

Introduction

I will never forget my first refugee claim. I was a law student in Halifax. The claimant, also a student, came from a small African country where a junior military officer had declared himself president of the country and then enforced that declaration with a ruthless military force. In those days, the refugee claim process was different. After filling out a brief information form, the claimant told his story to a tape recorder, prompted by questions from an Immigration Officer. The claimant would never meet the officials of the Refugee Status Advisory Commission, located in Hull, Quebec who would read a transcript of the tape and make a decision. Yes, you are a refugee. No, you are not.

My client and I were ushered into a small room in the offices of the Department of Immigration in Halifax, not far from Pier 24 where thousands of new immigrants had first entered Canada. At times, the immigration officer's interview seemed surreal, the touching of two dream worlds. He was a kindly man with a gentle voice and no discernible knowledge of the claimant's country or culture. Fortunately my client, I will call him Samuel, spoke English well although he scarcely understood the law or the refugee claim process and I fear that I, his legal counsel, was of limited assistance. There was one particular moment, Samuel was telling of his escape out the window of his bedroom as the soldiers were breaking through the front door, the sound of his mother screaming, of running into the bush and later learning what they did to his sister. During the telling, his face shone with sweat and fear although his voice was calm as his words spooled into the tape recorder which captured none of the incongruous contrast between the excruciating horror of his story and the quiet, almost indifferent setting in which it was being told. Intent

upon his duty, the immigration officer appeared oblivious to the meaning of the words he was hearing. “And then what happened?”, he prompted.

Since that time, the law has changed. Since 1989, refugee claimants have told their story directly to the person who decides their claim, a member of the Immigration and Refugee Board (“IRB”). Rather than an interview, there is a full quasi-judicial hearing with a panel of one or two Board members¹ a Refugee Claim Officer (“RCO”)² to assist the panel, an interpreter and the claimant’s lawyer who takes an active role in the hearing. I have participated in hundreds of refugee hearings, as both a lawyer representing claimants and as a member of the IRB deciding them. And still, despite the many improvements to the process and the training of Board members, there are invariably moments in every hearing where the gap between the reality of the claimant and the Board member is suddenly apparent and profound. Illusions of meaningful communication are momentarily shattered. The best of the Board members and lawyers find ways to rebuild or bridge those gaps. Others, because of indifference or hardened world views, founder in them, usually to the detriment of the claimant.

On average, about twenty-five thousand refugee claims are decided in Canada every year, although the number of decisions has fallen to 15,000 in the past year due to the government’s failure to appoint a sufficient number of decision makers. Unfortunately most refugee stories are never heard by the Canadian public. The claims are necessarily confidential to prevent additional persecution to claimants and others and so they rarely escape the hearing rooms of the IRB. Yet for immigration lawyers and IRB members, the hearing room is a fascinating place, a crucible of truth and falsehood, where the most remarkable stories of abuse and violence, overwhelming

fear, extraordinary courage and improbable events are told every day.

This is a book about hearing and deciding refugee claims in Canada. The stories are fiction although they are more accurately described as mosaics composed of pieces broken from hundreds of refugee claims heard by myself and other members of the IRB. But they are definitively fiction; no single individual or case is contained within these covers. The stories seek to illustrate the profoundly difficult process of communicating the experience of refugees within a judicial context, a difficulty that is shared by all participants. The Board member must decide whether or not the refugee claimant has a well-founded fear of persecution in her home country. If she does, she will be granted refugee status and be permitted to remain in Canada. If she does not, she will be removed from Canada.

The refugee definition is complex, legally technical and meaningless to most claimants. The full Convention refugee definition and the even more complex definition of a “protected person” are contained in the Afterword. Here is a quick, simplistic summary of the definition:

1. A fear of persecution which may be any form of serious, persistent harm, not just death or torture.
2. An agent of persecution. The persecutor may be a state agent or a non-state agent. In the latter case, the claimant must prove that the state will not or cannot protect her.
3. A reason for the persecution. Reasons include the claimant’s race, religion, nationality, political opinion or membership in a particular social group which in Canada is defined broadly to include gender, sexual orientation and family as well as unions or professional groups which

may be targeted by persecutors. Fears of random violence or personal vendettas, no matter how certain or harsh the injury, are not included.

4. A future fear. The refugee is not protected because of past persecution. The question is whether there is a reasonable possibility that the claimant would be persecuted if she returned to her home country.

5. No alternative protection. If the claimant has a right to enter and be protected by another country, Canada will not grant them protection.

6. The claimant deserves protection. Some people who have committed crimes against humanity or serious non-political crimes are excluded from refugee protection as not worthy of protection.

During the refugee claim process, the obstacles to communication are numerous and formidable. A vast chasm of potential miscommunication lies between the refugee claimant and the decision-maker. Most genuine claimants experience a profound sense of vulnerability due to their inability to understand the refugee claim process and their fear of being returned to persecution. The process is frightening because it does not make sense to them and because the stakes are so high. Their fear is magnified in the hearing room when questions are incomprehensible because of language, different cultural perspectives or false assumptions on the part of the questioner. The claimant may be uneducated, inarticulate, traumatized or simply unable to remember culturally irrelevant facts. She may be telling the truth as she perceives it, she may be exaggerating or she may be telling a big fat whopper.

The Board member may have a partial or thorough understanding of refugee law, some objective knowledge about the claimant's country and often, some experience with prior claims from that

country. He will have a detailed document, the Personal Information Form, reducing the claimant's life history to dry, objective facts that may or may not capture her reasons for fearing persecution. He will have the lawful authority to decide the claim on the facts and the law without interference from any other person or authority. He will have strong administrative pressures to complete the hearing within a half day. He will unavoidably bring his own cultural baggage to the hearing and hopefully will have some knowledge of its contents. The member will also have a powerful ethical imperative to get the decision right and hopefully some humility about the impossibility of getting it all right all the time.

The challenge, for both sides, is to find a means of bridging the chasm, of conveying and understanding the information necessary for the Board member to accurately decide the refugee claim. It is a daunting task requiring great skill, genuine empathy and moral courage on the part of the Board member. For most claimants, at least the sincere ones, the process demands even greater courage. For them, the stakes are obviously higher and the confusion, the fear and the lack of comprehension, greater.

This book is also about story telling: true stories, false stories, true and false stories. It is about the possibility and impossibility of relating and assessing the refugee experience within a judicial and bureaucratic context. It is about the genius and absurdity of human communication. It is a tribute to those who try to do it well and a condemnation of those who do not. It is a recognition that all parties to the process are sandwiched in between the demands of fairness and efficiency, between the differences in cultures, between wealth and poverty, between the fearful chaos of the refugee experience and the logical and unrealistic expectations of law and government.

Refugees are most obviously and desperately sandwiched in between the expectations of the law and their own limited abilities to meet those expectations. In subtler and less painful ways, refugee aid workers, lawyers, interpreters, Board members, judges, and judicial institutions are also sandwiched in between the demands of high volume justice and the obligation to get every decision right. The refugee arriving on our shores, asking for our protection, unavoidably connects us all to the brutalities that humans inflict on humans and to our sense of powerlessness to stop it. Ultimately, the refugee claimant places us all in the refugee sandwich.

1. In all of these stories, the claims are decided by two member panels. Since implementation of the *Immigration and Refugee Protection Act* in 2001, refugee decisions are decided by one member.

2. Under various statutory regimes, the Board official who assists the members in the hearing room has been called a Refugee Hearing Officer, a Refugee Claim Officer and currently, a Refugee Protection Officer. It is the same official doing the same job and for purposes of consistency is referred to as a Refugee Claim Officer (RCO) throughout the stories.