

From Narrative to Evidence - How Canadian Legal Procedures Reshape Refugee  
Claims

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Early in the process of making a refugee claim in Canada, claimants appear to be thrust into the role of storyteller. Within 28 days of initiating their claim, they must complete a Personal Information Form (PIF)<sup>1</sup>, section 31 of which is entitled “Narrative”. It offers two blank pages with the direction to use more if needed. This section differs substantially from the previous thirty sections which ask detailed questions mostly focusing on the claimant's personal history, including questions about work experience, education, criminal record, military service and travel to Canada.

On first sight, the request for a narrative in the claimant's own words appears to be a generous and respectful mode of ascertaining the relevant background information. The request seems to allow claimants “free rein” in structuring their account of the situation that gave rise to their claim for Canada's protection. It modifies the essence of the document by displacing the idea that it is a written interrogation that demands specific answers to someone else’s questions. Instead, it seems to give power, recognition and voice to claimants, permitting them to define the issues that should be considered. Whereas the other questions in the PIF put the claimant on the defensive, the call for a narrative reminds all involved that claimants are *asserting* a right rather than defending themselves. It also highlights the idea that personal experiences and perspective – the subjective element - play a critical role in determining whether that right exists.

The call for a narrative also implies that the reader will bring the appropriate attitude to the task of appraising the narrative: that he or she, as a reader, will try to see the world through the eyes of the narrator, will try to understand and be empathetic to the perspective that is offered and will be willing to be "captivated" by the language and personal style of the narrator.

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<sup>1</sup> An electronic version of the Personal Information Form is available on the website of the Immigration and Refugee board at [www.irb-cisr.gc.ca](http://www.irb-cisr.gc.ca).

In the following pages, I argue that the projected image of refugee claimant as storyteller is largely illusory. In Part A, I try to show that the idea of claimants having “free rein” in writing the narrative is inaccurate and that, in any case, the written narrative is an inadequate medium for claimants to describe their personal experiences. Some of these deficiencies were recognized over twenty years ago by the Supreme Court of Canada which decided in *Singh*<sup>2</sup> that the only adequate remedy for the inadequacies of written submissions was to accord refugee claimants an oral hearing before their claims are determined. However, I try to show that, over time, the written narrative has taken on a more prominent role in the process of claim determination and that it has been transformed significantly from its original design, to the extent that it is now widely accepted as a tool to be used in the process of interrogating the claimant.

To a large extent, the decision in *Singh* has been superseded by institutional changes. While originally the oral hearing was provided in order to remedy deficiencies, I argue in Part B, that it also has evolved into a forum where an interrogation takes place - where the claimant is challenged to explain the defects in the written format, placing the PIF and its requirement to provide a narrative at the centre of the refugee determination process. The dominant consequence of these transformations is that they increase the difficulty of making a successful claim. In effect, the oral hearing now places claimants in a defensive stance, requiring them to corroborate evidence already provided, rather than providing an opportunity to communicate more effectively through a different medium. While the Immigration and Refugee Board continues to promote its hearings as “informal” and “fair”, an amplified level of stress is endured by claimants. I also argue that recent reconfigurations

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<sup>2</sup> *Singh v. Minister of Employment and Immigration* [1985] 1 SCR 177

of the oral hearing in Canada have increased the constraints, dilemmas and challenges that face claimants in the construction of the written narrative.

### **A. The Inadequacies of the Written Narrative**

When composing the written narrative, claimants are required to follow instructions including the following:

On the following 2 pages, set out in chronological order **all the significant events and reasons** that have led you to claim refugee protection in Canada. Indicate the measures taken against you and members of your family, as well as against similarly situated persons, and by whom these measures were taken. Include dates wherever possible....

These instructions create a number of serious dilemmas. The most significant hinges on the fact that the instructions imply that a particular form of narrative is required, one that is, as I shall show, sadly inadequate to the task. Thus, the dilemma is whether to follow the instructions or not. For those who choose to follow them, there is the danger that they will be misunderstood or disbelieved. For those who do not, there is a double risk. First, the risk of having parts of one's narrative discounted as irrelevant and second, the risk of failing to communicate because of limitations inherent in the written form of communication. This dilemma is the focus of the following subsections.

#### **1) Events vs. Experiences**

As noted above, the PIF requires claimants to set out the "events and reasons" that have led them to seek Canada's protection. The message seems to be "Just give us the facts", with the dates of the events and chronology being spotlighted for particular attention. No room is made available for commentary nor for interpretation, nor for contextual background. Nor is there encouragement to provide description of subjective experience, or

of the impact of events on the individual claimant. These could be regarded as out of order; since they lack the objective grounding that the term “events” connotes.

As a result, it is unsurprising that PIF narratives tend to closely resemble police reports - listing discrete events tied to dates and times. They tend to be written with a veneer of detachment, as if the events were experienced from the outside rather than the inside, focusing on the factors that affected the claimant rather than on the manner in which they were experienced.<sup>3</sup>

To make use of a distinction developed by Clifford Geertz<sup>4</sup> and Michael Walzer<sup>5</sup>, the instruction in the PIF seems to call for a “thin” rather than a “thick” description of events. Whereas thick descriptions would refer to the local or personal significance of acts, thin descriptions will filter out nuances and reduce the complex, layered and multi-dimensional occurrence to a prosaic stab at objectivity. The notion that the PIF is looking for thin descriptions is bolstered by the fact that two pages is regarded as sufficient in most circumstances to accommodate the whole story. While claimants are encouraged to use other blank sheets should the need arise, the implicit message is that a barebones account is the norm and is expected. This conclusion is also bolstered by the fact that the PIF requires the claimant to sign a declaration that the information provided is “complete, true and correct”. While the ideal of completeness may be possible in the realm of the “thin description” (particularly when the claimants are instructed to limit their account to “significant events and reasons”, it seems unattainable in the realm of thick descriptions which may defy completeness and may hinge on belief rather than truth.

