in many societies by men."[64] The very language of "persecution" *already* seems to

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[61] One of the main arguments that has been put forward is the addition of "gender" as an extra category. See Sharon Pickering, "Narrating Women and Asylum: hostile administrative-legal justice" in Sharon Pickering and Caroline Lambert ed., *Global Issues, Women and Justice* (Sydney: Federation Press) 34. [Pickering, "Narrating Women and Asylum"]

[62] Matthew Gibney, *The Ethics and Politics of Asylum: Liberal Democracy and the Response to Refugees* (Cambridge: Cambridge University Press) 2004 at 7.

[63] According to Citizenship and Immigration Canada's "Facts and Figures 2005 – an Immigration Overview" there has consistently been around one and a half thousand more male refugees accepted into the country than female since 2001, which works out at around a 10% greater chance. Before that the disparity was even greater. Citizenship and Immigration Canada, "Facts and Figures 2005 – an Immigration Overview", online: CIC http://www.cic.gc.ca/ENGLISH/pdf/pub/facts2005.pdf.

[64] Pickering, "Narrating Women and Asylum", *supra* note 61 at 35.

preclude women's experience in "the home" or "in private", no matter how dreadful or pervasive those experiences may be.

In the immediate aftermath of the Holocaust and at the beginning of the Cold War it is hardly surprising that those fleeing the "persecution" of oppressive and totalitarian regimes were closer to the minds of the drafters than other potentially vulnerable groups of course. But as the political impulse towards tightening border controls rather than relaxing them continues to gather force, refugee law, as James Hathaway puts it, seems to be serving "fewer and fewer people, less and less well, as time goes on."[65] And even though far more inclusive definitions have been recommended by the UN High Commissioner for Refugees since 1974, such appeals seem generally to have fallen on deliberately deaf ears.[66] For most countries there is simply not sufficient incentive in political terms to agree to an expanded definition.

Some nations however have been prepared to move beyond a bare minimum commitment to the *Convention* on explicitly humanitarian grounds. Canada, notably, is one of them.[67] In addition to the existing *Convention* definition then, the Canadian legislature added an alternative ground for protection in 2002. According to s97 of *the Immigration and Refugee Protection Act* a person may now also claim refugee status as a so-called "person in need of protection" on the grounds that removal to their country of origin would subject them personally to a "substantial" risk either (i) to

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[65] James C. Hathaway, ed. *Reconceiving International Refugee Law* (The Hague and Boston: M. Nijhoff, 1997) at xxv.

[66] See *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, 1 HCR/IP/4/Eng/REV.1 Reedited, Geneva, January 1992, UNHCR (1979) online: UNHCR [illegible].

[67] Another is Australia, though their international reputation in this regard is nowhere so good. For more, see Catherine Dauvergne's comprehensive comparison between the Canadian and Australian regimes. Catherine Dauvergne, *Humanitarianism, Identity, and Nation: Migration Laws in Canada and Australia* (Vancouver and Toronto: UBC Press, 2005).

their life (ii) to being subjected to "cruel or unusual punishment" or (iii) to torture.[68] While taking steps towards a more generous refugee definition is commendable, however, even with this additional ground Canada's extended definition is not so broad as to include everyone who might be caught even by the least expansive of the OED's 'popular definitions' that we saw above. The risk still needs to be "personal", meaning that it cannot be something faced "generally by other individuals in or from that country."[69] And so those fleeing a natural disaster, war or a generally oppressive patriarchal regime, for instance, are thereby still precluded.[70] More significantly still, as Peter Showler points out, as a simple matter of fact "few claims have been granted solely under the secondary definition although it has significantly added to the legal work of lawyers and IRB members."[71] Which is to say that the actual material affect of this additional ground is minimal at best, and arguably altogether negligible.

Canada's dual-limbed "refugee definition" then, like any legal calculus, is imperfect. It is the fruit of a context which has been significantly exhausted. There are a large number of potential claimants today with at least as good humanitarian credentials as those the drafters had in mind at the time the *Convention* was written who would not obviously fall within its ambit, and in practice the addition of a second limb to the definition has done little to change things. But at least to a degree that is inevitable, even *necessary*. Legal categories are always political, they always concede something, they are necessarily incapable of encompassing *ex ante* the unique demands of future cases which could never have been known in advance. That is the double-bind of justice. As Derrida puts it:

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[68] *Supra* note 25 at s. 97. These are the main substantive points of the section anyway. As Peter Showler puts it, the section is written in somewhat "tortured prose that is virtually impenetrable to lawyers, lay persons, and certainly, refugees." Showler *supra* note 34 at 217.

[69] *IRPA*, *supra* note 25 at s97 (1)(b)(ii)

[70] As Ms. Jesurasa would eventually come to find out.

[71] *Supra* note 34 at 216.

> In short, for a decision to be just and responsible, it must, in its proper moment if there is one, be both regulated and without regulation: it must conserve the law and also destroy it or suspend it enough to have to reinvent it in each case, rejustify it, at least reinvent it in the reaffirmation and the new and free confirmation of its principle.[72]

The real test of a legal institution therefore is its ability, at the same time as it maintains its general rules or categories, to reinvent them, to rejustify them in response to individual difference. At least on the present evidence, the IRB is not up to the task. It is structured so as to pass the burden of their difference on to the claimants who come before it, rather than absorbing any of that burden itself.

Responding to Difference

Question 40 of the Personal Information Form asked Ms. Jesurasa "Why are you claiming refugee protection in Canada?" Her answer reads as follows:

> [40b] I am claiming protection as a Convention refugee because I have a well founded fear of persecution for reasons of
>
> ☑ race
> ☑ religion
> ☑ nationality
> ☑ membership in a particular social group
> ☑ political opinion
>
> [40c] I am claiming protection as a person in danger of torture, as defined in Article 1 of the Convention against Torture.

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[72] Derrida, "Force of Law", *supra* note 43 at 961.

☑ Yes ☐ No

[40d] I am claiming protection as a person who faces a risk to life or a risk of cruel and unusual treatment or punishment.

☑ Yes ☐ No

Up to this point every question had provided Ms. Jesurasa with a relatively high degree of autonomy in the formulation of her response. The question would be typed out and a line provided below upon which either she or her lawyer would posit an answer.[73] Question 4, for instance, reads: "When were you born?" Her answer is "24th September 1981". Question 5 asks "Where were you born?" And her answer is "Jaffna, Northern Sri Lanka". Question 33: "What other identity documents do you have or could you obtain?" Her answer: "(1) National Identity Card (2) Birth Certificate." When it came to the most crucial question of all, however, the rules suddenly changed. She is permitted to claim on the basis of one or other or both of the limbs of its "refugee definition" – political and historically contingent as we have seen – and on that basis alone. There is no box marked "other".

More significantly still, this is the first time that the word "I" appears. But it was written neither by Ms. Jesurasa nor even by her lawyer on her behalf. Every one of the four "I's" here are part of the standard form, designated by the institution far in advance of her arrival in the country. The IRB thus forces her not only to speak *its* language, in terms of *its* categories, but moreover to claim responsibility for doing so. In forcing Ms. Jesurasa's hand like this, the IRB enables itself to do two things. On the one hand, if subsequently her story ever deviates too much from the standard line according to which she has been required to claim, it can rule out that that portion of

[73] Most of the answers, in fact, are type-written in English and I presume therefore were filled in by Ms. Jesurasa's lawyer. However a few are obviously provided by Ms. Jesurasa in her own hand, notably the several occasions on which she was required to provide her signature and the one occasion on which she was asked to provide her name in full in the Tamil script.

the narrative as irrelevant: sad perhaps, but unfortunately outside the scope of the claim being made. On the other hand, if her story conforms too well to the categories, it can be ruled out as suspiciously formulaic. And either way the IRB will be innocent of any wrong. It will merely have applied the law, "legitimate", "statutory" and "calculable"[74] to the facts of *her* story, for which she is solely responsible. Both techniques were employed in Ms. Jesurasa's case.

First, following the news at the end of 2004 that her home had been destroyed be the tsunami and that a number of family members had been lost, the following was claimed by the presiding board member in the first instance decision: "it is not my prerogative to evaluate if the claimant can return to her country following the tsunami, a natural disaster which hit her county." The question of whether the tsunami might have rendered her more vulnerable than previously was at least considered arguable, but it was quickly dismissed. "No evidence however was produced to the tribunal that following the tsunami, young women in Sri Lanka in general are more vulnerable and that there is an increased risk for their life and security." The fact that the hearing took place just three months after the tsunami hit and it would be virtually impossible to produce sufficiently convincing evidence in that time is not considered. Second, in Ms. Jesurasa's answer to question 41 of the PIF in which she was required to set out in narrative form "all the significant events and reasons that have caused [her] to claim refugee protection in Canada,"[75] her response begins as follows: "I am a Sri Lankan Tamil by race and nationality and a Roman Catholic by religion. I wish to give the following statement in regard to my refugee protection in Canada." Race. Nationality. Religion. Already in her first sentence she has used three of the categories enumerated in the "*Convention* definition". Barsky writes:

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[74] Derrida, "Force of Law" *supra* note 43 at 959.

[75] Again, with the help of an interpreter. We will come to the matter of interpretation in section III below.

> Claimants are advised directly (by their lawyers and by other intermediary persons) and indirectly (by the very nature of the refugee determination system and the official descriptions thereof) to match their experience as closely as possible to the experience deemed acceptable, even if by so doing they must modify the narration of their own experience.[76]

Even as the text ought to be moving away from the institutionally legislated "I's" of question 40 to Ms. Jesurasa speaking in a voice of her own, therefore, it continues to be haunted by the institution's inflection. My suspicion is that on this occasion responsibility lies with her lawyer. Seen this way, these "I's" are doubly disingenuous. They evidence the full extent of the mediation in the narration of Ms. Jesurasa's story. If the lawyer's guidance is palpable here, where might it have been subtle enough to go unnoticed? At what point did Ms. Jesurasa stop requiring her lawyer's hints and begin to modify her account towards institutional norms all by herself? And on both counts to what effect? The risk with modifying one's narrative in an attempt to please the institution is that it begins to lose that crucial 'ring of authenticity', or of "credibility" in the IRB's preferred language. Consider, for instance, the presiding board member's claim in the first instance decision that "the claimant's testimony was rather direct and forthcoming." The "rather" here acts as a qualifier. The testimony was not *merely* "direct and forthcoming", which presumably would have been a good thing, it was "*rather* direct and forthcoming", which is to say almost too much so.

Barsky is not exaggerating when he suggests that the determination process is essentially a test of the claimant's ability to construct an appropriate image of the "*Convention* refugee".[77] "Claimants who are most able to navigate and understand the expectations of the host country tend to produce a successful 'refugee' image, while

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[76] *Supra* note 7 at 6.

[77] *Supra* note 7 at 6.

others whose narrative style and retelling of events do not fit into such expectations may be misunderstood and rejected."[78] But those who are able to do so are not necessarily the most needy. They are likely to be men, to speak English, to have an easily identifiable, possibly documented, history of being vilified by a recognizably tyrannical regime. Above all they will be familiar, safe.[79] The IRB, which asks that you tell your unique story and threatens you with a fine of thousands of dollars and a potential prison term if you lie, distrusts the very difference it demands. But at the same time as it thereby encourages you to conform to its idealized and historically contingent institutional categories, it distrusts overt sameness too. Not too similar, not too different, but just right: a Goldilocks style trial by hazard of which the claimant must bear the burden.

[78] Rousseau *et al.*, *supra* note 37 at 51.

[79] Barsky claims that "persons most familiar with Western forms of argumentative strategy and criteria for truth are favoured" as well as "active males who are bread winners in the country of origin and are likely to be *good First World citizens* when they arrive." Barsky, *supra* note 7 at 119 and 216.

4. The Hearing: *Interpretation*

On March 1st 2005, nearly a year and a half after her arrival in Canada, Ms. Jesurasa's case was finally brought before a member of the IRB. The hearing was a quasi-judicial affair following an "administrative tribunal process similar to what happens in court, though less formal,"[80] and comprising therefore "a peculiar hybrid of courtroom-style interrogation, loosely-structured story-telling, and inter-cultural discussions."[81] It was attended only by Ms. Jesurasa herself, her lawyer, the presiding board member and an *interpreter* translating English to Tamil, Tamil to English, sentence by painstaking sentence.[82] Although a "regular (half day) hearing" had been scheduled, proceedings in fact lasted only just over an hour and a half. And despite the fact that those crucial ninety minutes were recorded on old-fashioned analog cassette tape as usual, their official chronicling takes the form of a transcript which seems to have been commissioned only after Ms. Jesurasa applied for judicial review following the rejection of her claim at first instance.[83] Because the tapes were not part of the institution's official record, it was thanks only to the generosity of Ms. Jesurasa's lawyer that I was able to obtain a copy.

The difference between the two records of the hearing is formidable. As Barsky put it, "the transcript is the copy of a hearing that never took place."[84] The interpreter has been systematically erased. Although he mediated every single phrase that passed

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[80] Immigration and Refugee Board of Canada, "Procedures: Tribunal Process" online: IRB http://www.irb-cisr.gc.ca/en/references/procedures/index_e.htm.

[81] Barsky, *supra* note 7 at 65.

[82] The so-called "Refugee Protection Officer", whose job is normally to assist the board member by selecting issues to be explored and taking on the brunt of the responsibility of questioning the claimant, was on this occasion not present. The precise significance of which fact it has hard to determine. See Dauvergne, *supra* note 67 at 98.

[83] The transcript is signed and dated December 5th 2005.

