Spirited away: Asylum law and the institutional violence of legal discourse

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Finding law

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 — one or the other — 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 and a dark blue hat with a badge sitting at a desk in the centre of a large room, only a metal detector for furniture and his security cameras for company. 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 a recent asylum file, 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 in hand. Confronting that first case in the little grey room they put me in was a thoroughly bemusing experience. For starters the file itself looked like nothing I had ever seen during the course of my law degrees. A great big blue folder (IMM: 2850-5) with a massive jumble of papers in

it — six hundred pages probably, all told — bound together into various smaller bundles and arranged in no particular order that I could determine at the time at any rate. This was the law, 'real' law; I felt utterly unprepared for it. And 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. Seemed like as good a place to start as any.

The brown folder had maybe twenty pages in it, at most, and on these pages were two identical copies of Justice Simon Noël's judgment in the case of *Jesurasa v The Minister of Citizenship and Immigration*, an application for judicial review decided only a week or so previously and, I may as well add now, not a successful one. On page 1, at paragraph 3, it says, 'The application for judicial review is dismissed.' Case closed. The end. At last, I thought, a bit of familiar territory. In law we invariably start with the punch line.

Facts or function? The violence of process

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. 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 early March. From blue folder to brown, Noël J's words represent the culmination of a tremendous process of distillation. 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 (Manderson 2006: 98).

Justice Noël is alcoholic too. Six hundred pages of transcriptions, memorandums, emails, and newspaper clippings: all this and more

reduced down to 1,106 words; if you include the title.[2] And only 212 were deemed necessary 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. 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.

That's it. Together with a swift rundown of the reasoning in the first instance decision and a few case names dropped in for rhetorical effect, these 'facts' are all that is left of the big blue folder: the essence of the matter; ethanol; the *spirit* of the law. In contrast to the full-bodied richness of the blue folder, with all the subtle nuances of a wine and the oaky tones of a far broader context, the brown folder is rather more like the potent sharpness of a vodka, inducing a choking wince and that giddy rush. We like to oppose the law's letter to its spirit, but in

Noël J's 'facts' they are one in the same: the culmination of the law's long process of distillation. Over the course of the next two weeks or so that it took me to read and note the rest of the file, it was precisely the taste, the subtlety of flavour of this 'Applicant's' story that I began gradually to develop a sense of.

I have the impression that far too often in law we forget that 'legal reasoning' is not the only site of judgment. Students learn to read case summaries and headnotes and fact patterns and problem questions as if that were just the way legal matters entered the world. No doubt they are dimly aware that some person, possibly even some people, actually wrote them; no doubt practitioners are even savvier still. But there can be little doubt that this sort of persistent and systematic disavowal of authorship, judgment and context in the construction of the so-called 'facts' has an impact in the end; do anything for long enough after all and you are likely to start to believe in it. Peter Goodrich, introducing his rhetorical analysis of the House of Lords' reasoning in *Bromley London Borough Council v Greater London Council*, writes:

> I shall observe briefly that the language of [the] introduction or 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 (Goodrich 1984: 192-3).

'Facts' are not impartial. Right. They are motivated and they are political. But it is not merely a matter of reading subjectivity back into the supposedly objective, as Goodrich seems to suggest here.[3] Because the distillation that I was describing above is gradual, it is systematic and it employs multiple actors and multiple techniques. And the 'facts', the *spirit* of the law, that we are left with in the end are perhaps nothing but the function of its mechanics. The politics of legal language, then, are not just personally but also (if not especially) systemically determined. Distillation is not a moment, it is a *process*. How did Noël J come to

use these words in the first place? With what politics did they *already* come? Of what institutional forces, both conscious and unconscious, are they the function? What is excluded? How? And when? In law, these are questions which are rarely asked.[4] But they are crucial because the legal process is never innocent: every word nests violence after violence after violence and each one has real world implications. This is nothing less than what Jacques Derrida says about *all* language when he writes:

> But there is *always* something political 'in the very *project* of attempting to fix the contexts of utterances.' This is inevitable; one cannot do anything, least of all speak, without determining (in a manner that is not only theoretical, but practical and performative) a context. Such experience is *always* political because it implies, insofar as it involves determination, a certain non-'natural' relationship with others ... Once this generality and this *a priori structure* have been recognized, the question can be raised, *not whether a politics is implied (it always is), but which politics is implied in such a practice of contextualization* ... (Derrida 1988: 136 my emphasis).