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<sup>3</sup> These general characterizations of PIFs are based on my personal experience as a member of the Immigration and Refugee Board from 1998 to 2001 during which time I read approximately 300 PIFs.

<sup>4</sup> See Clifford Geertz, *The Interpretation of Cultures* (New York, Basic Books, 1973) at 6 Geertz attributes the distinction to Gilbert Ryle.

<sup>5</sup> See Michael Walzer, *Thick and Thin: Moral Argument at Home and Abroad* (University of Notre Dame Press, 1996)

There are a number of problems inherent in the instruction to set out events and reasons. First, the full meaning and intensity of what occurred may be diluted in a skeletal version of the story. Where the claimant attempts to harmonize hermeneutic horizons by reducing the story to that which is thought to be relevant to the reader, important details may be omitted. For example, the date on which government officials took a certain action (such as breaking up a political demonstration) may have historical or social significance. The action in question may allude to historical events or may be understood by the claimant to resonate with or refer to these events. The PIF instruction does not encourage the claimant to be expansive on such matters. The claimant may believe quite reasonably that reference to such allusions, resonances or connotations would be regarded as irrelevant.

Second, claimants who present their story as a detached report of events and reasons may be misinterpreted by the reader as untrustworthy or unreliable. A narrative that refers to the event but not to its subjective impact may be conceived as a concoction. The decision-maker charged with assessing the credibility of the narrative may regard it as a fabrication for the very reason that it lacks experiential reference. The very format of an incident report may encourage the finding that the claim is fabricated formulaic boilerplate.

This can occur because refugee claims are rarely unique. The objective problems suffered by one claimant are usually shared by others. The methods employed by government officials or others engaged in human rights abuse generally follow established patterns and show little imagination. Yet repetitive claims from unrelated claimants can give rise to suspicions of collaboration and concoction.

An extreme example of such suspicion is found in *Zhang*<sup>6</sup> where the Board Member was presented with a PIF narrative that was identical to one submitted by other individuals.

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<sup>6</sup> *Zhang v. Canada (Minister of Citizenship and Immigration)* [2006] F.C.J. No. 692

The Board Member regarded the narrative as a concoction because it was "insufficiently *personal* to be credible"<sup>7</sup> (emphasis added). The Federal Court overturned this decision and ruled that it was improper for the Board Member to decide that the narrative was a concoction *solely* on account of the existence of another identical narrative. However, less extreme approaches have received the court's approval. On several other occasions, the Court has concluded that similarity in PIF narratives, while insufficient in itself, is not a prohibited factor when an assessment of credibility is being made.<sup>8</sup> The underlying message appears to be that a Board Member is entitled to suspect that the claimant was not personally involved if he or she does not try to offer a unique perspective on the occurrences in question. Absence of any reference to subjective experience suggests falsity.

This seems to be consistent with empirical findings. In a detailed investigation of the differences between truthful and fabricated reports, Porter, Peace and Emmett<sup>9</sup> reveal a number of distinctions between the two. First, they note the different levels of attention to detail:

[A]ttention to specific types of details in the narratives helped to discriminate honesty from deception. When relating a fabricated experience, participants were unable to provide the same level of contextual information as when relating a genuine experience. They provided fewer time and location details and their reports were abbreviated overall, despite our prediction that they may be more detailed in an attempt to make their trauma stories more credible and to elicit sympathy. However this does corroborate a general finding in research on deception showing that deceptive accounts tend to be less rich in detail than truthful accounts.<sup>10</sup>

While this endorses the PIF's demand for specific reference to dates, it goes further to suggest that more detailed evidence of context will be important. More

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<sup>7</sup> Ibid at para 30.

<sup>8</sup> See for example, *Sargyson*

<sup>9</sup> Stephen Porter, Kristine A. Peace and Kelly A Emmett, "You Protest Too Much, Methinks: Investigating the Features of Truthful and Fabricated Reports of Traumatic Experiences" *Canadian Journal of Behavioural Science* (April 2007) 39:2 79-91

<sup>10</sup> Ibid at 88

importantly, the authors also find that truth-tellers and fabricators describe the emotional impact of trauma differently

Further, the self-reported emotional intensity ratings of the false events were higher. Thus, malingerers exaggerated the severity of the trauma when asked direct questions about the event but were unable to reflect this extreme distress in the stories themselves.<sup>11</sup>

These research findings do not, however, negate my central point. The PIF instructions do not call for an experiential account of the events that provoked the refugee claim. On the contrary, the directions in the PIF imply that an incident report is being sought rather than a cultural or phenomenological elucidation. In the absence of adequate instructions, it is dangerous to draw any conclusion about the truthfulness of the narrative.

## **2) The Written Medium**

Even where claimants are not dissuaded by the instructions from referring to the local or subjective significance of events,<sup>12</sup> they face the problem of reducing the complexity of such matters to writing. They may have difficulty in articulating their own responses to events or their motivations. Refugee stories frequently pivot on the claimant's feelings of shame or humiliation or a persecutor's capacity to diminish a person's self esteem by degradation. Claimants who have been demeaned will struggle to express such matters, and it will be on the rarest occasion that one will be able to perceive that struggle in the written word.<sup>13</sup> Where their own comprehension of the experiential is incomplete, the written word is unlikely to convey a clear account to the decision-maker. Claimants are also unlikely to have much practice using the medium of writing to express emotions, motivations, reactions or other subjective aspects that may be crucial to understanding the story. Such inexperience will likely reduce the persuasiveness or plausibility of the story.