[84] *Supra* note 7 at 55.

between those present at the hearing, you would hardly know it from the transcript. Only those words spoken in English are recorded. And they are presented, moreover, as continuous passages of speech. Admittedly, as Eric Prenowitz writes, "customs officer, judge and executor, mountebank medium, impassive imposter, forger of authority, illiberal host and ungracious guest, the translator should never really be there."[85] There is undoubtedly a certain indignity to the role of interpreter. In an ideal world we would do without. He is an outsider, a compromise. But in the context of asylum law, this compromise is an essential one. Without the interpreter, no discussion whatsoever could take place. And as Derrida puts it, "to address oneself to the other in the language of the other is, it seems, the condition of all possible justice."[86] In an important sense, therefore, the interpreter, though a nominal outsider, is actually an *insider*, integral to the mechanics of determination. Because "translation, however excellent it may be…necessarily remains a translation, that is to say an always possible but always imperfect compromise between two idioms,"[87] his judgments are crucial. Of this truth, the IRB is in denial. That is the first argument made in this chapter. The institution's effacement of the interpreter evidences a theory of language that, in its ignorance of the crucial relationship between context and meaning, is utterly impoverished. It does not understand *différance*.[88] But more than that, by rendering the interpreter's inevitable contribution invisible its power is only heightened.

Not only does the IRB have no adequate theory of interpretation, however, it has no theory of transcription whatsoever. That is the second argument. When the tapes are compared to the transcription in the blue file, there are a good number of

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[85] Jacques Derrida, *Archive Fever,* trans. by Eric Prenowitz (Chicago and London: University of Chicago Press) at 105. [Derrida, "Archive Fever"]

[86] Derrida, "Force of Law", *supra* note 43 at 949.

[87] *Ibid*. at 925.

[88] See Jacques Derrida, 'Différance,' in *Margins of Philosophy,* trans Alan Bass (New York: University of Chicago Press, 1972). [Derrida, "Différance"]

straightforward errors: spelling mistakes, words omitted, words misheard etc. Although the majority of these errors appear to have been relatively inconsequential, in one instance in particular the ramifications may have been very significant indeed. Once again, though, it is not simply a matter of blaming the transcriber. Transcription error is inevitable, entailed in the very project of transcription itself. And the power the institution vests in the transcriber by its blindness to this fact is therefore considerable.

Effacing the Interpreter: the IRB's Theory of Language

The IRB's *Handbook on Interpretation*[89] has this to say of the intended "role of the interpreter":

> Your task as an interpreter is to interpret orally all dialogue and, in some cases, short documents submitted during, before, or after the proceedings…[90] Whatever is said in one language should be interpreted faithfully and accurately into the other language using the exact equivalent meaning and structure.[91]

Rule 3 of the *Code of Conduct for Interpreters* is even more explicit, requiring translation "without *any* paraphrasing, embellishment, omission, explanation, or

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[89] Immigration and Refugee Board of Canada, "Interpreter's Handbook 2007" online: IRB http://www.irb-cisr.gc.ca/en/search/index_e.htm?searchtype=1&search_criteria=interpreter%27s+handbook ["Interpreter's Handbook"]

[90] As has been briefly adverted to in previous chapters, an interpreter played an important role in both the initial interview and the completion of Ms. Jesurasa's Personal Information Form. In the second case, the interpreter was the same as the one under consideration here.

[91] *Supra* note 89 at 25.

expression of opinion."[92] It is uncontroversial that *as a matter of fact* interpretation is unlikely ever to be perfect,[93] is in some cases far from it moreover with potentially dire consequences,[94] and, if sufficiently bad, can even be grounds for having a negative decision set aside.[95] Nevertheless, the IRB's commitment to the *theoretical* possibility of "exact" interpretation, not only of a passage's "meaning" but also of its "structure", "without *any* paraphrasing, embellishment, omission" etc is significant. Consider, for instance, its metaphorisation of the interpreter in the following two paragraphs:

> You are the *vehicle* for transferring the messages between the subject of the proceedings and other participants. You are asked to interpret only what is stated, without omitting, adding or altering what is said…[96]

> Interpret only the words you have been asked to interpret - no more, no less…You must *reflect* exactly what is said and not give an approximation.[97]

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[92] Immigration and Refugee Board of Canada, "Procedures: Code of Conduct for Interpreters" online: IRB http://www.irb-cisr.gc.ca/en/references/procedures/code_interpret_e.htm ["Code of Conduct for Interpreters"]

[93] For instance, see *R v Tran* [1994] 2 S.C.R. 951. The headnote states, "While the interpretation provided need not be perfect, it must be continuous, precise, impartial, competent and contemporaneous." [*Tran*]

[94] Robert Barsky, for instance, quotes an immigration lawyer named William Sloan, "who states that "I had one [interpreter] who translated 'socialist party' as 'social group,'" and, further on: "I've seen cases where a claimant with two university degrees is made to sound completely garbled (by an incompetent interpreter). That can create contradictions where their [sic] are none." These contradictions are grounds for rejecting claimants; incompetent interpreters, therefore, like other links in this system, can undermine a potentially valid claim." *Supra* note 7 at 42.

[95] *Tung v. Canada (Minister of Citizenship and Immigration)* (1991), 124 N.R. 388 (F.C.A.)

[96] "Interpreter's Handbook", *supra* note 89 at 26 [emphasis added].

[97] My emphasis. *Ibid.* at 28 [emphasis added].

As a *vehicle*, the interpreter is a mere conduit, literally a vessel by which Ms. Jesurasa's "messages" may be picked up and "transferred" to the other actors in the decision making process and vice versa. Words, on this view, are objects, cargo: immutable and solid in one language – one is forced to imply *any* language – as the next. As a mirror, *reflecting* "exactly what is said", the interpreter is even less than a conduit, completely passive, but utterly precise. Words now are rays of light: stable, intense and straight as arrows. Both metaphors deny the interpreter any agency whatsoever, any affect at all on the words being interpreted. As if interpretation were an entirely mechanical exercise, devoid of judgment or art. As if, moreover, a word were capable of having an entirely stable identity in even one language, let alone between them.

The IRB's theory of language is founded upon a gross misunderstanding. Words are not completely stable. They do not have any metaphysical existence outside of language. Interpretation is not a mechanical exercise. Given a word or phrase in one language, an interpreter does not simply reach up and pluck its equivalent off the shelf of another and pass it on unadulterated. Interpretation always involves choice. It is necessarily political. It is violent. It always operates at an economic loss.[98] This much is structurally entailed in the very project of language itself, the inevitable function of what Derrida calls "*différance*".[99] A function itself of language's "iterability"[100] – the idea that linguistic signs must by definition be repeatable, which is to say recognizably different from other signs in order to begin to convey meaning – *différance* entails that "every text differs from and defers to another in a cycle of

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[98] Derrida, "Archive Fever", *supra* note 85 at 109.

[99] See Derrida, "Différance", *supra* note 88.

[100] See Jacques Derrida, *Of Grammatology* (Baltimore: Johns Hopkins University Press, 1976). ["Of Grammatology"]

endless reference."[101] It is context and not metaphysics, therefore, that fixes meaning. But where context is concerned closure is simply not a possibility.[102] As Derrida puts it, "[N]o meaning can be determined out of context, but no context permits saturation."[103] That is not to say that meaning is indeterminate, however, but merely that it is only *relatively* stable. Some contexts are more fixed than others. We can, after all, communicate. The point is simply that the fixing of a context is always provisional, artificial, open to critique. There can be no final word on a subject. The idea that we could ever comprehend *exactly* what was said is an impossible ideal.

Interpretation is difficult enough, therefore, even between people who speak the same language. Between languages, in which necessarily dissimilar systems of differences inevitably operate, it is more complex still. Artificiality compounds artificiality. The interpreter must make his best attempt at appropriately determining the context in one language before immediately doing so again in another, the temporal and therefore contextual deferral necessitating a semantic difference. A confounding of intentions, thus, is not simply likely, it is inevitable. Interpretation is unavoidably an imperfect enterprise.

The IRB either does not understand this fact or ignores it. By way of a theory of language which insists upon the possibility of interpretation, metaphorising interpreters as "vehicles" and "mirrors", telling them that they must interpret "faithfully and accurately into the other language using the *exact equivalent meaning and structure*",[104] "without *any* paraphrasing, embellishment, omission, explanation,

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[101] Manderson, "Apocryphal Jurisprudence", *supra* note 18 at 34.

[102] *Ibid*.

[103] Jacques Derrida, "Living On: Border Lines", trans. James Hulbert, in Harold Bloom et al. *Deconstruction and Criticism* (New York: Seabury Press, 1979) at 81.

[104] "Interpreter's Handbook" *supra* note 89.

or expression of opinion,"[105] the IRB shuts its eyes to *différance*, neglects to take any account of it. It invests interpreters with an extraordinary power and then it proceeds to make the exercise of that power invisible.

By instating a transcript rather than the tape recordings as the official record of the hearing and then by effacing the interpreter from that transcript, the institution makes it exceptionally difficult to observe the *différantial* violences which *necessarily* occur in the interpretative process *all the time*. Not only that, but even if a person is able to locate something like an example of this inevitable "economic loss", the standard for review is set exceptionally high. Having made the starting point that interpretation *can* take place, the presumption becomes that it *will,* and mistranslation, interpretative error is constructed by the IRB as the anomaly, an undesirable but relatively unlikely scenario to be remedied in only the most serious of cases.

The rule, following the *Tran* case,[106] states that, "the claimant…must establish that the lapse in interpretation was in respect of the proceedings themselves, thereby involving the vital interests of the accused, and was not merely in respect of some collateral or extrinsic matter."[107] One must be able to show a demonstrably heinous error, with direct and measurable implications. But that is only very rarely how interpretative error works. Because of *différance* it is subtle but constant, always differing, always deferring meaning. In Ms. Jesurasa's case, though the identifiable "lapses" were multiple and could hardly be called "collateral or extrinsic", they were probably not sufficient to make out the test in *Tran*. It would be difficult to demonstrate a relation of cause and effect between the interpretative error and the eventual result of the case. But by requiring institutionally that the interpreter be

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[105] "Code of Conduct for Interpreters" *supra* note 92.

[106] *Tran, supra* note 92.

[107] As quoted in chapter nine of the *Convention Refugee Determination Handbook*. See Immigration and Refugee Board of Canada, "Legal References: Interpreters and Translation of Documents" online: IRB available online at http://www.irb-cisr.gc.ca/en/references/legal/rpd/handbook/hb09_e.htm

eradicated from the start, moreover, the IRB had already ensured that any such question would never even be raised.

Interpretative Violence

Unfortunately, I was unable to get a registered interpreter systematically to work through Ms. Jesurasa's tape, checking the live interpretation at the hearing against what appears on the transcript. Many were unwilling. The world of Tamil-English interpreters is a small one, and the possibility that it become general knowledge within the community that one had been 'criticizing' another was not a risk some I contacted were keen to take. I was forced, therefore, to settle for a friend of mine, a native Tamil speaker currently residing in Montreal. Although I am unable to state any of what follows with authority by conventional academic standards, therefore, I am nevertheless confident that the points I make are essentially good. Each time it was indicated to me that a certain word spoken by Ms. Jesurasa was either 'misinterpreted' or not interpreted at all it is possible to discern that word phonetically from the tapes, and quite clearly at that. In every case I was then able to check my friend's suggested translations against an authorized Tamil / English dictionary[108] and on each occasion my friend turned out to have been right. This chapter focuses on just one passage of many which demonstrates the extent of the interpreter's mediation, the huge power and silent responsibility vested in him which, although structurally necessary, is systematically disavowed. We will observe the various ways by which one of Ms. Jesurasa's central claims is institutionally censored. We will see her claims first understated by the interpret, second omitted on transcription and finally, by a combination of these two, her story made to sound altogether implausible.

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[108] *The Lifco Tamil-Tamil-English Dictionary* (Little Flower Co. India, 2002) ["Lifco"].

(i) From Applicant to Interpreter

About forty one minutes into the hearing, the following exchange occurs. The transcription here is my own. It deliberately reintroduces, at least as far as reasonably possible, the interpreter into the text.

> Presiding Board Member to Ms. Jesurasa
>
> Okay. Now, I am going back to your problems.
>
> *[Interpretation in Tamil]*
>
> You told me that between year (sic) 2000 and 2002…
>
> *[Interpretation in Tamil]*
>
> or 2003 it was, I don't remember. Let me check it. 2003. About five, six times the army came to your house when you were alone
>
> *[Interpretation in Tamil]*
>
> and they made some propositions to you.
>
> *[Interpretation in Tamil]*
>
> They asked you to go with them.
>
> *[Interpretation in Tamil]*
>
> You refused and they left.
>
> *[Interpretation in Tamil]*

Did you have any other problems with the army?

[Interpretation in Tamil]

Ms. Jesurasa

[In Tamil]

Interpreter (for Ms. Jesurasa)

Likewise, it has happened to some of my friends and they used to take …uhh…and…uhh…they…

Presiding Board Member to interpreter

I didn't understand what happened to some of my friends?

Counsel to Presiding Board Member

Likewise *it* happened. Likewise it happened.

Presiding Board Member to Counsel

Okay.

Interpreter (for Ms. Jesurasa)

And it happened to some of my friends and they took them and umm… they had sexually they harassed them and…uh…that's not happened to me.