Here Derrida explicitly goes beyond Goodrich's claim above because he universalises it. Language *always* does this. Every single word is a political moment, but each one comes to us always already systematically mediated, structurally violent. Which politics are implied and when? What do we lose with each iteration, each layer, each contextual determination? The deconstructive move then is towards an 'incessant re-contextualisation', even on to the entire 'real-history-of-the-world' (Derrida 1988: 136): *il n y a pas de hors texte*. But always in recognition of the fact that 'the reconstitution of a context can never be perfect and irreproachable even though it is a regulative ideal in the ethics of reading, of interpretation, or of discussion' (Derrida 1988: 131). Though I would not wish to suggest that the following reading will be deconstructive, perhaps it is inspired by the same ethics.

I should add that my contention is not that Noël J's judgment is, in any strong sense at least, unjust; I am certainly not claiming that there is anything 'illegal' about it, whatever that problematic word might mean. In fact, my claim is that, far from irregular, Noël J's account really does tell us something about the *spirit* of the law (in a sense closer to the

way in which we ordinarily understand that word): it is virtually an exemplification of the way in which law always works. If it is unusual at all then it is because it demonstrates the problems of law and language so dramatically, in so stark a manner. Law and legal interpretation we know take place in a field of pain and death (Cover 1986: 1601). Nowhere is this more true than in asylum law. Nowhere could be a better site for a demonstration of the systematic, institutional, and above all discursive violence that actually *is* law.

Asylum (as) law: from exception to exemplification

We often think of asylum as exceptional. In politics and the media all over the (English speaking) world we have grown accustomed to a discourse and a context that speaks of a so-called 'refugee crisis'[5] and so, in the belief that we are being inundated with 'illegal immigrants', 'queue jumpers', 'bogus' and 'phoney' applicants (Pickering 2001: 172), our governments attempt to batten down the hatches.[6] Legislation ticks over at quite a remarkable pace.[7] As does the case load. In 2002, for instance, 'in Canada, most Board Members listen to two claimants' stories each day of the week, for three consecutive weeks, and then have a week without hearings to write their decisions' (Rousseau et al 2002: 49). And we set up detention centres in which the rights we would ordinarily accord to our own citizens are habitually infringed.[8] Conversely, in the critical literature the starting point is often that asylum seekers are unusually needy legal subjects, especially vulnerable to the possibility of injustice. Many will have experienced severe psychological, physical and sexual violence and have endured horrifically destabilised family and social lives for considerable periods (Rousseau et al 2002: 48). Far away from their natural support networks, they are forced to communicate in a language not their own, uniquely reliant on the goodwill, faithfulness, care, and ability of lawyers, translators and other officials not only to communicate their stories but also to help them come to terms with and situate themselves within a new culture and a foreign land.

Politically and legally speaking, asylum seekers live on the fringe then. But it is precisely this fact that makes the texts of asylum law such exemplary material for analysis. Practical considerations mean that there is frequently very little, if anything at all, by way of conventional legal 'evidence' — either documentary or testimonial. Resources are virtually limited to: (a transcription of) the hearing itself, the asylum seeker's Personal Information Form (frequently a translation), newspaper articles, 'country reports' and, depending on the circumstances, a small number of others: for instance psychological evaluation reports. In short, a handful of stories all competing to be told. Political considerations put the process under considerable financial and temporal strain too, so that there are only ever relatively few actors involved in any one case; files are kept relatively brief. All of which means that it is considerably easier to observe particular words, ideas or reasoning become appropriated, tamed or repressed at each step of the way than in other legal contexts where many of the same moves take place to just the same extent. In asylum especially it is almost entirely on the field of language that the law's battles are fought. It is not that I reject a perspective that would situate asylum on the fringe, therefore, but rather that, concerned with textual and linguistic matters as I am, I come at asylum from a different angle, a different context, looking through a different lens.