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<sup>11</sup> Ibid at 88

<sup>12</sup> As I have noted, in my experience this is quite unusual.

<sup>13</sup> See *infra* at note

Further, the reader is an unknown stranger to the claimant. Even where claimants are content with their own understanding of their feelings, reactions and motivations, the written word may be an insufficient medium to allow their two worlds to conjoin. The written form presents no cues to allow the writer to gauge whether the reader is following or believing the story, or whether there are interpersonal or cross-cultural gaps that require attention

I shall return to consider these issues in greater detail. At this point, it is sufficient to note the difficulty in communicating highly personal, emotionally-charged episodes in one's autobiography to an audience whom one has never before encountered. The pernicious consequence of attempting to provide an enlarged account is that it may fail because of the problems inherent in the written medium.

### **3) Testimonial capacities and the weight of the evidence**

A third and independent deficiency in the PIF is also worthy of note. Two challenges face refugee claimants when completing section 31 of the PIF. The first is to construct a narrative from which the reader may infer that the protagonist has a right to Canada's protection on account of the risks faced in his or her country or countries of origin; the second is to construct a narrative that will be accepted as the protagonist's autobiography rather than fiction or the biography of a third party.

Success in each will depend on the reader's favourable assessment of the author's credibility. For the first, claimant will need to persuade the reader that the sources on which they are relying are sound and trustworthy. Where claimants rely on observation, they will have to persuade the decision-maker that they have sufficient skills of perception, of memory, of language and of understanding the meanings of social interaction to ground adequately the conclusion that their beliefs about what happened actually match the reality

that they are describing. Likewise, where they rely on hearsay or on someone else's experiences, they will have to persuade the decision-maker that the reliance is justifiable in the circumstances. The critical threshold question will not be whether they believe what they are saying but whether the foundations for their beliefs are trustworthy.

This challenge is quite different from that of showing that one is not prevaricating or fraudulently producing or reproducing a description of events in which one was not involved. The Federal Court of Appeal has substantially reduced the burden of this second challenge by holding in *Maldonado v. Canada* that, "When an applicant swears to the truth of certain allegations, this creates a presumption that those allegations are true unless there be reason to doubt their truthfulness."<sup>14</sup> . As noted earlier, the PIF requires the claimant to make a declaration that "the information provided in this form is complete, true and correct. My declaration has the same force and effect as made under oath."

While the declaration and the *Maldonado* holding are clearly applicable to issues of fabrication, they have no bearing on the issues of credibility raised by the first challenge. There is no reason to conclude merely from the fact that a declaration of truthfulness has been made that the claimant has good perceptual skills, memory, or intellectual skills or has good reason to rely on the skills of others (footnote to communicative skills and the sections in the PIF relating to language) And here is the critical issue; nowhere does the PIF offer to claimants the opportunity to confirm their skills as reliable narrators, nor their credentials as reliable witnesses, nor the reliability of the sources of their beliefs. While the questions in the PIF may delve deeply into issues of identity, they focus on the individual as claimant rather than on the individual as witness.

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<sup>14</sup> [1980]2 F.C.302

While there is some overlap between the issues of identity raised in the PIF and testimonial capacities (the questions that focus on education, and employment and language skills touch on testimonial capacities, as does the requirement that the claimant declare that he or she understands the contents of the PIF), the claimant’s skills as witness are not addressed directly nor exhaustively. The absence of encouragement to refer to one’s testimonial capacities, implying that such matters are irrelevant, constrains the development of the narrative. Whereas at a civil or criminal trial a witness is permitted to set the stage for their testimony by offering introductory remarks about their capacity to testify, the questions in the PIF do not canvas the relevant issues. The claimant is asked merely to set out the significant facts and reasons. In the absence of any introductory “credentializing”, the reader will have no knowledge of the claimant’s capacities and during the process of reading the narrative will have no gauge of how much weight to accord to it. Likewise, without any reference to reasons for trusting the sources for those beliefs that are not based on personal observation, the reader of a narrative may decline to regard it as a trustworthy or accurate account. In sum, the narrative instructions are insufficient to ensure that the claimant will address the question of the reliability of sources.

An IRB publication entitled *Assessment of Credibility in Claims for Refugee*

*Protection*<sup>15</sup> recognizes explicitly the centrality of the factors to which I am referring:

*Assessing a Witness's Testimony*

...The witness's powers of observation and capacity for remembering are important factors....Factors considered by the courts in assessing credibility include the witness's...

- opportunity for exact observation
- capacity to observe accurately
- firmness of memory to carry in the mind the facts as observed

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<sup>15</sup> Available online at [http://www.cisr-irb.gc.ca/en/references/legal/rpd/assesscred/index\\_e.htm](http://www.cisr-irb.gc.ca/en/references/legal/rpd/assesscred/index_e.htm).

- ability to resist the influence, frequently unconscious, to modify recollection
- capacity to express what is clearly in the mind
- ability to reproduce in the witness-box the facts observed...

However, it is only at the oral hearing that claimants are able to show that they have these capacities. They are not offered that opportunity by the PIF. This is a critical omission. It should also be recognized that while the Law of Evidence that is applied in criminal and civil trials disallows attempts to bolster a witness's truthfulness before it is impeached, nevertheless a certain amount of leeway is allowed when introducing the witness to "enhance the witness's credibility"<sup>16</sup> Introductory evidence about the witness's integrity can cast a favourable light on the testimony that follows. However, none of the questions that precedes the writing of the narrative bears on the integrity or trustworthiness of the claimant.