The presiding board member's question goes right to the heart of Ms. Jesurasa's claim. Did she have any other "problems" with the army? What was the character of

these "problems"? Might they perhaps be construed as "persecution" for the purposes of the refugee definition? Ms. Jesurasa's answer constitutes some fifteen seconds of continuous speech in which she uses two words of particular significance to her case and to our analysis. They are, in Latin characters rather than the Tamil script, *kedukka* – from *kedu* meaning "to destroy" or "to spoil"[109] – and *katpazhikka* – from *katpu,* meaning "conjugal chastity of wife"[110] and *azhi*, meaning "to decay, perish or destroy".[111] Both are formal but nonetheless common ways of expressing the English word 'rape'. In the latter instance, at least, that much is utterly unambiguous. How should we interpret what was Ms. Jesurasa claiming here then? What was she trying to say? That the very same kind of "propositions" she received from members of the army and the LTTE, when these men "asked [her] to go with them", had resulted in the rape – the "spoiling", the "destruction of the conjugal chastity" – of some of her friends. And she was afraid. This had not happened to her – yet – but, as another interpreter so eloquently put it for her in the relevant passage of her Personal Information Form, she "became feared" as "day by day the harassments increased". And yet all we get at the hearing is this timid "sexually they harassed them": not only rather strange sounding and ungrammatical in English, but palpably, even *radically*, less violent and invasive than the words Ms. Jesurasa actually used in Tamil. Her claim, thus, is dramatically *understated* by the interpreter in a striking example of the "economic loss" we adverted to above.

We could speculate as to why the interpreter might have done Ms. Jesurasa this semantic violence. And in doing so we could take Ms. Jesurasa's retreat into formal rather than her usual more colloquial Tamil at this point as rather revealing. Rape is hardly a comfortable discussion topic in any culture, but it is especially not in those which are more patriarchal than we are used to in much of the West and in which,

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[109] *Ibid.* at 237.

[110] *Ibid.* at 192.

[111] *Ibid.* at 53.

therefore, it brings to mind shame possibly even before violation.[112] This much is quite obvious when you listen to the tapes in fact. Ironically *reflecting*[113] Ms. Jesurasa's own expression of discomfort, as manifested in her move to formal Tamil, the interpreter becomes palpably uncomfortable when confronted with the task of translating these especially violent words, tinged as we suspect with shame and immodesty. He "umms" and "uhhhs", stuttering, groping for the words in English, and eventually opting for the platitudinous "sexual harassment" rather than the less comfortable "rape". The interpretation here, then, is very much political. The context has been fixed by cultural factors as opposed to merely linguistic or metaphysical then. But this was not merely "error" on the interpreter's behalf. Blame cannot lie entirely at his door. The occurrence of this sort of semantic downplaying was inevitable, structurally entailed by the fact of interpretation, of language itself. Admittedly it was not inevitable that it should occur at this crucial point. But we might speculate that it was likely. The cultural differences between ideas like "cat" and "tree", after all, may be relatively slim. But refugee hearings are not about cats and trees. They are about "rape", "harassment" and "persecution". And as far as those ideas are concerned, it is a quite different matter. In those cases, *différance* absolutely matters.[114] Interpretation is always political, and in this particular case, patriarchal. Something was always going to be lost in translation, of course, but, in this context it is very predictable that the loss would be to the tribunal's understanding of the degree of violence committed against a woman.

Or something like that… I've mangled it a bit but you get my point. You just need to say that there is something always lost, and what is lost is always political, and in this case the relevant politics is of course patriarchy.

[112] Rousseau *et al.*, *supra* note 37 at 62.

[113] "Interpreter's Handbook", *supra* note 89.

[114] In fact, this is not the only occasion that the interpreter makes performs such a *différantial* violence. Similar 'errors' occur on at least two occasions during the hearing. First, after approximately fifteen minutes, this time when the discussion turns to solicitations by army officers for Ms. Jesurasa to marry them, he fails to interpret the word *kedukka* altogether: an *omission.* And then later on he once again diminishes the violence of Ms. Jesurasa's *katpazhikka* by interpreting it as "molest", another word which hardly conveys the severity of our literal translation.

(ii) From Interpreter to Transcription

But there is more. The passage as it occurs in the official transcript is as follows:

> PM to Claimant
>
> Q Okay. No [sic], I am going back to your problems. You told me that between year [sic] 2000 and 2002…or 2003 it was, I don't remember. Let me check it. (inaudible) About five, six times the army came to your house when you were alone and they made some propositions to you. They asked you to go with them. You refused and they left. Did you have any other problems with the army?
>
> A Likewise, it has happened to some of my friends and they used to take and…they…
>
> PM to Interpreter
>
> Q I didn't understand what happened to some of my friends?
>
> Counsel to PM
>
> - Likewise
>
> A Likewise. Okay.
>
> Claimant
>
> A And it happened to some of my friends and they took them and they had *successfully they arrested them* and that's not happened to me.[115]

[115] Emphasis added.

Apart from the false impression of continuity given by the erasure of the interpreter from the text, the most noticeable thing here is that the interpreter's already suspect "sexually they harassed them" has become "successfully they arrested them" and the trace of sexual violence, already diminished, has thus been lost from the official transcript altogether. Here we have an example of what Derrida calls *mal d'archive* or, in English, "archive fever".[116] Inseparable from, or perhaps even the condition of the so-called "archive drive"[117] – that is the urge to record and to transcribe that is so important in law – is a "death" or a "destruction drive". The very possibility of archiving, of transcribing, simultaneously requires the possibility of "error" in doing so, which is to say, *omission* or loss. This is very close to the violence necessarily entailed in the iterability of linguistic signs, although the focus is somewhat different.[118] Now it is a matter not of moving between spoken languages but between the spoken and the written. But at least for our purposes the point is very similar.

"Archive fever", like *différance*, invests the transcriber-interpreter with a power which although structurally necessary is both considerable and virtually ignored by the IRB. In Derrida's words, "entrusted to such archons, these documents in effect speak the law: they recall the law and call on or impose the law."[119] The archive is not simply neutral as the institution might wish us to believe, the expository of some sort of authentic truth, a perfect representation of the hearing. It is a political, contingent, legal moment too. Its implications are capable of being very profound.

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[116] Derrida, "Archive Fever", *supra* note 77.

[117] Ibid.

[118] This is something near to what Derrida is getting at when he speaks generally of "arche-writing". See Derrida, "Of Grammatology" *supra* note 97.

[119] Derrida, "Archive Fever", *supra* note 85.

In this instance, the erasure of "sexual harassment" leaves only a *single* reference to anything relating to direct sexual violence in the official transcript that remains on file. Two separate movements by two separate intermediaries, both of which have then been made invisible so that the errors magically disappear, have conspired to attribute to Ms. Jesurasa words she never said, so that her multiple uses of *kedukka* and *katpazhikka* manifest themselves in this one brief passage alone.

> Counsel to Claimant
>
> Q And what is that you fear of the army, if you return to the country today?
>
> A They are also recruiting people and they are also take girls and they are will *molest* them and…
>
> Q Is there anything about yourself that make you feel maybe more susceptible of being targeted by the army or being taken by them , as you described it, to be *molested*?
>
> A Yes.
>
> Q What?
>
> A I was scared that they will threaten me and they will take me.[120]

Because there is now no prior reference to any sexual assault however, due to the various steps of erasure that we have already noted, the claim of "molestation" now, as well as being a similarly weak translation as "sexual harassment", sounds altogether *implausible*. It seems to come out of nowhere. Again, we can observe that meaning is dependent on context. The context that Ms. Jesurasa herself supplied to

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[120] Emphasis added.

this claim in Tamil, the extensive repetition of *kedukka* and *katpazhikka* in all of their considerable nastiness, which gave those words their meaning and weight, has now been radically altered by the institutional processes of interpretation and transcription, in their ignorance of the crucial relationship between context and meaning. In English, in this new context, Ms. Jesurasa's contentions read quite differently. Now the claim that she might be *molested* seems anomalous, not central to her claim. As we shall now see, that was exactly how it was treated by the presiding board member in her first instance decision.

5. The First Instance Decision: *Narration*

The first instance decision was delivered just over a month after Ms. Jesurasa's hearing, on April 5th 2005. At around two thousand words it is not a long document, but that is hardly surprising given the tremendous time pressure with which members of the IRB are faced. In 2002, for instance, "most Board Members listen[ed] to two claimants' stories each day of the week for three consecutive weeks and then ha[d] a week without hearings to write their decisions."[121] Peter Showler has suggested that refugee determination is "the single most complex adjudication function in contemporary Western societies."[122] On the basis of this extraordinary time constraint[123] and the magnitude of the stakes alone, I for one would be tempted to agree. Indeed, Derrida's use of the word "ordeal"[124] to describe the legal decision-making process seems particularly appropriate in this context. When this chapter undertakes an analysis of the presiding board member's "reasons for decision" in Ms. Jesurasa's case, therefore, it does not suggest that the decision was made lightly. The irony of the fact that I have had months to pore over a judgment that could have been written over the course of only a few days at most is not lost on me. My intention is neither to criticize the board member in her personal capacity nor to suggest that her decision was somehow 'legally' erroneous. Instead, through a close textual analysis, I

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[121] Rousseau *et al*., *supra* note 37 at 49.

[122] *Ibid.* at 43.

[123] There is no reason to think that by the time Ms. Jesurasa's case was heard things had dramatically changed. In 2005 the IRB, comprising 120 members in all at the time, apparently "recognized" 12,081 claims for refugee protection and "rejected" 11,848; a further 3,305 were "otherwise resolved". Quite what that means in terms of claims "heard" per board member per week is unclear, but if for the sake of argument we were to imagine (conservatively) that only those claims that were either "recognized" or "rejected" were actually "heard", and if we were to imagine further that those 24,000 odd claims were "heard" by a fully comprised board working full time for 11 months of the year, that equates to about 18 claims per member per month. Supposing again that one week every month is set aside for decision writing, that still works out at a minimum 6 hearings a week. Which is to say, not *dramatically* less than the 2002 figures. See the UNHCR "Global Refugee Trends", online: UNHCR http://www.unhcr.org/cgi-bin/texis/vtx/events/opendoc.pdf?tbl=STATISTICS&id=4486ceb12 at 46.

[124] Derrida, "Force of Law", *supra* 38 at 963.

want to consider how her judgment works from a discursive perspective. Because despite the presiding board member's quotation of sections 96 and 97 of the *IRPA* in full at the head of the judgment, seemingly grounding it in legality, making it *appear* authoritative, "the law" here is substantially besides the point. The vast majority of the argumentative work is not in fact done by way of "legal reasoning" as one might expect – that is to say by the analysis of the limits of a general legal rule in conjunction with or followed by the explication as to why the particular set of facts in question either do or do not fall within its ambit – but rather by the very particular way in which Ms. Jesurasa's story is *narrated*. Peter Goodrich, in a different context, puts the point thus:

> I shall observe briefly that the language of [the]…characterization of the case is already highly illuminating. As a putatively impartial description of the facts of the dispute, it is a failure. As an emotive stylistic characterization of the parties to the dispute and a preliminary evaluation of their actions, its highly selective use of apparently descriptive terms is of extreme intradiscursive and semantic relevance, it signals ahead, or prepares the reader for the outcome which will later be reached.[125]

In Ms. Jesurasa's case we could go somewhat further. The facts here do not simply signal ahead, they do not merely prepare the reader for the outcome which will later be reached, they actually *are* that outcome. There simply is no observable distinction between the presiding board member's narration of the facts and her legal analysis. In this judgment, law and narrative are one and the same. With no explicit discussion of "the law" forthcoming, it is the constant depiction of Ms. Jesurasa's 'problems' as insubstantial, possibly even implausible that constitutes the decision. In this chapter we are concerned with how, by what particular rhetorical techniques? Our focus is the

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[125] Peter Goodrich "Law and Language: An Historical and Critical Introduction" (1984) 11 *J. L. & Soc'y* 173 at 192-3.

presiding board member's persuasive strategies, her semantic and discursive practices.

"Allegations"

The presiding board member begins her discussion of Ms. Jesurasa's case with the so-called "Allegations". These consist of passages cut from Ms. Jesurasa's answer to question 41 of her PIF, transposed into the third person, and regulated occasionally by the word "alleged". Although the intention, thus, is clearly to relate her story for the time being without prejudice, this section is nonetheless interesting from a discursive perspective in at least two ways. First, the move from the first person of the PIF to third person here is not apolitical. Ms. Jesurasa is never once referred to by name. Instead the institution transforms her into "the claimant", objectified and rhetorically abstract. This is a case of, as Peter Goodrich puts it, "the syntax of impersonality and distance producing indirect control in terms of attitude and generalisation rather than direct command or speech act."[126] The reader is encouraged to think of "the claimant" not as a singular idiosyncratic human being, but rather as something generic, a legal conundrum. This subtle institutional slight of language acts something like an anaesthetic. It makes the violence of rejection that little bit easier to bear.

Second, taking Ms. Jesurasa's 'own words' directly from her PIF does not necessarily entail the impartial relation of her story that it is clearly taken to. Repetition always entails difference. The re-casting of identical words in a fresh context is a necessarily political moment, as Derrida's work on *différance* shows.[127] Consider, for instance, the extensive repetition by the presiding board member of Ms. Jesurasa's word "ask". Each one of the following sentences has its direct analogue in the PIF. "The claimant

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[126] *Ibid.* at 188.