Asylum, rather than an exception to the norm would then be its exemplification — law distilled, the *spirit* of law in yet another sense — and the reading that will shortly follow would have implications far beyond this one case. Although I have certain practical claims about this case in particular and certain theoretical claims about violence and systematicity in law more generally, nevertheless I hope to be able to do something more. My intentions are explicitly aesthetic. Think back to your first impressions of the 'facts' I quoted above. Read them again if you like. By beginning at the end and working backwards I want to enable you actually to *feel* the violence of language and process, to *taste* first the clinical efficiency of law's project of distillation and then the justice in a (necessarily partial) opening out to context.

Reading backwards

I said a moment ago that I do not view the reading that follows as deconstructive, though I will be employing various terminologies associated with that practice nevertheless. Perhaps a better word would be archeological.[9] I begin with the uppermost layer, Noël J's 'facts' from the little brown folder, and dig gradually deeper down through the big blue one, applying a similar logic at each level. I am looking for rhetorical and formal strategies of persuasion, instances of the semantic appropriation or neutralisation of words and concepts, and most especially (and not necessarily unrelatedly) symptoms of the legal system and process itself: I take a word or a phrase and attempt to show how it is part of a nested institutional structure.

I will not be referencing every document in the file, however. Nor could I: this reading is necessarily political too, it is also violent — no doubt systematically so. And so I will mainly be basing my reading on the following strata: the 'Supplementary Respondent's Memorandum' submitted on 6 February 2006 just a few weeks before Noël J's decision, the text of presiding tribunal member Barbara Berger's first instance decision from April 2005, both the transcription and a tape recording (which was not actually in the blue file itself but which I arranged to get hold of from Ms Jesurasa's lawyer) of the crucial hearing itself which took place on 1 March 2005,[10] a Psychological Evaluation Report based on interviews conducted by Dr Sylvie Laurion over the course of a few hours' worth of meetings with Ms Jesurasa in February 2005 and finally a few pages from Ms Jesurasa's diaries from around the time she left Sri Lanka that were, quite revealingly, included in the blue folder but never officially translated and only ever mentioned once in passing.[11]

No doubt my reading is as partial as it is parasitic (Hillis Miller 1979), but I would hope that it is both sufficiently sound descriptively, and sufficiently compelling aesthetically to convey the point I wish to make. If the 'truth' is a moment that perhaps never was, then language — systematic and violent — is the process by which our imitations of it are constructed. In law, especially, this process matters.

Losing law — finding context

Psychological distancing

FACTS

Written in capitals and underlined, this is going to be a pronouncement. To an extent, of course, this is 'merely' a matter of formal expediency, but then again one of legal discourse's great achievements has been systematically to repress inquiry into its own form (Schlag 1990: 1634). No matter how well Noël J might know in private, outside his legal office, that these 'facts' are thoroughly contingent and thoroughly mediated, nevertheless in his role as lawyer and judge the rhetorical form of his statements must effectively deny all knowledge of these insights. And what's more, this is *not just* some intellectual failing on his part. Rather, he has been 'rhetorically constructed this way by the very legal texts he reads and writes' (Schlag 1990: 1631). Like this for instance:

> The Applicant is a 23 year-old Sri Lankan Tamil.

'Applicant', with a capital 'A'. Like a name. The barest recognition that this is a person: a rhetorical distancing, an objectification and an abstraction that anaesthetises the reader from the violence of the decision that it prepares us for. As 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' (Goodrich 1984: 188).

