The Ten Commandments - Winning a Refugee Claim

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Firstly, I would like to give thanks and a shout out to my partner and long time best friend, Raj Sharma for co authoring and assisting me with this paper. Without his unparalleled typing speed and periodic insight this would not have been possible.

As former Refugee Protection Officers and now in private practice with a busy refugee practice, we know, more than most, that there's no such thing as a sure thing in refugee hearings. Let us repeat: Nothing can be taken for granted. There is a limited safety net for false negatives from the Refugee Protection Division; justice must be obtained at the first instance. The appeals process for your client is stressful, expensive, time consuming and inconsistent, to say the least. Refugee claimants have a right to be represented by counsel and that counsel is required to act with reasonable care, skill and knowledge. Based on our experience, the list below consists of our top ten commandments for winning a refugee claim and avoiding common mistakes. While it may not be biblical, it will hopefully be helpful.

By failing to prepare, you are preparing to fail - Benjamin Franklin

1. Preparation, or, in other words, <u>don't be lazy</u> is the first and most important commandment. Failing to prepare your clients is preparing to fail, and frankly, that's incompetence, which we will discuss below. You owe the same duty to a client with, shall we say, a thin retainer or a thin or dubious claim, to the client that has paid in full, up front and with a *prima facie* meritorious claim. In my opinion, for every hour a claimant is expected to testify, there should be at least two hours of preparation. I find it

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is very useful to have multiple preparation sessions to prepare a client. Even people who are telling the truth need to prepare. Do not justify inadequate preparation time by telling yourself that if they are telling the truth then it should not be too difficult for your client.

Don't be lazy! Don't watch the clock or the nonsense billable hour. Remember you've committed yourself to helping this individual and perhaps his/her family in securing protection against risk upon return. Look, either be all in or all out. There are no half-way measures in this particular aspect of immigration law.[2] Most refugee claims are won or lost before claimant and counsel step foot into the hearing room. Also, just because the Member questions first does not mean that you are relieved from questioning. You need to remain fully engaged throughout the hearing. Pay attention, take notes, listen to the Member and his or her concerns, be prepared to question further and fill in the gaps and always have the last word. In your questions you will have an excellent opportunity to address any inconsistencies that may have arisen in the previous testimony. Remember, it is not a leading question if you are just summarizing previous testimony for clarification.

> *[27] There is a reason competent counsel meets with and prepares witnesses for their testimony. This is especially the case where, as here, the process is new and in a foreign country. Where, as here, the relevant events occurred years before the hearing, it is only common sense that memory will not be as sharp on dates of those events if the witness has not had an opportunity to review those facts with counsel. Here, on the evidence of the applicants, there was no such opportunity. I add that it is no answer for counsel to assert that she was waiting to be "properly retained." Ms. Simon acted for these applicants in making their claim and if she was not prepared to do a competent job representing them because of a lack of a financial retainer, then she ought to have removed herself as counsel of record. I do not accept the respondent's submission that the result would necessarily have been the same in regards to the credibility finding had the solicitor done a competent job of representing these applicants.*[3]

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[2] See *El Kaiss v. MCI* 2011 FC 1234, Justice Near held that there was a miscarriage of justice because counsel did not assist in filling out his Personal Information Form, did not meet with him until two days before the hearing and failed to disclose to the RPD a document that was critical to the claim.

[3] *Kavihuha v Canada (Citizenship and Immigration)* 2015 FC 328.

2. Have an in-depth familiarity with the IRB's materials. These are the documents that the decision maker will be relying on. That means, obviously, the National Documentation Package (NDP) - and don't slavishly adhere to the most recent NDP either as there are good items that have been removed from the NDP (God knows why but I have my own conspiracy theories about this). Also, you must review, understand and apply the Chairperson Guidelines - specifically victims of sexual violence or vulnerable individuals[4]. Making an application under these Guidelines allows flexibility and accommodation to your client that may be absolutely critical in allowing them to fully, and without inhibition, present their claim. Some examples of these accommodations are questioning first, in-person hearings, and female Members/interpreters. An application under the Guidelines may allow for more reliance on objective evidence and lowered expectations in terms of accessing state protection.

   Another great and perhaps underutilized resource that we used even as a Refugee Protection Officers, more than a decade ago, was the Interpretation Binder (of the Convention Refugee) which is dated, but still a great resource. Update it yourself if you haven't already done so. It provides a fantastic framework of analysis and it's a quick reference guide if you need to turn to it in your submissions.

3. The Basis of Claim Form is the foundation for your client's claim. Make sure that you are involved; it cannot be delegated to your client or your assistant (it shouldn't have to be said). It certainly can't be left to the claimant to write his or her own narrative. In *El Kaiss v. MCI* 2011 FC 1234 Justice Near held that there was a miscarriage of justice because counsel did not assist in filling out the claimant's Personal Information Form[5].

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[4] *Raju v. MCI* 2013 FC 848 at paragraph 19 "...the Gender Guidelines, on which the Board purported to rely, make clear that victims of sexual violence do not have to go beyond the police to non-state agencies if they do not receive protection at the first instance..."

[5] Also counsel did not meet with the claimant before the hearing and failed to disclose to the RPD a document that was critical to the claim.

You should meet with the client, ask questions and canvass the issues that will arise during the hearing. If they haven't sought state protection, they must explain in the narrative why not. If they have, they must explain their interactions with the state authorities. If there are delays, returns, failure to claim elsewhere, or inconsistencies then these should be dealt with in the narrative. They cannot be left exclusively for the hearing as it may result in a material omission and an adverse inference. The narrative should, of course, display internal and external consistency. That means, if at all possible, the Port of Entry (POE) materials (the forms and the interview notes) should be reviewed prior to the preparation of the BOC narrative. If you have not received the POE notes and package then get them. You are entitled to them and it is the Minister's onus to provide them to you and the IRB. If issues arise due to the POE notes and eligibility forms then an amendment or addendum may well be warranted.