[127] *Supra* note 88.

and her siblings were repeatedly *asked* by the LTTE militants to join the movement." "In May 2002, the militants came to the claimant, *asking* her to join the movement." "In April 2003, the LTTE militants *asked* her again to join their forces." Whatever Ms. Jesurasa might originally have understood by the word, remembering that even that 'original' usage had been mediated by an interpreter to begin with; whatever light may have been shed on the circumstances surrounding that usage at the hearing, with its implications of sexual violence; however that might have changed things; its 'repetition' here, shorn now of all that contextual data, fixes it as something decidedly insubstantial, the merest of requests: presumably non-violent and neither particularly forceful nor threatening. The absurdity of this "semantic appropriation"[128], to borrow Goodrich's terminology, is dramatically confirmed when considered in juxtaposition with the board member's own usage of the word to conclude the section: "The claimant came to Canada on December 17th, 2003, and at the airport, *asked* for refugee protection." This, *this* is what the word means for the presiding board member and what it comes to mean for the reader. Although to wit there could be nothing more different than a group of soldiers knocking on a young female orphan's door on the one hand and that same orphan knocking on Canada's on the other, here the two are brought together by linguistic 'accident'. In this new context, and ironically in the belief that they accurately represent her "allegations", Ms. Jesurasa's own words are thus used against her quietly to prepare the reader for the negative decision that will follow.

"Analysis" Part 1: Set up

In the "Analysis" that follows these supposed "Allegations", the presiding board member consciously assumes her own voice for the first time. The section consists of a peculiar hybrid of direct reporting from and discussion of the hearing, related in the

[128] Goodrich, "Law and Language", *supra* note 125 at 189.

first person and interspersed with occasional flourishes of supposed cultural knowledge. Again, the narration here is anything but impartial. It begins, "the claimant *became* an orphan when she was seven or eight years old. Her mother *died* in 1987 and her father in 1988. In 1995 one of her brothers *was* wounded and *became* paralysed." So where in the previous section Ms. Jesurasa "alleged" that her parents were "killed" and her brother "was hit by a shell", here those injuries, no longer qualified as "allegations", are rendered entirely passive as "facts". Her parents merely "died", her brother was simply "wounded"; he "became" paralysed. These things *happened* but they were not *caused* by anything, and they are made to seem far less violent as a result.

"Despite these tragedies", we are told, "the claimant seemed to live a fairly normal life." She went to school up until 2002, obtaining "quite a high level education for a young woman from a village." The civil war that raged at the time, thus, is diminished away to nothing. In fact, the word "war" is never used at all. We get no sense of the violence that Ms. Jesurasa would have encountered every day in this supposedly "normal life". There is no reference, for example, to the time helicopters opened fire on her school, precisely when she was obtaining the education which the presiding board member seems to regard as such a significant indicator of normality. Rousseau *et al* write, "simplistic representations of war and persecution lead some Board Members to assume that all 'normality' or daily life is altered or comes to a standstill in situations of violence."[129] The presiding board member does not seem to have allowed for the possibility that the degree of "normality" which Ms. Jesurasa was able to maintain for so many years could equally be viewed as a survival mechanism; that she might have chosen to leave only when she had truly abandoned hope.[130]

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[129] Rousseau *et al*., *supra* note 37 at 62.

[130] *Ibid.*

The judgment continues:

> [the claimant] testified that her siblings lived nearby after they moved out of the family house when they got married. It was not clear to me why her oldest brother would have moved out of the family house, and would not have stayed there with his new bride, as it is the tradition [sic].

The function of this particular statement, this pretense at cultural knowledge for which no evidence whatsoever is provided, is unclear. On the one hand it is such an unbelievably crass generalization and would be such a strange thing for Ms. Jesurasa to lie about that it is hard to imagine that the presiding board member can really have intended to cast doubt upon Ms. Jesurasa's credibility generally with it. But it is hard to see what other function it could possibly serve. Irrelevant as it seems to the substance of the decision, therefore, this statement nonetheless evidences the presiding board member's skepticism, another practical example of the institutionally embedded distrust that we identified in chapter 2. Again, it is not simply a matter of reflecting or *evidencing* this distrust, but of rhetorically constructing Ms. Jesurasa as a less plausible candidate for refugee protection. Its rhetorical reach is not necessarily limited to the particular statement to which it applies.

At this point the presiding board member moves on to describe Ms. Jesurasa's various encounters with the Sri Lankan army and the LTTE over the years. Beginning with Ms. Jesurasa's encounters with men from the Sri Lankan army it says:

> The claimant testified that when she lived with her sister and brother, the soldiers from the Sri Lanka army would come to their house and make indecent propositions to her. They would say, 'come with me and I will marry you'. Such incidents happened five or six times between 2000 and 2002. When the claimant refused, they would stay for a little while longer and eventually leave the

> house. She was never taken by the army. When asked if she had any other problems with the army, she stated that she did not have any.

This is what has become of the passages we read in chapter 4 from the hearing, where we observed first the reduction of *kedukka* – meaning "to destroy" or "to spoil"[131] – and *katpazhikka* – meaning "to decay, perish or destroy"[132] the "conjugal chastity of [a] wife"[133] – to mere "sexual harassment" by the interpreter, and then the effacement of "sexual harassment" from the face of the record altogether by way of its transcription as "successfully arrested." All that remains now are a few "indecent propositions". The presiding board member is not blameless in this however. Whatever violences may already have been done in the process of interpretation, the presiding board member actively cements them, embedding them once and for all in the institution's understanding of Ms. Jesurasa's story. Her doing so was by no means inevitable.

First, the interpreter did at least speak the words "sexual harassment" at the hearing, even if they were mis-transcribed later on in the course of Ms. Jesurasa's application for judicial review. Second, even if much of the original meaning of Ms. Jesurasa's claims here was literally lost in translation at the hearing, making "indecent propositions" a reasonable enough approximation for "sexual harassment" a-contextually, it requires very little imagination to see what "come with me and I will marry you" might have meant to a young female orphan at a time of civil war. This is so regardless of whether one knows in hindsight that in Tamil "sex" and "marriage" are intimately related linguistically so that "wife" for the purposes of our interpretation of *katpazhikka* may as well read "woman", and "marriage" might as well read "sex". Even in English the implication is clear enough. The fact that the

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[131] *Supra* note 109.

[132] *Supra* note 111.

[133] *Supra* note 110.

board member's quotation of the soldiers' words persists without any further explanation, thus, is very significant. Again, a radical decontextualisation serves to diminish almost to nothing the violence of these words as they would actually have been experienced. Indeed, such was the board member's incomprehension here that she was led to ask the following at the hearing:

> PM to Interpreter
>
> Q They asked me to marry them? The army asked you to marry the army? Who asked you to marry someone?
>
> *[Interpretation into Tamil]*
>
> Ms. Jesurasa
>
> *[In Tamil]*
>
> Interpreter for Ms. Jesurasa
>
> A Yes[134]
>
> PM to Interpreter
>
> Q Madame, did the whole army asked [sic] you to marry? Who asked you to marry them?
>
> *[Interpretation into Tamil]*
>
> Ms. Jesurasa

[134] In fact, at this point Ms. Jesurasa continues to speak in Tamil a phrase which is never interpreted. She repeats again *katpazhikka* which we have already noted in chapter 4 is, for her, intimately bound up with these "requests" of marriage, but which fact the presiding board member clearly does not pick up on.

[In Tamil]

Interpreter for Ms. Jesurasa

A Not everybody. Sometimes when one or two comes and they used to threaten me like that.[135]

What the presiding board member demonstrates here is a complete misunderstanding of what, beyond their more 'everyday' meaning in English, these words might actually have meant to Ms. Jesurasa in their original context. These were not proposals, they were threats. The presiding board member's inability or unwillingess to comprehend this fact demonstrates a lack of empathy which is not uncommon in the IRB. Rousseau *et al* attribute it in part to what they call the "vicarious traumatization" of Board Members. "Overexposure to these types of accounts", they write, "often triggers defensive reactions that lead to trivialization of horror, cynicism and lack of empathy."[136] Whether or not we credit all this to psychological causes, what we can clearly observe here is an unwillingness by the presiding board member to place herself in the claimant's shoes that was critical in enabling her to reach the conclusion she eventually did.

The "analysis" continues as follows:

> Concerning her problems with the Tigers, the claimant stated that they *asked* her several times to help them and to join the movement. They approached her for the first time in 1995 and they kept doing so until she moved to Gurunagar, in January 2003. She was not able to tell how many times the Tigers asked her to join their army when

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[135] The transcription here is my own.

[136] Rousseau *et al.*, *supra* note 37 at 49.

> she was still living at home. *Asked* what happened when she refused, she stated that when she said 'no, no', they would go away, but they would come back and *ask* her again.
>
> After the claimant moved to live with her aunt in Gurunagar, the Tigers spotted her as a newcomer, and from April 2003 on, tried to recruit her again. She would be *asked* by the tigers to join them whenever she went out. That lasted until November 2003, when she left for Colombo. The claimant was *asked* what happened when she refused. She said that they forced her. *Asked* to explain, she stated that they would threaten to come and get her. However, they never took her away by force or tried to do so. Her aunt would tell them to leave her alone, and they would go away.[137]

Once again the juxtaposition of these two valences of the word "ask" – founded, we know by this point on "the claimant's" own "allegations", as if that justified it – is very significant. "The claimant stated that they asked her several times to help them and to join the movement" / "Asked what happened when she refused". "She would be asked by the tigers to join them whenever she went out" / Asked to explain, she stated". In each case the latter regulates the former, undermining the force of it, stabilizing it as a mere request and revealing what the presiding board member actually understands by the word. Even despite the presiding board member's admission that Ms. Jesurasa "said that they forced her" and notwithstanding the blatant contradiction of this claim just two sentences later – "however, they never took her away by force or tried to do so" – these encounters; once again with men; once again soldiers; presumably with guns; are all cast as essentially innocent, polite requests and nothing more. When Ms. Jesurasa spoke about these encounters at the hearing, she was not quite so forgiving:

> PM to Interpreter

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[137] Emphasis added.

Q Okay. And did you agree to join them?

[Interpretation into Tamil]

Ms. Jesurasa

[In Tamil]

Interpreter for Ms. Jesurasa

A No, no.

PM to Interpreter

Q And what happened when you refused?

[Interpretation into Tamil]

Ms. Jesurasa

[In Tamil]

Interpreter for Ms. Jesurasa

A They forced me and they said: "No, we are going to take you."

PM to Interpreter

Q What do you mean by they forced you?

[Interpretation into Tamil]

Ms. Jesurasa

[In Tamil]

Interpreter for Ms. Jesurasa

A "If you don't come, we will take you or we will bring trucks and take you." And they threatened me like that.[138]

And yet in the first instance decision these "requests", which are by now beginning to sound a lot more like demands backed up by serious threats, are diminished to the point at which Ms. Jesurasa's aunt could simply "tell [the Tigers] to leave her alone, and they would go away". As if that were all there were to it. As if she were politely asking a door-to-door salesperson to leave.

"Analysis" Part 2: Execution

Although the presiding board member does not divide the "analysis" into two parts, the second half is noticeably different to the first. This is where all the narrative work done thus far is cemented into conclusions. But it is not by way of "legal reasoning" as one might expect. The following paragraph represents the only occasion on which the language of either of the two grounds of the *IRPA* upon which Ms. Jesurasa was forced to claim appears in the body of the decision. The presiding board member writes:

> Based on the claimant's testimony, I cannot conclude that she was ever *personally* targeted and *persecuted* by the army in the past. Even if I believed that the soldiers harassed her at times with indecent propositions, she was never *persecuted* or even mistreated

[138] Transcription my own.

> by them. No evidence was produced to tribunal that today, when the situation in the north and in the entire country has seriously improved, after a ceasefire was signed between the government and the LTTE in 2002, there is a serious possibility that the claimant would be recruited or otherwise *persecuted* by the army. The same goes for the LTTE.[139]

The three appearances of the word "persecution" we recognize from section 96's "*Convention* definition". Similarly, the suggestion that Ms. Jesurasa had never been "*personally* targeted" seems to be a reference to section 97's additional ground whereby a "person in need of protection" is anyone "whose removal to their country of residence would subject them *personally*" to a danger believed on substantial grounds to exist to their life, of torture or of cruel and unusual punishment. But why specifically the presiding board member thinks Ms. Jesurasa's "harassments" fell short in either case is never explained, leaving us instead to speculate.

As far as the section 96 claim is concerned, her status under each of the five enumerated "categories of protection" does not appear to be in dispute. Rather, the inference seems to be that, Young Orphan Female (particular social group) Sri-Lankan (nationality) Tamil (race) Christian (religion) though she may be (political opinion, as her lawyer put it at the hearing, being accordingly "imputed"), she simply had not been "persecuted" by anyone. Moreover, with no good reason to think that her situation in Sri Lanka would be any different now, neither could she establish the future element required by the definition: she did not have a "well-founded *fear* of persecution". Though none of this, of course, is stated in so many words. We know only two things. First, that "recruitment" probably would have been sufficient to constitute "persecution", although no jurisprudence to this effect is offered to reinforce the claim. Second, that not having been recruited what Ms. Jesurasa did in fact suffer fell well short of the requisite standard. "*Even if* [the presiding board member] believed that the soldiers harassed her at times with indecent propositions",

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[139] Emphasis added.

which is to say that even that much is open to question, "she was never persecuted *or even mistreated* by them."[140] The sort of harassment that she is understood to have been subjected to, then, (if she was subjected to any at all, that is) was so far away from "persecution" that it did not even constitute "mistreatment". Again, we can only speculate as to what *would* have been sufficient. Perhaps "*sexual* harassment" would have been enough. Even despite the reference to "indecent propositions" here, the refusal to call Ms. Jesurasa's harassment "sexual" is significant from a semantic perspective. The two words are a pair so often in English that here we read the latter's very absence. More likely the "mistreatment" would have had to have been physical: a beating or actual rather than merely threatened rape. Later, in her discussion of the aftermath of 2004's tsunami, the presiding board member writes,

> Some women were raped or otherwise exploited in the refugee camps in these tragic circumstances. However, the claimant has her brother still in Sri Lanka. She lived alone with him for at least two years with no major problems to her life and her security. No evidence was produced that it would be different now, if she went back to her country.