#### 4) The Legal Framework and Reliance on Legal Experts

Before completing question 31 of the PIF, the claimant is asked to identify how he fits into the legal classification of a protected person. The relevant questions read as follows

**28.** I am claiming protection as a Convention refugee because I have a well-founded fear of persecution for reasons of  
*(check only those that apply)*

race  
religion  
nationality  
membership in a particular social group  
political opinion

**29.** I am claiming protection as a person in need of protection because I face a risk to life or a risk of cruel and unusual treatment or punishment.

Yes No

**30.** I am claiming protection as a person in need of protection because I face a danger of torture, as defined in Article 1 of the Convention Against Torture.

Yes No

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<sup>16</sup> (See Paciocco and Struesser, *The Law of Evidence* (Concord, Ontario: Irwin Law, 1996) at 253

To assist the claimant in completing these questions, the PIF refers him to its Annex which contains the legally relevant definitions of the various categories of protected person. These definitions are remarkably complex<sup>17</sup>

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<sup>17</sup> The relevant definitions are as follows:

**Definitions**

**“Convention refugee” is defined as follows in section 96 of the *Immigration and Refugee Protection Act*:**

A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,  
(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themselves of the protection of each of those countries; or  
(b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.

**“Person in need of protection” is defined as follows in subsection 97(1) of the *Immigration and Refugee Protection Act*:**

***Protection Act*:**

A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally

- (a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or
- (b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if
  - (i) the person is unable or, because of that risk, unwilling to avail themselves of the protection of that country,
  - (ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,
  - (iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and
  - (iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

**Article 1 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or**

**Punishment states as follows:**

1. For the purposes of this Convention, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

**Exclusion from protection**

**Section 98 of the *Immigration and Refugee Protection Act* states as follows:**

A person referred to in section E or F of Article 1 of the Refugee Convention is not a Convention refugee or a person in need of protection.

**Sections E and F of Article 1 of the United Nations Convention Relating to the Status of Refugees state as follows:**

Yet claimants are expected to read them and check off which parts of the definitions apply and then to compose the narrative to fit in with the responses. Evidently, the instruction to set out all the “*significant* events and reasons” for seeking Canada’s protection is premised on claimants being able to understand the relevant legal concepts and thus be able to determine what the law considers significant

The intimidating nature of the definitions ensures that most claimants seek advice either from lawyers or from consultants who represent themselves as having the expertise to assist those seeking Canada’s protection. Yet the inclusion of definitions in the PIF creates the impression that claimants do have sufficient information to complete the form by themselves. This is a false and dangerous impression. By including the definitions found in the relevant legislation, the PIF supplies claimants with only one source of law. It does not supply them with the jurisprudence that has refined the meaning to be accorded to the various words and phrases. It does not even refer the claimant to the document published by the IRB that summarizes the leading judicial interpretations of the relevant terminology and the applicable legal principles.<sup>18</sup> It is striking and odd that the detailed definitions are included but authoritative statements from the Supreme Court of Canada on the nature of such matters as “persecution” or what can count as a “particular social group” are not. The

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E. This Convention shall not apply to a person who is recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country.

F. The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

(a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;

(b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;

(c) he has been guilty of acts contrary to the purposes and principles of the United Nations.

<sup>18</sup>“Interpretation of the Convention Refugee Definition in the Case Law” available online at: [http://www.cisr-irb.gc.ca/en/references/legal/rpd/crdef/index\\_e.htm](http://www.cisr-irb.gc.ca/en/references/legal/rpd/crdef/index_e.htm).

inclusion of the definitions creates the risk that the claimant will compose a narrative based on a faulty understanding of the relevant law and that the narrative (declared to be complete) will omit reference to incidents that are material to the claim.

One can surmise that the various definitions are included within the annex just because of their intimidating effect. The government does not expect nor want individuals to become experts in refugee law. It realizes that it would be exceptionally onerous and unfair to expect a claimant to become familiar with the intricacies of refugee law in the 28 day period within which the PIF must be completed. Yet, for reasons of efficiency, it is unwilling to extend the preparation period. The inclusion of “legalese” in the PIF can be understood as a method of persuading claimants to seek counsel. The choice of whether to rely on counsel is left to the claimant, who may mistakenly believe that he has been provided with sufficient information to proceed alone.

Undeniably, legal experts serve an important function in the refugee determination process. Most significantly, they are able to use their knowledge of the legal structure to draw out important relevant information from their client. However, when real or purported experts become engaged in the composition of the PIF narrative, its deficiencies do not disappear. In fact a new set of inadequacies emerge. First and foremost, without any quality control there is no guarantee that the persons who purport to have expertise do indeed have it. This is a problem that has bedeviled the Canadian refugee determination process for decades and continues to impair its functioning. Generally speaking refugee claimants are frequently subject to the influence of individuals who provide them with bad advice. Smugglers whom they have trusted to bring them to Canada may require that they destroy the documents on which they have relied, or may demand that they lie about their means of getting to Canada. Fellow claimants who have experience with the refugee determination

process may persuade them that it is not in their best interest to tell the truth. In light of the powerlessness of the claimant and their susceptibility to such influences, it is vital that they have sound advice when it counts. Yet stories of the incompetence and dishonesty of immigration consultants persist exposing the flaws in the current self-regulating machinery.<sup>19</sup> It is telling that when offered the opportunity to limit to members of the legal profession the capacity to represent refugee claimants, the Supreme Court of Canada declined to do so, partially on the ground that it accepted the IRB's self description as an "informal" tribunal.<sup>20</sup> Yet the Board has declined to develop procedures that reflect the realistic possibility that a claimant may be represented by an incompetent advisor. Further, even when the claimant has a reliable legal adviser there is a danger that the written narrative will not be expressed in the claimant's own words. Where a written narrative is expressed in terminology that is obviously foreign to the claimant, the decision-maker's suspicions of fabrication may again be aroused. Reliance on another's expertise can operate to diminish the authenticity of the story.<sup>21</sup>

Moreover, an advisor with experience will be aware that the written narrative serves a function in the ensuing oral hearing and may tailor its content to minimize the risks that it will be used in a manner that is contrary to the client's interests. Where, for example, a claimant is unable to express part of the story clearly or expresses it in a confused or confusing way, the counsel may advise that all reference to that part of the story should be omitted, on the ground that the decision maker may cite the confusion as a ground for

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<sup>19</sup> See "Lost in Migration" Toronto Star June 16, 2007. Online at <http://www.thestar.com/News/article/226065>. ("Three years after self-regulation, the lucrative immigration consulting industry has failed to purge itself of advisers who operate beyond the reach of the rules").