Temporal distancing

And apparently this 'Applicant' (for there have been many others, of course — Applicant is a family name) is a '23 year-old Sri Lankan Tamil'. Only 'The Applicant' is not 23 at all, 'The Applicant' is 24 and had been for some months in fact. And what's more, Noël J was explicitly told as much in the 'Supplementary Respondent's Memorandum' which he received not three weeks before he rendered this decision.[12]

This is not a decision being made in the present tense, then, and certainly not with an eye to the future. Asylum law, ostensibly for reasons of practical necessity (time, money and such), has been condemned to the administrative stream and so this is just an application for judicial review rather than fully fledged appeal: asylum seekers, we said before, live on the fringe. The question therefore is not whether this person ought to be sent home *right now*, on 24 February 2006, the date of the judicial review decision, or even at some point in the not-necessarily near future — it can take months and months for an unsuccessful applicant eventually to be deported — but only whether the first instance decision to do so was correct 'in law'.

And so on the back of this seemingly inconsequential 'error' rests a whole mindset: the difference between 23 and 24 is the difference between then and now, review and appeal, applicant and appellant. Not so much an 'error', then, as an orientation. From December 2005 to February 2006 there were reportedly more than six hundred deaths in the northern and eastern provinces of Sri Lanka alone.[13] We can now say in retrospect that when Noël J wrote this passage Sri Lanka's descent into the throes of civil war had very definitely already begun. But that's not Noël J's problem. For him 'The Applicant' will always have been a distant 23.

Sanitising violence: the passive voice

Next Noël J writes:

> Her mother died in June 1987 and her father in February 1988 during military operation in her village.

So finally we learn 'The Applicant's' gender, albeit indirectly. 'Her' parents, then, both nameless, 'died' — passively — 'during military operation in her village'. But there is not, necessarily at least, any correlation between the two events and nor is there any allusion as to the nature or duration of the so-called 'military operation', in which words we hear inflected legitimacy, even rationality. This is certainly a long way from the statement of facts in the Supplementary Respondent's

Memorandum where she and her brother were:

> *Victims* of the armed conflict which lasted from 1983 to the ceasefire in 2001 between the army and the LTTE. (My emphasis.)

So 'victims' now of prolonged hostilities that would have 'lasted' most of her childhood. Even in Berger's first instance decision, which is resoundingly cautious, steeped in restraint, the deaths are attributed to a hostile cause:

> She alleges that her mother was *killed* in June 1987 and her father in February 1988, during army operations in the area. (My emphasis.)

Though this version certainly smacks of Noël J's account (the wording is remarkably similar), Noël J's is without doubt the sparser of the two. Despite positing the tentative 'alleges', Berger at least conveys the violent nature of the deaths with the word 'killed'. And yet, in neither version do we get a sense of the sustained brutality that is conveyed in Dr Sylvie Laurion's Psychological Evaluation Report:

> A couple of months before her sixth birthday, her mother was killed in a shelling attack. Within six months of this event, her father was shot dead. Ms Jesurasa witnessed both killings.

This, *this*, is what, by Noël J's judgment, has been distilled into the simple passivity — 'died'.

Neutralising 'harassment'

The next section of Noël J's 'facts' reads as follow:

> 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. (My emphasis.)

At first blush Noël J's words: 'harassed', 'questioned', 'humiliated', even 'slapped' do not sound like particularly heinous offences. Not very nice, certainly, but we have to draw the line somewhere: the political climate being as it presently is we cannot let in every stranger that arrives on our shores and there are surely people out there more worthy of our hospitality. The word 'Applicant' implies a line up, after all: it is by definition multiple. Perhaps. At least that is what is implied by Noël J's language. But dig a little deeper and we find that buried in the word 'harassment' is a troubling past.

The word next makes an appearance as follows, in the Supplementary Respondent's Memorandum:

> *Although* the Applicant testified that she was *harassed* in the past by the two groups, the army and LTTE, *nothing ever happened to her*. (My emphasis.)