Rape, then, *would* have constituted a "major problem", worthy of the title "persecution". But the likelihood of this actually occurring were Ms. Jesurasa returned home is confined to rarefied refugee camps. And with her claims that she had been threatened with rape – *kedukka, katpazhikka* – even in her own village diminished already to mere "harassments" and "indecent propositions", the presiding member's logic is disturbingly inexorable.

As far as the section 97 claim is concerned, we have even less to go on. Perhaps the danger Ms. Jesurasa faced was not sufficiently "personal". Or sufficiently "substantial". Or perhaps the danger was not considered be to her life, of torture or of

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[140] Emphasis added.

cruel and unusual punishment? We simply do not know. The coupling of "persecution" with "*personally* targeted", moreover, in the word's first instantiation is more problematic still. Sections 96 and 97 are separate grounds for protection. A person can only claim "persecution" under the "*Convention* definition" as part of an identified collective, that is to say on the grounds of one of the five enumerated "categories of protection". But you wouldn't know it on the basis of this judgment. The two grounds seem to be treated together and we simply cannot tell whether this is a hugely significant misreading of the law, an innocent semantic error or whether the section 97 claim was ever genuinely considered at all.

The presiding board member concludes the first instance decision as she began it, with explicit reference to the law on which she has been more or less completely silent throughout. She writes:

> Decision
>
> *Considering all the above*, I conclude that the claimant has not established a well-founded fear of persecution in Sri Lanka and therefore, she is not a 'Convention refugee', as per Section 96 of the IRPA. No credible evidence was submitted to the tribunal which would allow me to conclude, for the reasons alleged in her written and oral testimony or for any other reason, the claimant is a 'person in need of protection', as defined in Section 97(1) of the said Act.
>
> Conclusion
>
> The claim for refugee protection is rejected.[141]

The rhetorical effect of these concluding words is undoubtedly significant. Like the quotation of sections 96 and 97 up front, it both masks and compensates for the lack

[141] Emphasis added.

of legal analysis in the body of the text. When we come to consider Ms. Jesurasa's application for judicial review in chapter 7, we will see that the first instance decision will be difficult to critique precisely because its reasoning so scant. The presiding board member's "analysis" will become "fact" for the purposes of review, a subtle but crucially important slippage. And with the standard of review for "error of fact" set higher than that for "error of law", the significance of making the "facts" do all the work here will become particularly clear. By transforming "analysis" into "fact", what the institution has effectively done is to protect itself against future criticism or reversal.

Before we come to that, however, let us first consider how it could so very easily have been otherwise, by contrasting the depiction of Ms. Jesurasa's 'problems' here with that in the psychological evaluation report. What we will see is that, the product of an institution with an entirely different hermeneutic, it not only more sympathetic, but a tangibly *different* account.

6. The Psychological Evaluation Report: *Hermeneutics*

The psychological evaluation report was completed on February 28th 2005, almost exactly one month before the date of Ms. Jesurasa's hearing. At seventeen hundred words it is of virtually identical length to the first instance decision, if you don't count the quotation of sections 96 and 97 of the *IRPA* at the beginning of that document. Like the first instance decision too it was the product of an *in camera* interview, and the same interpreter mediated in both cases. But that is where the similarities end. Though both documents offer an account of essentially the same story, though they share a common subject – Ms. Jesurasa, her life in Sri Lanka, and how she might fare if she were returned – in virtually every other respect they are as different as can be. The one written by a lawyer, the other by a doctor of psychology, they are obviously the product of different institutions, with very different *hermeneutics*: that is to say, with very different ways of seeing and understanding the world.

Peter Showler writes that "every hearing is a human drama."[142] The IRB, however, is not interested in the hearing's more "dramatic" elements. It prefers to treat refugee claimants as texts, exhibiting a faith in the metaphysical sanctity of the word that borders on the fetishistic. Intonation, gesture, emotional state and other more immediate, aesthetic, non-verbal means of communication are simply not relevant. And the result of this is not greater 'objectivity' as one might be tempted to suppose. On the contrary, the decision to exclude an entire order of communication is precisely *subjective*, that is to say selective, incomplete. Michael Jackson identifies a "logocentric bias" in much thinking since the Enlightenment: "the denial of the somatic, a turning of blind eyes on the physical aspects of Being,"[143] undue weight given to the 'word' or *logos*. In a very similar vein, Douglas argues that "speech has been over-emphasised as the privileged means of human communication, and the

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[142] Showler, *supra* note 34 at 210.

[143] Michael Jackson, "Knowledge of the Body", (1983) 18 *Man* 327, at 328.

body neglected."[144] That is exactly the claim being made about the IRB here. Its hermeneutic is unmistakably *logocentric*.

This chapter begins by reading the psychological evaluation report in counterpoint to the first instance decision. It argues first that the version of Ms. Jesurasa's story it offers is not only more sympathetic in orientation or disposition, but it charts a different territory, it has a different scope altogether. It is concerned with parts of the story that the legal institution entirely ignored, providing the context necessary to render Ms. Jesurasa's story plausible and her claim for refugee protection persuasive. Nevertheless, as we shall see, the report's tangible impact on the determination of Ms. Jesurasa's claim was practically nil. The second part of the chapter submits that not only was the psychological evaluation report virtually ignored altogether at first instance, but it had been always already marginalized by the IRB to begin with.

Hearing vs. Observation

Where the psychological evaluation report refers to itself as the product of "over three hours of [semi-structured] clinical interviewing and observation" conducted on February 19th 2005, the first instance decision was the product of a "hearing". The difference is not slight. At a "hearing" the field of study is limited to 'testimony' – "the claimant *testified* that when she lived with her sister and brother" – and 'oral' and 'aural' evidence – "*asked* to *explain*, she *stated*". That is to say, it is primarily concerned with words. And as we saw in chapter 4, this particular "hearing" was concerned with words only inasmuch as they could be transformed into text: the tape-recordings are not part of the official record. During "interviewing and observation", by contrast, the field is set far wider. An entire additional sense is being employed: sight as well as sound. The concern is not only with words but behaviour too, *body*

[144] Mary Douglas, *Implicit Meanings: Essays in Anthropology* (London: Routledge & Keagan Paul, 1978) at 85.

language as well as spoken. The result of…is a totally different account of Ms. Jesurasa's story.[145] The psychological evaluation report begins as follows:

> Ms. Jesurasa communicates the following information:
>
> She is a soft spoken, young woman of small build whose body posture and dependent attitude make her appear quite shy, nervous and somewhat younger than her age. She seems to communicate best when she relaxes somewhat but has trouble relaxing in general. Even though she is very distraught during the interview, she cooperates well and answers questions to the best of her ability. Sometimes she doesn't answer questions directly, usually because of misinterpretation of the question. Her distress is expressed through the lowering of her voice, avoidance of eye contact, constant twisting of hands, some rigidity in body posture and overflowing tears shed in silence.

The tone for the entire document has already been set by the end of the first line. First, in contrast to the anaesthetic rhetoric of the first instance decision, Ms. Jesurasa is referred to by name rather than generically as "the claimant". Second, the word "communicate" is obviously not limited to verbal data. One "communicates" with one's entire body. Ms. Jesurasa communicates best when she relaxes somewhat, though she has trouble relaxing in general. She is cooperative, though the interpreter sometimes scuppers even her best efforts at answering questions. Unlike in the first instance decision, then, the interpreter is directly acknowledged, and with a healthy dose of skepticism at that. Elsewhere the doctor writes "the assessment took place *with the help of* …an interpreter from Tamil to English and vice versa." Not a *mirror* then, even less a *conduit*; simply helpful. This passage evidences an institution with palpably less interest, let alone faith than the IRB in the word. One does not need to know *what* a person is saying, for instance, to understand that they are "soft spoken",

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[145] *Ibid.*

"dependent", "shy", "nervous", "very distraught". No interpreter is necessary to observe "overflowing tears shed in silence", though a doctor of psychology might be useful when attempting to understand their significance. Especially considering that what we say with our bodies does not always coincide with how we express ourselves in language. As Jackson puts it, "it is…often the case that gestures and bodily habits belie what we put into words, and give away our unconscious dispositions, betraying character traits of which our verbal and conceptual habits keep us in ignorance."[146]

This difference in hermeneutic does not simply manifest itself in an account of Ms. Jesurasa's mood or physical attributes however. Concerned with Ms. Jesurasa herself rather than the correlation between her words and a generic and no doubt idealized refugee claimant, the doctor presents a dramatically different version of her story, both in terms of the kinds of 'fact' presented and the way in which the resulting story is told.

In general, the narrative is considerably more empathetic. Thus, where Ms. Jesurasa merely "alleged" that her parents "were killed" in the first instance decision, where "her mother died in 1987 and her and her father in 1988", in the psychological evaluation report, "a couple of months before her sixth birthday, her mother was killed in a shelling attack. Within 6 months of this event, her father was shot dead. Ms. Jesurasa witnessed both killings." Where the first instance decision leaves us to work backwards to Ms. Jesurasa's age at the time of her parents' decidedly non-violent deaths, here that violence is made manifest. Not a couple of months before she *turned* six, nor *when* she was five, then, but "a couple of months before her sixth *birthday*". A birthday is an occasion. For a six year old especially it ought to be an exciting, even a joyful one. What it absolutely oughtn't be is the axis on either side of which you witness your parents' murders. But neither the fact that there were actually agents actually behind the death of her parent nor the possibility that being witness to this horrendous ordeal might properly affect her claim for refugee protection is

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[146] *Supra* note 143.

considered in the first instance decision. If the concern was that this particular factual nugget had not been yielded in the course of a properly legal hearing, then the presiding board member could easily have asked Ms. Jesurasa about the circumstances surrounding her parents' deaths at the hearing if she had felt so inclined. That she chose not to, even though the opportunity to do so arose on a number of occasions, reveals that she simply did not regard it as relevant information. As she herself put it, "it is very sad that the claimant lost her parents early in her life…However, based on the claimant's testimony, I cannot conclude that she was ever personally targeted and persecuted by the army in the past." The "loss" of her parents, thus, this deeply traumatic event, is constructed as nothing more than unfortunate historical fact: at best irrelevant, at worst reason to doubt the credibility of Ms. Jesurasa's account altogether on the grounds that this might have been what she was *really* running from: the subsequent "threats" and the severity of the "harassment" she "alleged" to have suffered having been blown out of all proportion because of earlier misfortunes. Elsewhere in the first instance decision the presiding board member writes, "she was at times emotional, mostly when she spoke about her parents and her handicapped brother, left in Sri Lanka." Ms. Jesurasa's emotional state, thus, is attributed not to the "persecution" she alleged to have suffered but to remorse first with respect to her parents and second with respect to her brother, whom she "left in Sri Lanka". Her emotions, thus, are constructed as primarily the product of guilt: for outliving her parents and for leaving what little remained of her family behind. But this is by no means an obvious inference, even less a necessary one. And it is certainly not one made on the strength of the psychological evidence. The report continues:

> Ms. Jesurasa names her parents' deaths as the most traumatic events but memories and thoughts about the threats to her integrity are more frequent, intrusive and what she presently fears the most. She is very much afraid of being harassed or harmed by men in general. Other than family members, she would rather avoid men altogether especially those of large stature. Even during family gatherings she prefers to play with the children than to mingle with the

> adults…She experiences herself more as a child than as a grown woman. This may also be her means of avoiding mature heterosexual relationships which are feared.

There are two things worth noting here. First, the interpretation of Ms. Jesurasa's emotional state is totally contrary to that of the presiding board member. "Memories and thoughts about the threats to her integrity", *kedukka* and *katpazhikka*, "are more frequent, intrusive and what she presently fears the most." As far as the doctor is concerned, it is *not* primarily remorse which motivates Ms. Jesurasa's claim but the "threats to her integrity", the symptoms of which were apparently severe. Second it was the exclusion of precisely this sort of contextual data that enabled the presiding board member consistently to downplay and render implausible her claims in the first instance decision. The following is a restructuring of some of Ms. Jesurasa's crucial testimony at the hearing into continuous prose. It is worth considering again, I think, in the light of the psychological evaluation report. She says:

> when I was alone at home and they check every house and they come to our house and they say: '*you come with us and I will marry you'*…likewise, it has happened to some of my friends and they used to take them they sexually harassed [read "raped"] them…they asked me several times to help them, to join the movement…they forced me and they said: *'no, we are going to take you*'*… 'if you don't come, we will take you or we will bring trucks and take you'*...they are also recruiting people and they are also take young girls and they molest them…I was scared that they will threaten me and they will take me…they who shot my father, they who shot my mother…I am scared that they are going to shoot me.

Knowing now that a professional psychologist, a "specialist in psychological expertise reports" as the blurb at the end of the report puts it, has described Ms. Jesurasa as "very much afraid of being harassed or harmed by men in general", that "she would rather avoid men altogether, especially those of large stature", that,

approaching her twenty-fourth birthday, she still "experiences herself more as a child than as a grown woman", that she is actively *afraid* of having a sexual relationship with a man, the claims in this passage are rendered all the more awful and compelling. They take on the distinct ring of credibility. The last two sentences are particularly chilling. "They who shot my father, they who shot my mother…I am scared that they are going to shoot me." Far from working against Ms. Jesurasa, this testimony now seems to reinforce her claim. What it signifies is that the "harassments" and "threats" that had already resulted in the molestation and rape of some of her friends, Ms. Jesurasa would have particular reason to regard as deadly serious. And the presiding board member's statement that "*even if [she] believed* that the soldiers harassed her at times with indecent propositions, she was never persecuted *or even mistreated* by them" now appears all the more radically misconceived.