<sup>20</sup> See *Law Society of British Columbia v. Mangat* [2001] 3 SCR 113

<sup>21</sup> The point also applies to interpreters. In the above noted case of *Zhang*, (supra at note 5) one of the reasons why the Federal Court overruled the Board member's decision that identical PIF narratives indicated falsehood was that the interpreter in the case offered the plausible explanation that he had prepared the PIFs by asking the claimants the same questions

disbelief. Where for example a claimant is uncertain about the date of an occurrence it may be tactically effective to omit any reference to it rather than risk a negative general inference being drawn from this single failure to remember. The final form and content of the written narrative may reflect the tactical and strategic concerns of a claimant's advisor

Recognition that the written story may be influenced by the advisor's projections of how the decision-maker is likely to use it in the oral hearing leads me to the next stage of my argument: In the following section, I argue that recent developments have altered the nature of the refugee hearing, and that these have impaired significantly the claimant's ability to present his or her story by making the strategic choices more complex.

### **B. The Restructuring of the Refugee Hearing.**

As noted above, the Supreme Court of Canada's decision in *Singh* pivots on the recognition that written submissions are an insufficient and inadequate basis for the determination of refugee claims. However, the opinions in the case are none too clear about the specific reasons for preferring oral testimony to the written word. For example in the opinion of Wilson J one finds the following remarks:

In particular, I am of the view that where a serious issue of credibility is involved, fundamental justice requires that credibility be determined on the basis of an oral hearing. Appellate courts are well aware of the inherent weakness of written transcripts where questions of credibility are at stake and thus are extremely loath to review the findings of tribunals which have had the benefit of hearing the testimony of witnesses in person: see *Stein v. The Ship "Kathy K"*, [1976] 2 S.C.R. 802, at pp. 806-08 (*per* Ritchie J.) I find it difficult to conceive of a situation in which compliance with fundamental justice could be achieved by a tribunal making significant findings of credibility solely on the basis of written submissions.

Beetz J. on the other hand offered a broader reason that goes beyond the determination of credibility :

There are additional reasons why the appellants ought to have been given an oral hearing. They are mentioned in the following submission with which I agree:

The Appellants submit that although "fundamental justice" will not require an oral hearing in every case, where life or liberty may depend on findings of fact and credibility, and it may in these cases, the opportunity to make written submissions, even if coupled with an opportunity to reply in writing to allegations of fact and law against interest, would be insufficient.

In sum, both judges agree that oral evidence is in some way superior to written evidence when credibility is at issue. Beetz J goes further and adopts the view that oral evidence is superior whenever facts are being determined and goes out of his way to note that the requirement of the oral hearing is not tied to the opportunity to reply to the case against you. Neither judge suggests that the deficiencies of the written word are insurmountable. In fact, both imply that the oral hearing offers a necessary complement to the written evidence.

In a recent report evaluating the use of videoconferencing in refugee hearings,<sup>22</sup> Ronald Ellis has attempted to extrapolate upon the idea that factual decision-making requires the oral component by referring to the need for the decision-maker to adjudge the "demeanour" of the claimant:

"Demeanour" is the traditional catch-all label for the various non-verbal clues to credibility that a judge picks up - both consciously and unconsciously - through close observation of a witness during his or her testimony. Changing facial expression, the way the voice is used, the various aspects of the so-called body language the look in the eyes, and so on are all aspects of "demeanour". Many judges are confident that they can tell whether a witness is lying or not merely by observing his or her demeanour in the witness box. The overriding importance that the assessment of demeanour has traditionally been thought to play in the determination of credibility in our judicial justice system may be seen in the established legal principle that appeal courts should almost never question a trial judge's findings on credibility because only the trial judge has "seen" the witnesses.<sup>23</sup>

In essence, Ellis is expressing the view that the oral hearing presents claimants with the opportunity to offer evidence via a different medium on the material issues. The

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<sup>22</sup> "Videoconferencing in Refugee Hearings", available online at [http://www.irb-cisr.gc.ca/en/about/transparency/reviews/video/index\\_e.htm](http://www.irb-cisr.gc.ca/en/about/transparency/reviews/video/index_e.htm).

<sup>23</sup> Ibid at 34

evidence may be so weighty that it would be unfair to determine these issues without providing an opportunity to the claimant to submit it for consideration

*Pace* Ellis, there are good reasons not to infer from *Singh* that the sole reason for requiring an oral hearing is to allow the decision-maker to witness the demeanour of the claimant and to take it into account when deciding credibility. I shall identify three.

First, while it may be true that the Supreme Court Justices had demeanour in mind when they established the need for an oral hearing, the particular demands and idiosyncracies of the PIF were not considered by the Supreme Court when it decided *Singh*. The Refugee Protection Division of the IRB and its procedures were created in response to the decision in *Singh*. Most significantly, the Court did not consider the problematic instructions that I have analysed in the preceding sections nor the failure of the PIF to encourage claimants to credentialize themselves and to include contextual and subjective information and impression. These aspects of the PIF provide additional reasons for having an oral hearing. The need for the oral hearing has in fact transcended the reasons underpinning the Supreme Court's decision.