'Harassment', then, is not something that 'happens' to you. Or to put it another way, it is *precisely* what happens to you *when* 'nothing happens', because in the conspicuous absence of an explanatory adjective it is (virtually) empty. Like the word 'promise' for instance, to take a prototypically legal word, it requires something more (*What* did you promise? *How* were you harassed?). On its own here, then, that is exactly how we read it: as communicating (virtually) nothing, requiring something more. It is a non-event; almost certainly non-violent and very probably altogether non-physical, or at the very least non-intrusive. And presumably non-sexual too. The word 'sexual' so commonly precedes 'harassment' in English that here we read its very absence. We can infer, without the need for anyone explicitly to say as much that this is not a sex issue.

And this kind of barren usage of the word crops up again and again throughout the file: each time a linguistic deference to a somehow more authentic and therefore more authoritative past, a deferral that conceals a crucial difference and constitutes an important decision each time. *Différance*, in Derrida's terminology (Derrida 1985). Once again, Barbara Berger's first instance decision is a little more revealing:

> Even if I believed that the soldiers *harassed* her at times with indecent propositions, she was never persecuted or even mistreated by them. (My emphasis.)

In this iteration the redundancy of 'harassment' is just as palpable as before, only more explicitly so. Here, even as the word is finally given a little positive content in the form of 'indecent propositions', 'persecution' (the word that crucially must be satisfied in the UN convention's refugee definition as incorporated into Canadian law at section 96 of the *Immigration and Refugee Protection Act 2002*) and even that lowly misdemeanour 'mistreatment' are *explicitly* excluded from its contents. 'Harassment' is *so* far away from being persecution here, then, that it doesn't even constitute mistreatment.

(Mis-) transcription

And so we finally arrive at the hearing itself. And approximately half way into proceedings, the following exchange appears in the transcript:

> Presiding Member to Claimant
>
> **Q** Okay. No [sic], I am going back to your problems. You told me that between year 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 ...
>
> Presiding Member to Interpreter
>
> **Q** I didn't understand what happened to some of my friends?
>
> Counsel to Presiding Member
>
> — 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. (My emphasis.)

Now as you might have noticed, the word we've been tracing here, 'harassment', doesn't appear in this section of text at all. That is precisely the problem.

I managed, after much to-ing and fro-ing and many a phone call, to get my hands on the audio-recording of the hearing from Ms Jesurasa's lawyer and if you listen to this part of the tape the 'interpreter' says, quite clearly actually, not 'they had successfully they arrested them' (whatever that means anyway) as in the transcript, but rather 'they had ... *sexually* they *harassed* them'. (My emphasis.) So as quickly as the harassment takes on a sexual nature it is lost forever from the written record by the merest transcription error, a sort of unauthorised translation, for only the likes of me to dredge up again. Law's errors efface themselves. Here we have an example of what Derrida might have called *mal d'archive* or, in English, archive fever (Derrida 1996). Inseparable from, or perhaps even the condition of the archive drive — the urge to record and to transcribe that we think is so important in law — is a death or a destruction drive. The very possibility of archiving simultaneously requires the possibility of error in doing so. As Derrida puts it: 'There would indeed be no archive desire without the radical finitude, without the possibility of a forgetfulness which does not limit itself to repression' (Derrida 1996: 19).

And the mal-archiving, the mutation, of 'sexually they harassed' into 'successfully they arrested', is not 'merely' a case of repression. This is not the sort of (barely subconscious) appropriation of a word like 'harassment' that we have already seen. This is an error, plain and simple and it invests the transcriber with a tremendous, even potentially decisive power. 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' (Derrida 1996: 2). The archive is not simply neutral as the law might wish us to believe, the expository of some sort of authentic truth. It has political implications and is very much a tool for change. In this case, that change may even have been determinative. But there is more.

(Mis-) translation

We have been looking at the violence of iterative *différance* and archive fever. I turn now to the violence of translation. Eric Prenowitz writes regarding his translation of Derrida's *Archive Fever: A Freudian Impression*: 'Whatever it may change, a translation maintains above all its own fiction, it maintains the true fiction that translation is possible' (Derrida 1996: 196).