Marginalizing Alternative Hermeneutics

Not only is the IRB, in its *logocentrism*, insufficiently competent at interpreting psychological data, it is also not prepared to take the claims of an institution with a better adapted hermeneutic seriously. The following is the only reference to the report in the whole first instance decision. It comes right at the start of the "analysis" section:

> I also took into consideration the claimant's psychological evaluation. The claimant's testimony was rather direct and forthcoming. She answered most of the questions which were asked. Although she seems to be a reserved, shy young woman, as often are young women from her culture, she is intelligent and clearly understood questions which were asked and the purpose of these questions.

In a very similar move to the one we observed in chapter 5 with respect to sections 96 and 97 of the *IRPA*, the report – despite the name-check – is not explicitly engaged with at all. Worse than that, it seems to have been ignored altogether. Either ignored or overruled. The paltry attempt at psychologising on the presiding board member's own behalf runs in flat contradiction to the expert opinion. Whether or not "young women" from Ms. Jesurasa's culture are "often" "shy", "reserved" or anything else[147] (a claim which, incidentally, no evidence whatsoever is provided for), the psychological evaluation report explains that *this* particular young woman is suffering from "frequent and disturbing posttraumatic symptoms", "depression" and "suicidal ideation". She "appears to be genuinely in need of reassurance and support", not to have the trauma of her experiences in Sri Lanka explained away by an impoverished supposed cultural knowledge.

The marginalization of this sort of expert evidence is a perennial problem in refugee determination. In Rousseau *et al*'s study from 2002 one board member suggested that he always took expert psychological reports "with a grain of salt."[148] In another case it was found that "neither the Board Members nor the Refugee Claim Officer took the expert status of the psychologist concerned seriously and they declared that the report and the testimony were not credible overall, without any further explanation."[149] In response, the following solution is offered: "the training of all actors must be improved. A continuing and well-designed training programme oriented towards cultural and psychological sensitivity…should be offered to all actors."[150] No doubt such a programme would improve matters somewhat. Nevertheless, this analysis proceeds from a mistaken assumption: that the problem here is a mere lack of

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[147] And even if they are that surely speaks to the extent of female oppression in Sri Lanka before it does to the legitimacy of it.

[148] Rousseau *et al*., *supra* note 37 at 55.

[149] *Ibid.*

[150] *Ibid.* at 67.

sensitivity. It is not. Even if the presiding board member had been slightly better trained as a psychologist herself, it would not change the fact that the real expert evidence – the report produced by a professional, expert, specialist doctor of psychology – had already been marginalized by the processes and priorities of the institution to begin with.

First, reports such as the one we have been looking at here are not made as a matter of course, even in serious cases. Ms. Jesurasa was lucky that her lawyer, "following observations of intense distress and a slow response rate during the hearing preparation", saw fit to have her examined by a doctor at all. Second and more importantly, his reasons for doing so were that the report might "shed light on Ms. Jesurasa's present state of mental health and *ability to testify*." Its function was only ever intended to indicate her *future* ability to testify, the reliability of her *testimony* at the hearing. The institution never actually understood the psychological evaluation report as being capable of producing anything of *substantive* interest. Its relevance seems to have been understood as limited to claims of this sort:

> A semi-structured, non-confrontational style is likely to facilitate Ms. Jesurasa's testimony but I believe that inconsistencies may be inevitable. Her testimony may become somewhat confusing and she may have trouble remaining focused on the issues at hand.

The report is relevant in so far as it excuses a testimonial error here and there, then, but as far as the IRB's utterly partial, *logocentric* hermeneutic is concerned, that is left completely unmodified. Perhaps, though, we should not find this all that surprising. What is at stake here is more than simply the devil in the details. What the psychological evaluation report evidences is not merely a slightly different spin to the IRB on the "facts" of Ms. Jesurasa's case but, far more dramatically, a clash of institutions. This report, then, is very symbolic in the context of this thesis. By

showing what happens when two institutions are pitted against each other, it demonstrates just how significant the way in which an institution 'thinks' really is.[151]

[151] See Douglas, "How Institutions Think", *supra* note 9.

7. Memorandums of Argument: *The Adversarial Process*

As soon as the presiding board member rendered her decision at first instance Ms. Jesurasa set about challenging it. Her lawyer submitted a request for an initial grant of leave to apply for judicial review to the Federal Court on May 13th 2005 and the first of three so-called "memorandums of argument" a little under a month later on June 8th. The "Applicant's Memorandum" was followed on June 11th by a rebuttal from the "Respondent", a representative of the Deputy Attorney General of Canada acting for the Minister of Citizenship and Immigration, and after both these documents had been submitted leave was finally granted by a judge of the Federal Court on November 23rd.[152] A number of further rulings were made at this point. A judicial review hearing was scheduled for February 21st 2006 "for a duration not exceeding two hours", the transcription of the initial hearing we looked at in chapter 4 was ordered, and both parties were given a date by which any further memorandums should be submitted. Only the Respondent took advantage of this opportunity, however, and the "Supplementary Respondent's Memorandum" was filed on February 6th 2006.

Expounding the virtues of the adversarial process in 1822, Lord Eldon wrote that "truth is best discovered by powerful statements on both sides of the question."[153] Many outside of the common law tradition however would not agree. Rather than seeing truth as lying somewhere between two argumentative poles, the "inquisitorial" model employed predominantly in civilian legal systems, for instance, regards it as the horizon point at the end of a necessarily finite line of investigation. The same is true in principle of scientific inquiry.[154] This chapter addresses the specifically

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[152] Ms. Jesurasa was lucky to have got this far. On the basis of what Showler describes as an "unavoidably cursory review of the application by the court", about ninety percent of applications are denied even at this early stage. And given that the court does not give reasons for its refusals in such circumstances, if she had not been successful here it would have been impossible for us or anyone else to determine why. Showler *supra* note 34 at 227.

[153] *Ex parte Lloyd* (1822) Mont 70, 72n.

[154] Bruno Latour, *Scientific Objects and Legal Objectivity (a chapter from* La Fabrique du droit) in Alain Pottage and Martha Mundy, ed., *Law, Anthropology and the Constitution of the Social: Making Persons and Things*, trans. by Alain Pottage (Cambridge: Cambridge University Press) 73.

adversarial nature of these three memorandums. It considers the impact of the IRB's particular process of truth finding on the type of argument made and, correspondingly, on the version of legal 'truth' that results. The argument is two-fold. First, that although the effectiveness of the adversarial process relies absolutely on formal equality between the competing parties in theory, when it comes to refugee determination, that equality will rarely if ever be achieved in practice, with results invariably to the detriment of the person seeking protection. Virtually by definition they refugee claimants will be less able to retain competent counsel than the Minister for Citizenship and Immigration. Second, that if anything the adversarial process is designed to compound such formal inequality. Bruno Latour writes, "imagine how horrified a scientist would be if he were asked to address only to those questions asked of him by others rather than the hundreds he has asked of himself."[155] The IRB is not similarly concerned. The Respondent, in order to 'win' his case, need only respond to the arguments put. If they are not persuasive, then from his perspective so much the better. The fact that at law he is not supposed to act "simply as an agent of his or her client but also as an officer of the court,"[156] means exceptionally little in practice. The adversarial process actively diverts the contesting parties' attentions *away* from the substantive merits of the case. Instead it encourages them to attempt to establish their very particular and utterly motivated version of the 'truth' as superior by virtually any means necessary: from the discursive to the rhetorical and even occasionally the downright underhand.

Inequality of Resources, Impoverishment of Argument

I met with Ms. Jesurasa's lawyer several times during the course of my research for this thesis. His office is on the top floor of a grey and slightly battered looking building in an industrial complex just north-east of the centre of Montréal. It was

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[155] *Ibid.* at 79.

[156] Stephen Bottomley and Simon Bronitt, *Law in Context* 3rd ed., (Sydney: The Federation Press, 2006) at 120. Referencing ALRC Report No 89, 2000, para 3.41.

immediately clear that this was a man both overworked and under-resourced. There were always clients waiting in the lobby and the office itself was, to put it kindly, cosily disheveled. The furniture was made of MDF, not oak, and familiar looking files spilled from every shelf and seethed from cabinets, each one representing another life in the balance, another story told and swiftly forgotten. It is neither controversial nor particularly surprising that refugee lawyers are grossly under-funded,[157] but the implications of this fact for the refugees who require their services are severe. In Ms. Jesurasa's case, the "Applicant's Memorandum" makes for difficult reading.

The main thrust of the argument, identified up front under the heading "points in issue", is purportedly twofold. First, that the Board "erred in stating that a substantial, effective and durable change of circumstances had occurred in Bangladesh (sic) rendering the applicant's fear of persecution inexistent." Second, that the Board "erred when it believed that a viable Internal Flight Alternative existed for the applicant in Sri Lanka." Before we come to the substance of these arguments, the first thing to note is the glaring typo in the first point. Ms. Jesurasa was not of course from Bangladesh, she was from Sri Lanka, as indeed the subsequent sentence makes clear. Were this an isolated error it would not be worth mentioning. In fact, it was merely the first of many made by Ms. Jesurasa's lawyer. In one particularly disquieting paragraph towards the end of the memorandum the following appears:

> It is submitted that the foregoing evidence clearly demonstrates that the applicants [sic] have met the test set out in *Adjei* and have clearly established they [sic] have 'good grounds for fearing persecution'.
>
> It is submitted that the claimants [sic] have a genuine fear of returning to there [sic] [sic] country and that there [sic] [sic] fear is reasonable.

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[157] Showler, *supra* note 34 at 232.

The precise significance of these clerical errors is of course difficult to quantify, but I think it is safe to say at least two things. First, both examples suggest a lawyer with other things on his mind, other clients in the lobby, other files on the go. The pluralisation in the two paragraphs quoted above is particularly revealing. The mistake here is more than merely typographical. The entire grammar is plural: nouns – "the applicants" – pronouns – "they" – adjectives – "there [their]" – and verbs – "the claimants *have*"; a sort of textual instantiation of the Freudian slip. Second, whatever the precise measure of their impact in practice, these errors can hardly have done Ms. Jesurasa any favours. Particularly not in this adversarial setting.

The Respondent points out the mistaken reference to Bangladesh in both of his memorandums; several times. In his own statement of the points in issue, he repeats the original mistake in full: "Firstly, the Applicant argues that the Board erred in stating that a substantial, effective and durable change of circumstances had occurred in Bangladesh." Under the heading "Argument", the title is "Changes of circumstances in Bangladesh". It is not until the mistake has repeated a number of times for effect that the error, of which the reader is by this point unquestionably aware, is explicitly mentioned: "First of all the Respondent wishes to state the country in this instance is Sri Lanka and not Bangladesh which is a clerical error on the part of the Applicant." There is no substantive value to any of this of course. The effect is purely rhetorical and the intention can only have been cynical. The Respondent's implication is clear: that the untidiness of mind exhibited by Ms. Jesurasa's lawyer here is not limited to clerical errors, the entire memorandum is poorly composed.

Now unfortunately for Ms. Jesurasa, as we shall see in a moment, that is probably true, but that does not change the fact that there is something distinctly unsavory about an argumentative technique with zero substantive merit and which under an "inquisitorial" system, moreover, would not have been worth bothering with. The institution is at least as much to blame here as the Respondent. The adversarial process it has put in place impliedly encourages exactly this sort of behaviour.

The second thing to note about the "points in issue" identified by Ms. Jesurasa's lawyer, then, is that they are substantively weak. It is far from obvious that the presiding board member claimed either of things she is said to have. While her first instance decision was hardly the model of precise legal argumentation as we saw in chapter 5, the two points raised here nevertheless seem to miss the mark by some considerable distance. Both proceed from the mistaken assumption that the presiding board member at least understood Ms. Jesurasa to have had a reasonable fear of persecution at some time in her past. In the first case, so the argument goes, her "fear of persecution" had *in fact* been "rendered inexistent" by an "effective and durable change of circumstances" brought about since 2002's ceasefire. And in the second case, it *could be*: the presiding board member is understood to have argued that Ms. Jesurasa, if she were returned to Sri Lanka, could avoid the sort of persecution she would have had good reason to fear if she returned to her former village were she to move in with her brother who had gone to stay with a relative in Mullaitivu after the Tsunami in 2004. But the presiding board member argued neither of these things, quite the contrary. In her own words, "even if I believed that the soldiers harassed her at times with indecent propositions, she was never persecuted or even mistreated by them." Having suffered "no major problems to her life and her security" to begin with, there was no good reason to think that it would be any different for Ms. Jesurasa now. Not *because* things had changed, but regardless of whether or not they had. Her fear of persecution had never been reasonable in the first place. Whether there had since been an effective and durable change of circumstances on the one hand, therefore, or whether there existed a viable internal flight alternative on the other, was decidedly beside the point.

Whose truth?

The central argument raised in the "Applicant's Memorandum" could and possibly even *should* have been with respect to the presiding board member's construction of

Ms. Jesurasa's "problems" as essentially minor in character, as we saw in chapter 5. The psychological evaluation report could have been employed to provide extensive and, moreover, expert evidence that Ms. Jesurasa's "problems" were in fact very serious indeed. When this did not happen, Ms. Jesurasa's fate was more or less sealed. With the two so-called "points in issue" non-starters right from the off, the Respondent was under no obligation to correct his opponent's mistake. Quite the opposite. The one occasion on which Ms. Jesurasa's lawyer does mount an argument of the sort I am suggesting might have been more effective in the circumstances, the Respondent gives it remarkably short shrift. And again, his tactics are worryingly cynical.