The dominant reason for considering the oral hearing to be an essential element in refugee determination is that it provides an opportunity for claimants to remedy most of the deficiencies to which I referred above. Claimants have an occasion to offer an adequate introduction to the evidence by referring to their testimonial skills; and the reliability of their sources of information. They have the opportunity to offer a thick description of their experiences rather than a thin account of events. They are likely to be more practiced in expressing themselves orally than in writing especially in relation to personal or emotional matters. Moreover, it allows claimants to tailor the manner of their presentation in accordance with their judgment of whether the Board member is understanding the story, to

respond to visual cues that are provided while the story is being told. In other words there are a host of reasons for requiring a hearing as a matter of fairness beyond its ability to supply evidence of demeanour.

There is a second important reason to move beyond the view that the oral hearing exists solely to permit the decision-maker to witness the demeanour of the claimant..

Academics have begun to voice the suspicion that demeanour is an inaccurate source of information on which little reliance should be placed, and growing numbers of decision-makers appear to be adopting their views. .

Much of the skepticism is based on the recognition that many of the communicative “clues” on which reliance was being placed are culturally based, and may have no application in the claimant’s place of origin. However, the critiques run deeper. For example Michael Kagan<sup>24</sup> distinguishes between “subjective” and “objective” approaches to credibility and relegates evidence of demeanour to the subjective category. Because subjective decisions are “highly personal to the decision-maker, dependent on personal judgement, perceptions and disposition, and often lacking an articulated logic.”<sup>25</sup>, they can undermine “confidence in the system”<sup>26</sup>. Kagan attributes large disparities in rates of granting asylum to the fact that “emotional impressions” and “gut feelings”<sup>27</sup> (374-5) are allowed to play a significant role in decision making

Allowing a central part of refugee status determination to be essentially subjective generates serious doubts about the fairness and effectiveness of the adjudication system. Applying a common approach to credibility assessment, which so often determines the outcome of refugee cases, would bolster confidence in an RSD system.<sup>28</sup>

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<sup>24</sup> See Michael Kagan, “Is Truth in the Eye of the Beholder: mObjective Credibility Assessment in Refugee Status determination” (2003) 17 Georgetown Immigration Law Journal 367

<sup>25</sup> Ibid at 374

<sup>26</sup> Ibid (same page)

<sup>27</sup> Ibid 374-5

<sup>28</sup> 375

Kagan also points out that the UNHCR, in updating its *Handbook on the Determination of Refugee Status*, has moved away from propounding a subjective approach to endorsing an objective approach, and proscribing decision-making on the basis of the “interviewer’s intuitive or gut feeling”.<sup>29</sup>(378)

In its publication, *Assessment of Credibility in Claims for Refugee Protection*,<sup>30</sup> the IRB has noted the problematic nature of inferences drawn from demeanour, but , following comments in Federal Court opinions, suggests that they can be objective in nature:

[R]elying on demeanour to find a claimant not credible must be approached with a great deal of caution. The Federal Court has recognized that every judge's assessment of credibility is influenced by a witness's demeanour. The Court cautioned that, although the reasons for reaching a conclusion on this issue may be partly subjective, they must also be founded on objective considerations. In assessing demeanour, the decision-maker ought not to form impressions based on the physical appearance or political profile of a witness, but on objective considerations that flow from the witness's testimony, such as the witness's frankness and spontaneity, whether the witness is hesitant or reticent in providing information, and the witness's attitude and comportment (behaviour) before the tribunal. Moreover, there must be a rational connection between the claimant's demeanour and the conclusions drawn from it. Individual personality traits and cultural background should be taken into account as these could cause the witness to leave a misleading impression.

The demeanour of a witness is not an infallible guide as to whether the truth is being told, nor is it determinative of credibility. It would be a rare case where demeanour alone would be sufficiently material to the claim to undermine the entire testimony in support of a claim. Generally, demeanour is one of several indicators of a lack of credibility. In general, the courts have attempted to diminish the role of demeanour in the final assessment of credibility.<sup>31</sup>

However, the inferences drawn from the so-called “objective” factors to which reference are made – such as spontaneity and comportment before the tribunal – cannot

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<sup>29</sup> 378

<sup>30</sup> *Supra* at note xx

<sup>31</sup> At p. x

evade the “personal judgement, perceptions and dispositions” which Kagan finds problematic. Moreover, as long as the courts use the standard of patent unreasonableness as the proper standard for judicial review<sup>32</sup>, it is unlikely that it will curtail the exercise of such judgement in giving weight to the individual’s comportment.

Ronald Ellis has also noted the limitations of reliance on subjective factors. While he himself concludes, “[I]n a refugee hearing the assessment of credibility, which is at the heart of refugee claim determinations, depends to a large extent, when all is said and done on the Board member’s assessment of the claimant’s *demeanour*.”, he notes that skepticism is growing:

Of course modern judges are now far less confident about the reliability of their “read” of a witness’ demeanor (sic) as the basis for the judge’s credibility call. Indeed empirical studies of the judging function have recently suggested that it is the adjudicators who are most confident of their ability to judge credibility based on a witness’s demeanor (sic) who are least likely to get the credibility call right.<sup>33</sup>

Ellis also quotes a Board Member who offers the unreliability of demeanor evidence as a reason for endorsing video-conferencing.