And if this is true theoretically, it is even more palpable in practice. Listening to the recording of the hearing again with a Tamil friend, the word that the interpreter translates as 'sexually harassed', which we have just seen erased from the transcript, is (in latin characters rather than the Tamil script) *kedukka*. It comes from *kedu* meaning 'to destroy' or 'to spoil' (Lifco 2000: 237). So hardly the descriptively empty sort of 'harassment' we see by Noël J's account then. Especially not when you read it next to the word that he failed to 'interpret' altogether: *katpazhikka*. This word comes from the Tamil *katpu*, meaning 'conjugal chastity of wife' (Lifco 2000: 192), and *azhi*, meaning 'to decay, perish or destroy' (Lifco 2000: 53). It means rape. Not harassment, not even sexual harassment, but decisively, horribly, rape. And yet, we would never know it. Translation effaces its own impossibility, maintains its own fiction.

The upshot of all this, then, is that the word 'harassment', in its countless iterations right up to the passage we have been reading from Noël J's judicial review decision, is always characterised as a minor problem: less than persecution and even mistreatment. But haunting each of these iterations is a ghost. What Ms Jesurasa fears is not this empty 'harassment', this ghost tells us, but rape at the hands of the army or the LTTE, like her less-fortunate friends. Dr Sylvie Laurion writes in her psychological evaluation report:

> 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.

If these men did come round to her house and did 'harass', 'insult', 'threaten' and 'slap' her, a young female orphan, what should we imagine she was thinking? What should we imagine the events that are emptied into this convenient receptacle of a word 'harassment' mean to her?

> The Davidson Trauma Scale reveals frequent and disturbing posttraumatic symptoms such as repetitive intrusive thoughts and nightmares accompanied by insomnia, flashbacks as well as physical manifestations of stress such as increased heart rate, trembling and sweating.

What images haunt these nightmares? What does this young woman see when she lies awake at night thinking of Sri Lanka, trembling and sweating? Just the occasional irritation of a few overly zealous men who she wishes would go away so she could get on with her homework? Or rather something inspired by one of her friends' first hand accounts of what it is like to be raped by a man with a gun? By more than one man with more than one gun? Of course we can never know. But layer by layer by layer, law's great project of distillation has systematically erased the possibility of any of this even being thought. That is the real point. By the time we get to the judicial review decision all this nuance, all this complexity, all this flavour, has simply gone and we are left with the now rather feeble 'harassment', potent in its very redundancy and unmistakably bitter to taste.

Spirited away

I am going to jump now to the end of the passage to locate my concluding words. They go to a point which I hope might have been implicit throughout this article but which we have yet to confront directly. Justice Noël completes his depiction of the 'facts' as follows:

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

The assumption here is that asylum seekers are somehow different from us. They may have aunts and handicapped brothers and friends and homes but they do not mind leaving all these things behind because, whether they have been 'persecuted' or not, they are in search of greener pastures and a better and richer life. The decision is made to leave; just like that. And then they arrive; just like that. How they made that decision and how hard it might have been; how they went about arranging the journey and how long and lonely it might have felt; none of these things are important, they do not make it into the 'facts'. Because what we lose in the distillation process — through all the rhetorical, semantic, formal and otherwise discursive devices we have seen at work here — is, most of all, the radically human element, the infinite difference between 'The Applicant' and Maliny. That is her name, Maliny Victoria Jesurasa. A person. Just like you and me.

The real force of this point was brought home to me for the first time when I came across the photocopied pages from Maliny's diary immersed in the depths of the big blue folder. They are vibrant, playful, sad and evocative. Their impact is immediate and aesthetic. That they seem to have been composed over exactly the period that Noël J is referring to in the passage above, moreover, is especially telling because the contrast between the stories these two documents tell could not possibly be greater. Unlike the utterly abstract and lifeless depiction in Noël J's account of the 'facts', these pages from Maliny's 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. 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. 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 symbolise that which the legal process is perhaps most especially incapable of capturing, that most ineffably human of qualities we sometimes like to call *spirit*.