Submerged under the head of the first so-called "point in issue" Ms. Jesurasa's lawyer writes, "It is submitted that the Board completely erred in its analysis of the applicant's fear from (sic) both the LTTE and the army":

> the Board erred in fact when it stated: "…based on the claimant's testimony, I cannot conclude that she was ever personally targeted and persecuted by the army in the past." This is simply not true. The claimant's testimony is supported by her PIF which clearly states that: "In April 1996 my Vadamaradchy area was invaded by the army…They used to come to our house during their search operations and round ups and questioned, **humiliated and slapped us**".[158]

The argument here is left severely underdeveloped. No reference is made either to Ms. Jesurasa's extensive testimony at the hearing or to the numerous statements in her favour in the psychological evaluation report. The quotation from the PIF, moreover, is problematic, impliedly limiting the scope of the critique of the Board to this particular piece of evidence when so much else could have been drawn upon. On Ms. Jesurasa's fears of "molestation", "(sexual) harassment" (and rape) like her

[158] Original emphasis.

friends, for instance, this passage is silent. Not only is the argument here impoverished, however, the adversarial process entails not only that nothing *need* ever be done to correct it, and effective representation on the other side requires that in practice such correction should be actively avoided.

Together the Respondent's two memorandums comprise some six and a half thousand words. The space given to this crucial argument accounts for a mere six percent of them, a paltry four hundred and twenty eight words in total. In the "Supplementary Respondent's Memorandum", the rebuttal commences as follows:

> In her PIF, the Applicant vaguely stated that, in 1996, the army:
>
> > '…used to come to our house during their search operations and round ups and questioned, humiliated and slapped us by falsely relating them [sic] with the LTTE.'
>
> However, a simple reading of the Minutes of the Hearing shows that during her testimony, the Applicant did not mentioned [sic] that she was slapped. On the contrary, the Applicant testified that nothing ever happened personally even when she was a 'young girl': she was simply harassed, but was never beaten nor taken by the army nor the LTTE and she led a fairly normal life and could pursue her studies 'achieving a quite high level of education for a young woman from a village.'

There are two points here. First, Ms. Jesurasa did not "vaguely" state anything. If the Respondent is referring to the clunky language employed, then that is at least arguably, perhaps even likely the fault of the interpreter provided by the institution and not Ms. Jesurasa. If he is referring to the content of the statement, the claim that it is "vague" once again gives no consideration to the context in which it was made. Given that this was a preliminary statement made literally within days of arriving in Canada, through an interpreter and, no doubt, in unfamiliar and not a little

intimidating circumstances, it is difficult to see what more can fairly have been expected. The whole point of the PIF, after all, is that it will be followed up by a more comprehensive hearing. Second and far more importantly, the insinuated inconsistency with Ms. Jesurasa's testimony at the hearing turns out on closer inspection to be nothing of the sort. The Respondent fuses Ms. Jesurasa's actual testimony with reporting by the presiding board member from the first instance decision, statements made in different contexts and with very different purposes, to weave a patchwork which we are clearly meant to understand as "facts" but which, in reality, are not.

While it is true, on a "simple reading of the Minutes of the Hearing", as the Respondent rather condescendingly puts it, that Ms. Jesurasa did not mention that she was slapped at any point, the Respondent fails to mention that she was actually never explicitly asked. The claim that "on the contrary, the Applicant testified that *nothing ever happened personally even when she was a 'young girl'*", moreover, stretches any reasonable interpretation of the passage from the hearing to which it refers so far as to be verging on the willfully misleading. Once again, the transcription here is my own:

> <u>Presiding Member to Claimant</u>
>
> Okay. Now, I am going back to your problems.
>
> *[Interpretation in Tamil]*
>
> You told me that between year 2000 and 2002…
>
> *[Interpretation in Tamil]*
>
> or 2003 it was, I don't remember. Let me check it. 2003. About five, six times the army came to your house when you were alone
>
> *[Interpretation in Tamil]*

and they made some propositions to you.

[Interpretation in Tamil]

They asked you to go with them.

[Interpretation in Tamil]

You refused and they left.

[Interpretation in Tamil]

Did you have any other problems with the army?

[Interpretation in Tamil]

Ms. Jesurasa

[In Tamil]

Interpreter (for Ms. Jesurasa)

Likewise, it has happened to some of my friends and they used to take …uhh…and…uhh…they…

Presiding Member to interpreter

I didn't understand what happened to some of my friends?

Counsel to Presiding Member

Likewise *it* happened. Likewise it happened.

Presiding Member to Counsel

Okay.

Interpreter (for Ms. Jesurasa)

And it happened to some of my friends and they took them and umm… they had sexually they harassed them and…uh…that's not happened to me.

Presiding Member to Claimant

Q But you, yourself, besides those five or six visits by the army, did you have any other problems with the army?

[Interpretation in Tamil]

Ms. Jesurasa

[In Tamil]

Interpreter (for Ms. Jesurasa)

A No, nothing has happened as such

First, Ms. Jesurasa's actual testimony that "no, nothing has happened as such" is far more equivocal than her supposed testimony that "nothing ever happened personally even when she was a 'young girl'", even though the Respondent's suggestion that "The Applicant *testified*…" seems to imply that what follows will be in her own words. Second, the meaning of the word "happened" in its original utterance by the interpreter for Ms. Jesurasa is very much open to interpretation. The Respondent, by wrapping it with the words "ever" and "personally" gives it a far more positive content. He implies that Ms. Jesurasa explicitly testified that she never suffered any

form of physical abuse whatsoever. That is a gross misrepresentation. And I do not think it an unreasonable interpretation to say that what Ms. Jesurasa might actually have been trying to say here was nothing more than that no, she had not been raped – *kedukka, katpazhikka* – like her friends. In which case the words "as such" might even imply that the difference was merely technical, that it was perhaps only a matter of time. That the Respondent continues by saying that "she was *simply* harassed", therefore, is troubling. If the word "harassed" when it appears on its own does not already exclude the possibility of a sexual element by mere virtue of the word "sexual" not being there, then the qualifier "simply" absolutely excludes it. "*Simple* harassment" is the direct opposite of "sexual harassment". It is what door-to-door salesman do, not rapists.

Far from correcting the error made by Ms. Jesuarasa's lawyer, then, the Respondent compounds it, as the adversarial process undoubtedly gives him license to. What has happened here is that all the different levels of judgments we have been concerned with in this thesis thus far, products of different voices, different times and different contexts, have become reduced down to a single horizontal legal reality – "facts" – which are then able to be read by the Respondent in such a way as to suggest inconsistencies and illogicality between them. In actuality there is no such inconsistency in Ms. Jesurasa's story. The inconsistencies 'identified' are nothing but the product of the institutional processes we have been observing. Not only that, but because there is no "Supplementary Applicant's Memorandum", the version of events offered in the "Supplementary Respondent's Memorandum" becomes the final word on the matter. As the Respondent puts it in the very next paragraph, "this pure factual finding does not warrant the intervention of this Court." Rendering his decision less than three weeks later, it is hardly surprising that the reviewing judge found himself inclined to agree.

8. Conclusion: *Spirited Away*

So finally we have come full circle to the judicial review decision where we began, the culmination of the IRB's great project of distillation. The *IRPA* requires that reviewing judges "dispose of applications [for judicial review] without delay and in a summary way."[159] The Oxford English Dictionary defines the word "summary" in this adjectival sense as follows:

> 1. Containing or comprising the chief points or the sum and substance of a matter; compendious (now usually with implication of brevity).
>
> 2. *Law.* Applied to proceedings in a court of law carried out rapidly by the omission of certain formalities required by the common law.[160]

At barely over a thousand words, the judicial review decision in Ms. Jesurasa's case is certainly "compendious". And the legal arm of the OED's definition is no less apposite. The "certain formalities" omitted in this case one might reasonably describe as "reasoning", "argument" or "justification". "I agree with the Respondent that this was not a decision on the availability of an Internal Flight Alternative." "The personal situation of the Applicant was not unreasonably assessed." There is no argument here, simply pronouncement. Because what this document is concerned with above all, what the institution has *made* it concerned with, is authority. Power. Law distilled.

This much is evident even before you have read a word. The judicial review decision is authoritative in its very aesthetic: its look and its feel. The paper is thick and

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[159] *IRPA*, *supra* note 25 at s. 74(c).

[160] *Shorter Oxford English Dictionary*, 5th ed., *s.v.* "summary".

watermarked, obviously expensive,[161] and an embossed gold coat of arms marks a very literal stamp of authority at the centre top of the first page, like a crown signifying that the reviewing judge's word here is sovereign. The paltry thousand words of the decision are broken down into short headed sections and sub-sections, the font is large, the spacing double, and each paragraph is clearly numbered, conveying reason, logic, and presumably also enabling ease of reference at some later stage. This is a document which may well be looked at again, is *worthy* of being looked at again moreover:[162] it is authoritative, too, in the sense that it can be cited in later cases as precedent. It is so important, in fact, so assuredly different from everything else we have yet considered that it enjoys a folder all of its own: small and brown as opposed to big and blue. The work done by all this formal imperiousness is twofold. On the one hand it exemplifies and enhances the judgment's authority. It conveys aesthetically what will soon become clear in substance. On the other hand it compensates for it. The formal austerity of the document diminishes the impact of an impoverishment of argument which would, presented otherwise, substantially undermine its force. Single spaced, with regular margins and a single line for the heading rather than the coat of arms that takes up most of the first page, the decision fits comfortably onto three sides of A4. In the form I came across it, it is made to last ten. And it appears twice.

But it is not the reviewing judge that is of interest here, it is the institution, the IRB. It was the IRB that required he dispose of the application "without delay and in a summary way,"[163] and determined the way in which his judgment would be physically presented. Similarly the question is not whether he was *right* to decide this way, but rather *why* he did. If this judgment represents the culmination of the IRB's distillatory project, what has been lost and where? How did we get to the point where this was all that remained? On what basis did the reviewing judge decide, both in

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[161] At the very least it is palpably *more* expensive than the paper used for the rest of the documents we have been looking at thus far, even the first instance decision.

[162] Unlike the first instance decision, it is available in full on the internet. See *supra* note 3.

[163] *IRPA*, *supra* note 25 at s. 74(c).

terms of what *was* known to him and what *wasn't*? Why *this* judicial review decision? These sorts of questions are what it has been the purpose of this thesis to answer. How does this institution, the IRB 'think'?[164]

In chapter 2 we saw how the IRB's *inhospitality* towards asylum seekers manifested itself in practice. The "issues" identified by the institution in Ms. Jesurasa's case were not so much "issues" in fact as they were possible reasons for rejecting her claim. The institution was engaged in the production of the very ambiguities it claimed to regulate. In chapter 3 we turned the IRB's utilization of legal *categories* as a means of regulating the kinds of stories permitted to be told. In order to be successful Ms. Jesurasa would have to construct herself simultaneously as both similar enough to the IRB's particularized and historically contingent "refugee definition" and sufficiently different to remain "credible". The fact that justice requires a real sensitivity both to the consistent application of general rules or categories *and* the inevitable uniqueness of each individual case we said was given insufficient regard. In chapter 4 we considered the IRB's impoverished theory of *interpretation* and the correspondingly dramatic power it invested in both the interpreter and transcriber. The IRB, we said, has no concept of *différance*. Chapter 5 dealt with the presiding member's failure to engage in 'legal reasoning' in the first instance decision in favour of the *narrative* construction of Ms. Jesurasa's 'problems' as always minor in character. In chapter 6 we saw how, had the IRB been either willing either to genuinely engage with the evidence provided by an alternative, less *logocentric hermeneutic,* or to utilize such a hermeneutic itself, it might not have treated Ms. Jesurasa so skeptically. In chapter 7 we considered the effects of the *adversarial process* on the adjudication of Ms. Jesurasa's claim and found that, whatever its merits in theory, in practice it works to divert the contesting parties' attentions away from the substantive merits of the case, inevitably to the benefit of the side which is better resourced. So that by the time we come to chapter 8 and the judicial review decision, the institution has managed to manufacture sufficient doubt to enable the rejection of Ms. Jesurasa's claim for

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[164] Douglas, "How Institutions Think", *supra* note 9.

refugee protection. All of the context, all of the considerable variety in the depiction of her story caused by different institutional actors, speaking in different voices, according to different procedures and at different moments has been flattened down by the law's quest for a single distilled version of events. The very variety which the institution has created has proved sufficient to create the ambiguities and inconsistencies necessary to say that definitive, final no. And we suspect perhaps that, in the institution's skepticism which we noted right at the very start, everything had somehow led inexorably to this moment.

Those were the claims about the IRB, the particular institution. But we said in the introduction that this thesis had jurisprudential implications too, that it was concerned not just with *one* institution, but with *institutionality* more generally. Mostly, those claims have been left unstated, though I think some of the more obvious implications at least will have been clear. The idea that refugee determination is or could ever be either wholly or even very much more than notionally governed by rules, for instance, we can confirm to be seriously misleading. The necessarily layered nature of the adjudicatory process has been crucial. We have seen how a multitude of different institutional actors – immigration officers, interpreters, transcribers, psychologists – are required every step of the way to make decisions with potentially very important consequences for the eventual determination of the claimant's case. These decisions, moreover, were no less important for not being 'legal' according to the conventional usage of the word. Indeed, even the activities of a more prototypical legal sort – the activity of 'judging', for instance – was nowhere near as concerned with rules, the orthodox province of jurisprudence,[165] as we might have suspected beforehand.