I think that hearings by video-conferencing may to a degree help the Board move away from troublesome ‘demeanour’ cases ... as a claimant’s demeanor in delivering testimony is slightly more remote in doing hearings by video-conferencing, forcing the Board to focus on examining the substance of testimony, where it properly should [be] in my opinion<sup>34</sup>

The skepticism revealed in this latter quote raises a serious issue. If demeanor evidence is unreliable, and the oral hearing is made available only to obtain evidence of demeanor then why provide a hearing? A significant downside of basing the need for an oral hearing on the opportunity to adjudge the claimant’s demeanor, is that if this latter

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<sup>32</sup> The Federal Court expressed an unwillingness to overturn the credibility determinations of IRB panels unless they are “patently unreasonable”.

<sup>33</sup> At 34

<sup>34</sup> At 37

factor is given little or no weight, then the need for an oral hearing decreases. The view provides strong ammunition for those who wish to dispense totally with the oral hearing, and to allow even more weight to be placed on the written narrative.

Alternatively, suspicions about the reliability of demeanour evidence encourage decision-makers to reconceive and reconfigure the hearing in ways that may increase the difficulties and pressures on the claimant. Where the commitment to having oral hearings endures but only objective indicia of credibility are considered reliable, the hearing will inevitably develop into an occasion for finding more objectively grounded reasons for either a positive or negative determination on credibility. The archetypally objective (logical) criterion for credibility has been consistency. A claimant who is able to stick to the story he has provided will be regarded as more credible than the one who provides inconsistent version. So, where the Board Member is uninterested in the claimant's demeanour, the hearing may be conducted as an interrogation to discover the capacity of the claimant to remain consistent with the original written narrative. In effect, the claimant is tested on his ability to remain constant.

Since vagueness and omissions are also widely regarded as objective signs of untrustworthiness,<sup>35</sup> the hearing can develop into an occasion for the claimant to explain the inadequacies of the PIF, or a challenge to the claimant to explain why there are omissions or vagueness in the written narrative.

Where the hearing is conceived as an opportunity for claimants to show their constancy or to offer adequate explanations for weaknesses in the written evidence it will be conducted on the decision-maker's terms and claimants will be placed in a defensive stance. By having to respond to the Board's ideas of how the claim should be tested rather than

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<sup>35</sup> See Kagan

being offered the opportunity to introduce themselves and supplement their narrative, claimants are denied the chance to present the whole story and to present themselves in the best light. Where the written narrative takes the form of a detached incident report, the questions are not likely to take a contextual turn. The oral hearing is unlikely to introduce “thicker” issues and instead is likely to focus on the adequacy of the thin account of events. In sum, the hearing will become a forum to discover how committed the claimant is to the version of the narrative in the PIF, rather than an occasion where that story can be supplemented.

These developments are not merely hypothetical. Recent innovations in Board procedures suggest that they are already quite well entrenched. The first innovation is that of structuring the hearing by requiring that it begin with claimants responding to questions from the Refugee Hearing Officer, rather than being offered the opportunity to introduce the claim orally. This process, known as “Reverse Order Questioning” has recently been challenged in the Courts. While a challenge was successful in the Federal Court, the decision was overturned in the Federal Court of Appeal.<sup>36</sup>

The view that reverse order questioning is a fair mode of proceeding gains leverage from two factors. First, for those who continue to accept that the claimant’s demeanour is a reliable source of evidence, the process of reverse order questioning may be a welcome innovation: How the claimant behaves in response to sometimes aggressive questioning may be a useful gauge of his or her credibility. However, for those who do not regard such evidence as reliable, reverse order questioning will also provide a fertile source of evidence. The claimant has declared in the PIF that the information provided is “complete, true and

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<sup>36</sup> *Thamotharem v. Canada (Minister of Citizenship & Immigration)* (2007) FCA 198

correct”. Reverse order questioning can be used to challenge that declaration, to expose incompleteness, falsity and lack of clarity .

However, when assessing this innovation it is vital to keep in mind that the Supreme Court imposed the requirement of an oral hearing for reasons of fairness rather than reasons of accuracy. The hearing exists for the benefit of the claimant – to ensure that he or she has a full opportunity to express the core elements of the claim. It does *not* exist for the benefit of the decision-maker to ensure that he or she has access to more evidence that will allow a better decision. A procedure that does not permit claimants to give oral evidence until after they are questioned about an inevitably partial version of the story provided in writing gives insufficient weight to the difficulties that I have identified. If the aims of the hearing are defined to include the factors I have considered above, the process of reverse order questioning will impede them by preventing the claimant from introducing his or her testimonial skills, and from supplementing the necessarily incomplete written narrative with a personal account of his or her experiences. One serious consequence of the restructured hearing is that it amplifies and augments the strategic and tactical hurdles for claimants who are nervous about their ability to survive the scrutiny or to provide the so-called objective indicia of credibility. Moreover, the process of reverse order questioning –eliciting information by questioning rather than by offering a space to present – fails to respect the finding by Porter *et al.*, cited earlier, that “malingerers exaggerated the severity of the trauma when asked direct questions about the event but were unable to reflect this extreme distress in the stories themselves”. It would appear that offering an opportunity to tell a full version of a story is a more efficacious way of discovering truth about traumatic occurrences.