Notes

1 My sincerest thanks to Desmond Manderson whose inspiration, encouragement and generous feedback made this article possible. Special thanks also to Karen Crawley for all her comments and support, even at short notice. And finally, to the Canada Research Chair for Law and Discourse for funding my trip to Melbourne back in June 2006 so that I could present the paper which eventually grew into this article at the Law and Literature Association of Australia's annual conference, much appreciation.

2 On reading this, one recent commentator pointed out that that seemed like awfully few words to be made to span over 10 pages and wondered if perhaps I had made some mistake. In fact, my figures are correct. Although the whole decision could easily have been made to fit onto one page, it was spread as thinly as possible — large margins, double spacing etc — presumably to give the impression of substantiality. Indeed, the two copies of Judicial Review Decision appear on thicker, obviously more expensive paper than any of the other documents. And on the top of the front page in

both cases there is an embossed gold coat of arms. No matter the quality of the decision itself, the reader is left in no doubt that these documents are sufficient in the eyes of the law. They reek of authority.

3 I should add that I don't doubt that Goodrich would agree with me here. My claim is merely that he is not making any claims about the systemic nature of the politics of language in this particular quotation.

4 And even though much good work has undoubtedly been done in the context of the 'law and literature' movement, there seems to me to have been a tendency to avoid confronting directly the systematicity which I want to emphasise here.

5 The Guardian reports on the 2006 anniversary of Guy Fawkes's failed attack on Parliament, 5 November, 'for the first time in British history, there are asylum seekers who could attack the country which gave them sanctuary'. How it knows this, I've no idea. Unsurprisingly perhaps, no source is given. Apparently, it is a good one though, as the report continues, '*Everyone* now condemns past governments for allowing London to become 'Londonistan', a centre for Islamist exiles': http://www.guardian.co.uk/commentisfree/story/0,,1939959,00.html

6 And in Canada, at least, it seems to be working. 'Over the past 15 years, Canada has received approximately 28,000 inland claims per year. In 2001 the IRB received 45,000 claims; in 2002, 39,000; in 2003, 29,000; in 2004, 26,000 (numbers rounded to nearest thousand). With the tightening of US security provisions since 11 September 2001, and the *Safe Third Country Agreement*, which came into effect in December 2004, the number of refugee claims has fallen steadily. It is expected that fewer than 20,000 claims will be made during 2005' (Showler 2006: 220).

7 In the UK, for instance, there was a major new piece of legislation purporting to overhaul, significantly amend or both, the British asylum every three years from 1993 to 2002 (Cohen 2003: 23). Only slightly behind schedule, in March 2006, the *Immigration, Asylum and Nationality Act 2006* received Royal Assent.

8 Amnesty International online quotes refugee, Ibrahim Ishreti, on the subject of detention centres in Australia, as saying, 'We came to a country we heard has human rights and freedom. We can't believe what's happening to us ... We haven't any human rights. We are just like animals. We do not have a normal life like a human. Our feeling is dead. Out thinking is dead.

We are very sad about everything. We can't smile': http://www.amnesty.ca/resource_centre/news/view.php?load=arcview&article=2567&c=Resource+Centre+News

9 And again, I do not intend this in the strict Foucaultian sense (Foucault 1969).

10 Interestingly enough, however, the transcription is dated 5 December 2005. Whether the tapes would have been transcribed if Ms Jesurasa had not appealed the first instance decision I do not know.

11 By Barbara Berger at the very beginning of the hearing as follows:

> 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
>
> **A** Diary
>
> — It was your diary. That's what I thought. Okay.

12 He could also quite easily have deduced it for himself from the countless times Ms Jesurasa's date of birth is written on her Personal Information Form.

13 http://english.people.com.cn/200606/05/eng20060605_271066.html 5 June 2006.

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