While I do not think that we can necessarily say that the IRB is representative of all legal institutions, or that refugee determination is in any way archetypal as far as legal adjudication is concerned, I think that we can safely draw out a few general claims nevertheless. Above all, we can say that the fact that adjudication is carried out by an

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[165] Austin, *supra* note 20.

institution is important: *institutionality* matters. The point is not that *all* legal institutions operate in precisely the ways we have identified with respect to the IRB here, but merely that the sorts of issues we have highlighted here are always a concern. An institution's *hospitality* is always important, as is its particular utilization of *categories*. Legal institutions have theories of language, *interpretation*. They employ different *narrative* techniques and different *hermeneutics*. Their adjudicatory processes, whether *adversarial,* inquisitorial or otherwise have genuinely significant practical implications. No doubt each particular institution has its own special concerns.

To confine ourselves in the study of law to rules is to see so little of the picture as to be virtually a detriment to our understanding of it. Legal adjudication involves a multitude of actors, performing discrete institutional functions, making individuated choices every step of the way. Above all these choices effect a loss. In the end, legal adjudication is about making only one decision, the law's *spirit*, ethanol: "the application for judicial review is dismissed." But getting to that moment requires an entire process. And it is that process, the law's *institutional* mechanics, with which we have been concerned here and which, moreover, it is claimed that both the orthodox and the heretical approaches to jurisprudence pay insufficient attention. Barsky writes that:

> The individuals working in the determination system are often sincere, qualified and well-meaning; but the system within which they work…is not geared towards compassionate rulings for suffering human beings.[166]

It is on that note which I want to finish. Legal institutions are dispassionate creatures. If they have a tendency to do just one thing it is to enable well-meaning individuals to behave as if they were not. What we lose most of all in law's distillatory project – through all the rhetorical, semantic, formal and otherwise discursive devices we have seen at work here – is the radically human element, the infinite difference between

[166] Barsky *supra* note 7 at 230.

'The Applicant' and *Maliny*. That is her name, Maliny Victoria Jesurasa. A person. Just like you and me. Throughout all my work on this thesis and Maliny's case over the last two years, I have always tried to keep this one thing at the forefront of my mind.

I knew it that very first day back in March of 2005. Rifling through the big blue folder, one particular collection of papers quickly caught my attention on account of its obvious difference from everything else in the file. These, I soon discovered, were pages from Maliny's diary. They had apparently been seized by the immigration officer the day she arrived at Pearson International Airport in Toronto, photocopied and then dumped unceremoniously into the archive seemingly for want of anything better to do with them. They are mentioned only once in the course of the entire record when the presiding board member said the following at the very start of the hearing:

> Presiding Member (to Claimant)
>
> Q Was that your diary or what was…what did you have with you, they photocopied [sic]? It's…it's not in English
>
> *[Interpretation in Tamil]*
>
> Ms. Jesurasa
>
> *[In Tamil]*
>
> Interpreter (for Ms. Jesurasa)
>
> A Diary
>
> Presiding Member (to Claimant)
>
> - It was your diary. That's what I thought. Okay.

The fact that any possible relevance of these diary pages was dismissed so quickly is somehow more poignant than if they had never been mentioned at all. Their impact is immediate and aesthetic. Though they may not be written in English, they are vibrant, playful, sad and evocative. Unlike the utterly abstract and lifeless depiction in the reviewing judge's account of the "facts", which is so representative of the institution's treatment of Maliny throughout, these pages from her diary – full of doodles, stickers, notes from friends in Tamil, names, phone numbers and addresses – speak unambiguously of a person. They convey something of the terrible reality which leaving behind your friends, family and home must unquestionably entail. A reality which, through all this law and process, it is so very easy to forget; or, more to the point, to be made to forget by the institution.

On one particularly affective page, for instance, under what I am told is a farewell message from one of Maliny's friends, there are two hearts, drawn close enough together so that their tips intersect like a Venn diagram. In one is written the letter M – presumably for Maliny – and in the other the letter T; two friends bound together no matter that one would soon be on the other side of the world. On another page somebody has drawn a flamingo over which has been placed a sticker containing the only word in the whole diary to appear in English. It says "congratulations." For what, one can really only guess, but the awful reality of the paradox is striking: a diary which speaks a real sadness throughout – friends lost, a home abandoned – yet which holds out a faint hope, a promise, of a brighter, safer, future. Congratulations: perhaps for managing to escape.

Now my descriptions here really do not do these pages justice. That is a shame in a way, but it is also precisely the point. Unlike everything else in the file, Maliny's diary has been left untouched by the legal process, the institution. And that is exactly the reason it is so incredibly affective. Palpably human, it is irreducible to words; and thus to law, to legal discourse. Undistilled, it is all the more potent; it seems to

symbolize that which the legal institution is perhaps most especially incapable of capturing, that most ineffably human of qualities we sometimes like to call *spirit*.

Bibliography

ARCHIVAL MATERIAL

The Jesurasa case file (December 2003 – February 2007), Montreal, Archives of the Federal Court of Canada (IMM-2850-05).

INTERNATIONAL LAW / LEGISLATION

Convention Relating to the Status of Refugees, 1951, 189 U.N.T.S. 150 (entered into force 22 April 1954).

Immigration Act S.C. 1976-7.

Immigration and Refugee Protection Act, S.C. 2001, c.27 (entered into force on June 28 2002)

Protocol Relating to the Status of Refugees 1967, 606 U.N.T.S. 267 (entered into force 4 October 1967)

Universal Declaration of Human Rights, GA Res. 217A (III), UN Doc. A/810 (1948) 71.

JURISPRUDENCE

Ex parte Lloyd (1822) Mont 70, 72n.

Jesurasa v The Minister of Citizenship and Immigration (2006), F.C. 234, online: Federal Court (Canada) http://decisions.fctcf.gc.ca/en/2006/2006fc234/2006fc234.html.

R v Tran [1994] 2 S.C.R. 951.

Singh v Canada (1985) 1 S.C.R. 177.

Tung v. Canada (Minister of Citizenship and Immigration) (1991), 124 N.R. 388 (F.C.A.).

SECONDARY MATERIAL: ARTICLES

Balkin, Jack. "Deconstructive Practice and Legal Theory" 96 Yale L.J. (1986) 743.

——— "Transcendental Deconsruction, Transcendental Justice" 92 Mich. L. J. (1993) 1131.

Clark, Tom. "Rights Based Refuge, The Potential of the 1951 Convention and the Need for Authoritative Interpretation" 16 Int'l J. Refugee. L. (2004) 584.

Derrida, Jacques. "Force of Law: The Mystical Foundation of Authority" (1990) 11 *Cardozo Law Review* 919.

——— "Living On: Border Lines", trans. James Hulbert, in Harold Bloom et al. *Deconstruction and Criticism* (New York: Seabury Press, 1979).

Goodrich, Peter. "Law and Language: An Historical and Critical Introduction" (1984) 11 *J. L. & Soc'y* 173.

Howard, Rohda. "The Canadian Government Response to Africa's Refugee Problem" (1981) 15 *Can. J. African Studies* 95.

Jackson, Michael. "Knowledge of the Body", (1983) 18 *Man* 327.

Manderson, Desmond. "Apocryphal Jurisprudence" (2001) 23 Studies in Law, Politics and Society 81.

Marx, Reinhard. "The Criteria of Applying the "Internal Flight Alternative" Test in National Refugee Status Determination Procedures" 14 Int'L J. Refugee. L. (2002) 179.

Pearce, Hannah. "An Examination of the International Understanding of Political Rape and the Significance of Labeling it Torture" 14 Int'L J. Refugee. L. (2002) 535.

Pickering, Sharon. "Common Sense and Original Deviancy: News Discourses and Asylum Seekers in Australia", *Journal of Refugee Studies* 14 (2001) 169.

——— "Narrating Women and Asylum: hostile administrative-legal justice" in Sharon Pickering and Caroline Lambert ed., *Global Issues, Women and Justice* (Sydney: Federation Press) 34.

Rousseau *et al.* "The Complexity of Determining Refugeehood: A Multidisciplinary Analysis of the Decision-making Process of the Canadian Immigration and Refugee Board" (2002) 15 *Journal of Refugee Studies* 43.

Unger, Roberto. "The Critical Legal Studies Movement" (1983) 96 Harv. L. Rev. 561.

Upton, John. "In The Streets of Londonistan" *London Review of Books* (Vol 26 2 dated January 24 2007), online: http://www.lrb.co.uk/v26/n02/upto01_.html.

Valverde, Mariana. "From Deserving Victims to 'Masters of Confusion': Redefining Refugees in the 1990s" *Canadian Journal of Sociology* (2002) 135 at 138.

SECONDARY MATERIAL: DATA/ GUIDELINES / HANDBOOKS

Citizenship and Immigration Canada, "Facts and Figures 2005 – an Immigration Overview", online: CIC http://www.cic.gc.ca/ENGLISH/pdf/pub/facts2005.pdf.

Immigration and Refugee Board of Canada, "Interpreter's Handbook 2007" online: IRB http://www.irb-cisr.gc.ca/en/search/index_e.htm?searchtype=1&search_criteria=interpreter%27s+handbook.

——— "Legal References: Interpreters and Translation of Documents" online: IRB available online at http://www.irb-cisr.gc.ca/en/references/legal/rpd/handbook/hb09_e.htm.

——— "Procedures: Code of Conduct for Interpreters" online: IRB http://www.irb-cisr.gc.ca/en/references/procedures/code_interpret_e.htm

——— "Procedures: Tribunal Process" online: IRB http://www.irb-cisr.gc.ca/en/references/procedures/index_e.htm.

UNHCR, "Global Refugee Trends", online: UNHCR http://www.unhcr.org/cgi-bin/texis/vtx/events/opendoc.pdf?tbl=STATISTICS&id=4486ceb12.

——— *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, 1 HCR/IP/4/Eng/REV.1 Reedited, Geneva, January 1992, UNHCR (1979) online: UNHCR http://www.unhcr.org/publ/PUBL/3d58e13b4.pdf.

——— *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, 1 HCR/IP/4/Eng/REV.1 Reedited, Geneva, January 1992, UNHCR (1979) online: UNHCR http://www.unhcr.org/publ/PUBL/3d58e13b4.pdf.

SECONDARY MATERIAL: DICTIONARIES

The Compact Oxford English Dictionary 2d ed.

The Lifco Tamil-Tamil-English Dictionary (Little Flower Co.,India, 2002).

Shorter Oxford English Dictionary, 5th ed.

SECONDARY MATERIAL: MONOGRAPHS

Austin, John. *The Province of Jurisprudece Determined*, New Ed. edition (Cambridge: Cambridge University Press, 1995).

Barsky, Robert F. *Constructing a Productive Other: discourse theory and the Convention refugee hearing* (Amsterdam/Philadelphia: John Benjamins Publishing Co,1994).

Bottomley, Stephen and Simon Bronitt, *Law in Context* 3rd ed., (Sydney: The Federation Press, 2006).

Dauvergne, Catherine. *Humanitarianism, Identity, and Nation: Migration Laws in Canada and Australia* (Vancouver and Toronto: UBC Press, 2005).

Derrida, Jacques. 'Différance,' in *Margins of Philosophy,* trans. Alan Bass (New York: University of Chicago Press, 1972).

——— *Archive Fever,* trans. by Eric Prenowitz (Chicago and London: University of Chicago Press).

——— *Of Grammatology* (Baltimore: Johns Hopkins University Press, 1976).

——— *Paper Machine (Cultural Memory in the Present)* trans. by Rachel Bowlby (Stanford University Press, 2005).

Douglas, Mary. *How Institutions Think (Frank W. Abrams lectures)* (Syracuse University Press, 1986).

——— *Implicit Meanings: Essays in Anthropology* (London: Routledge & Keagan Paul, 1978).

Dworkin, Ronald. *Taking Rights Seriously* (Cambridege, Mass.: Belknap Press, 1977).

——— *Law's Empire* (Cambridge, Mass.: Belknap Press 1986).

Frank, Jerome. *Law and the Modern Mind* (New York: Brentano's, 1930).

Gibney, Matthew. *The Ethics and Politics of Asylum: Liberal Democracy and the Response to Refugees* (Cambridge: Cambridge University Press) 2004.

Hart, H.L.A. *The Concept of Law* (Oxford, Clarendon: 1961).

Hathaway, James C. ed. *Reconceiving International Refugee Law* (The Hague and Boston: M. Nijhoff, 1997) at xxv.

Latour, Bruno. *Scientific Objects and Legal Objectivity (a chapter from* La Fabrique du droit*)* in Alain Pottage and Martha Mundy, ed., *Law, Anthropology and the Constitution of the Social: Making Persons and Things*, trans. by Alain Pottage (Cambridge: Cambridge University Press) 73.

Llewellyn, Karl. *Jurisprudence: Realism in Theory and Practice* (Chicago: University of Chicago Press, 1962).

Manderson, Desmond. *Proximity, Levinas and the Soul of Law* (McGill-Queen's University Press, 2007).

Perec, Georges. *Life A User's Manual*, trans. by David Bellos (David R Godine, 2000).

Salomon, Kim. *Refugees in the Cold War: Toward a New International Refugee Regime in the Early Postwar Era* (Lund, Sweden: Lund University Press, 1991).

Showler, Peter. *Refugee Sandwich* (Montreal and Kingston: McGill-Queen's University Press, 2006).

Simpson, Sir John Hope. *The Refugee Problem: Report of a Survey* (London, Eng; Toronto: Oxford University Press) 1939.

Unger, Roberto. *Knowledge and Politics* (New York: Free Press, 1975).