The IRB has taken some steps to temper the impact of this innovation. The guideline that introduced reverse order questioning as the standard mode of proceeding recognized that it should not be used in exceptional circumstances:

The member may vary the order of questioning in exceptional circumstances. For example, a severely disturbed claimant or a very young child might feel too intimidated by an unfamiliar examiner to be able to understand and properly answer questions. In such circumstances, the member could decide that it would be better for counsel for the claimant to start the questioning. A party who believes that exceptional circumstances exist must make an application to change the order of questioning before the hearing.<sup>37</sup>

Moreover the IRB has introduced a new more general guideline, Guideline 8 on procedures with respect to vulnerable claimants appearing before the Board. The guideline recognizes the Board's discretion to tailor the hearing to accommodate the vulnerable claimant's needs:

The Division has a broad discretion to tailor procedures to meet the particular needs of a vulnerable person, and, where appropriate and permitted by law, the Division may accommodate a person's vulnerability by various means, including:

- a. allowing the vulnerable person to provide evidence by videoconference or other means;
- b. allowing a support person to participate in a hearing;
- c. creating a more informal setting for a hearing;
- d. varying the order of questioning;
- e. excluding non-parties from the hearing room;
- f. providing a panel and interpreter of a particular gender;
- g. explaining IRB processes to the vulnerable person;
- h. allowing any other procedural accommodation that may be reasonable in the circumstances

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<sup>37</sup> Guideline concerning preparation and conduct of a hearing in the Refugee Protection Division available online at [http://www.cisr-irb.gc.ca/en/references/policy/guidelines/preparation\\_e.htm](http://www.cisr-irb.gc.ca/en/references/policy/guidelines/preparation_e.htm).

However, the guideline is intended to apply in only a very limited range of cases. As is explained in Guideline 8<sup>38</sup>

Persons who appear before the IRB frequently find the process difficult for various reasons, including language and cultural barriers and because they may have suffered traumatic experiences which resulted in some degree of vulnerability. IRB proceedings have been designed to recognize the very nature of the IRB's mandate, which inherently involves persons who may have some vulnerabilities. In all cases, the IRB takes steps to ensure the fairness of the proceedings. This Guideline addresses difficulties which go beyond those that are common to most persons appearing before the IRB. It is intended to apply to individuals who face particular difficulty and who require special consideration in the procedural handling of their cases. It applies to the more severe cases of vulnerability.

In essence, a two tier system is introduced. For those who meet the test of extreme vulnerability, fairness is thought to require a personalized tailoring of procedures. All others, no matter how close to the extreme they may be, face the possibility of robust and aggressive scrutiny by decision-makers searching for objective indicia by which to determine the issue of credibility. .

The second innovation in Board procedures is the hearing by videoconference, where the claimant and the Board member are located in different parts of the country and communicate through microphone and television screen. This mode of hearing claims has received significant critique. In his evaluation of this strategy, Ronald Ellis has recommended that it be studied further before a final commitment to its use be made primarily on the ground that it is unclear how far the strategy interferes with the assessment of demeanour. The Management of the IRB has rejected this recommendation.<sup>39</sup> Ellis' recommendation is based primarily on the incompleteness of scientific analysis of the impact of replacing the

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<sup>38</sup> Guideline on Procedures with Respect to Vulnerable Persons Appearing Before the Immigration and Refugee Board of Canada, available online at [http://www.cisr-irb.gc.ca/en/references/policy/guidelines/vulnerable\\_e.htm](http://www.cisr-irb.gc.ca/en/references/policy/guidelines/vulnerable_e.htm).

<sup>39</sup> IRB response to the Report on Videoconferencing in Refugee Hearings available online at [http://www.cisr-irb.gc.ca/en/about/transparency/reviews/video/response\\_e.htm](http://www.cisr-irb.gc.ca/en/about/transparency/reviews/video/response_e.htm)

face-to face encounter with the electronic image The experts whom Ellis consulted suggest that the studies that have been completed indicate major problems. For example, Dr.

Martine Lagacé noted:

In the case of studies assessing interviews where sensitive information has to be delivered, results are clearer: participants are more comfortable in a face-to face type of communication when delivering **sensitive information**... Moreover when the communication session involves **emotionally charged information**, studies point to the face-to-face communication as the more efficient interaction in comparison with mediated-communication. **These results can partly be explained by the fact that highly emotional situations need to be assessed through verbal and non-verbal cues (especially eye contact). Immediate feedback and natural language.** <sup>40</sup>(31)

Doctor Lagacé's analysis assumes that the hearing provides the opportunity to evince sensitive evidence and is consistent with the analysis I offered earlier Where one's story is permeated by personal experiences and particularly by feelings of shame, the intervention of technology to mediate the relationship between claimant and Board Member will render the process less comfortable and less efficacious.

Mark Federman, another expert consulted by Ellis, has noted further problems suggesting that there may be an acclimatization to the technology on the part of board members through repeated exposure which "would create a *de facto* experiential imbalance between adjudicator and applicant that could change the outcome of a hearing compared to a face to face encounter."<sup>41</sup> Federman also quotes the opinion of an immigration lawyer as a valid expression of concern that is corroborated by empirical results

I begin to wonder if the video hearings somehow distance members and RPOs [Refugee Protection Officers] from the humanity/personhood of the claimants....and lessen the inhibitions against cruelty or callousness, thereby precluding the kind of empathy, which might in fact be a component of a positive determination <sup>42</sup>

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<sup>40</sup> Cited in Ellis at p.31

<sup>41</sup> Mark Federman, "On the Media Effects of Immigration and Refugee Board Hearings via Video Conference" (2006) *Journal of Refugee Studies* Vol 19 433 at 446

<sup>42</sup> Id at 448

## Conclusion

These innovations, when considered alongside the instructions found in the PIF suggest that the Immigration and Refugee Board has lost sight of the ideal that the proper way to determine refugee claims is to afford a full opportunity to claimants to tell their story. The interrogatory model that it has developed imposes strictures that deny the status of author to claimants. Instead, they are tested on their ability to “reproduce the facts”<sup>43</sup> While the PIF asks for a narrative, it is in truth demanding a detached and skeletal incident report. While the hearing promises an opportunity to engage personally with a listener it provides an inquisition with a sometimes unseen and unknown interrogator. The problem is not that refugee claimants have no stories to tell. Instead, it may be that we have lost the institutional will to listen.

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<sup>43</sup>The phrase is found in the IRB publication [\*Assessment of Credibility in Claims for Refugee Protection\*](#) quoted above.