Remember, the BOC is the foundation for the claimant's entire immigration matter now and moving forward. It will follow them through their immigration history. If the claim is refused and your client has been found not credible this can be an immense obstacle when moving forward with subsequent appeals and applications. I cannot tell you how many humanitarian and compassionate decisions I have seen referencing a client's lack of credibility as noted by the RPD. Even at the Federal Court it is a powerful beginning when you point out that your client was found to be truthful and their allegations were accepted. Consequently, even if you are going to lose your refugee hearing (nobody wins them all) it is critical that, at least, you seek to preserve your client's credibility and thereby preserve his or her ability to fight another day.

4. Individualize your claim; you should eschew the cookie cutter approach. Ironically, the Board seems to welcome and prefer certain "profiles". Perhaps they have their own t's to be crossed and i's to be dotted. At the same time, the Board does not like to grant claims based on profile alone. Simply establishing that you are, for example, a Roma from Hungary or a female from Haiti (despite the fact that there is evidence of systemic discrimination, harassment and persecution based on these profiles) is not enough; you must be able to demonstrate the individual's experience(s). It must be something that the

Board can easily understand, but it can't be pro forma at the same time. The more cases look similar (your own or simply the claim type) the more suspicion and doubts are aroused. Approach each case on its own merits. In my view, the ideal claim will fit within certain accepted profiles and will have individualized and corroborated incidents to maximize the chances of success.

In the same vein, KYB, "Know Your Board". With experience comes knowledge of how different Members think about certain cases. Be flexible in your mindset and questioning depending on the Board Member that is before you. If you are a newcomer and do not have experience with the Board Members, sound out senior practitioners of your local bar to have some background going in. Also, your job is to advocate for your client. If you find a Board Member is relying on previous experiences or background knowledge gleaned from life experiences then challenge the Member on the conclusions they are drawing and the questions they are asking.

5. Be creative. Go beyond the NDP. For heaven's sake, don't restrict yourself to just the NDP; you must do your own research and prepare your own disclosure. This may well mean requesting medical evidence, police documents, a psychological assessment, and records from other individuals and institutions. Be creative. Your disclosure may well include statutory declarations from academics and peer-reviewed academic articles and remember if possible, to call these academics as witnesses. Don't be reluctant to do so! There appears to be no shortage of experts to discuss obscure but interesting topics from obscure countries. Universities are fertile grounds for such experts and in my experience these experts are all too eager to tell you everything they know about their niche field of expertise. Their respective spouses at dinner probably tire of hearing about the antics of a particular sub clan in the Afmadow District in the Lower Juba Region of Somalia.

   The criterion for calling expert evidence in administrative hearings is different and relaxed (or perhaps functionally non-existent). It's all a question of weight; in fact everything is about weight. Again, this is not criminal law! Don't restrict or fetter yourself by niggling concepts such as the rules of evidence because in the black hole of

administrative hearings those hallowed and well litigated rules do not seem to apply. This can often work against you when, for example, the Minister intervenes in the hearing as a Government Representative and a witness cannot be cross examined, but these flexible rules can equally work in your favour. You can tender just about anything in support of your claim.

The IRB dealt with the qualification of expert witnesses in Nguyen-Tran v. MCI (http://canlii.ca/t/243xz); qualifying a police officer who had no post-secondary education but had significant experience and "read" widely on gang structure and membership. Notably, he was not accepted as an expert in a recent court proceeding. "It is a long established principle of law that an expert witness is a person possessed of special knowledge acquired through study or experience, which entitles him to give an opinion on a topic of expertise which is likely outside the experience and knowledge of the decision-maker." - Member Miller in Nguyen-Tran.

As a final note on this topic, remember that psychological reports are important in immigration matters. The Supreme Court in *Kanthasamy* has settled the outstanding questions or concerns that some jurists had.[6] In a word, they're in and success or failure could turn on such a report. They are very relevant and can address issues such as your client's credibility, internal flight alternative and the reasonableness of their efforts to seek state protection.

6. Corroborate every aspect of your claim. Get corroborating (and notarized) detailed statements from friends, family or relatives. If possible make sure photo identification is attached. Remember, evidence cannot be dismissed simply by its association with the claimant.[7] The statements must be cogent, detailed, and cross-referenced. They must be

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[6] Contrast Justice Annis' comments in *Czesak v. MCI* 2013 FC 1149 at paragraph 38 and 40 with *Kanthasamy* 2015 SCC 61 at paragraph 49.

[7] *Ochoa v. MCI* 2010 FC 1105, Justice Zinn found that the IRB committed a reviewable error by dismissing sworn statements provided by the applicant (see paragraph 9).

vetted before disclosure and inconsistencies with the forms or the narrative must be identified and dealt with. Make sure you have medical reports, police reports, letters from community leaders, and whatever you can think of. If something can be corroborated then get the document. Make sure your clients have read and are familiar with their own documents which includes when and how they were obtained. They are of critical importance in establishing the claim and your client's credibility. If you get letters and they do not include enough detail then get new ones. Don't be lazy and take nothing for granted.

A simple issue such as a person's identity can become a fatal flaw to any hearing irrespective of objective risk. Simply because CIC accepted your client's identity and nationality and your client is eligible to make a refugee claim does not mean the same is sufficient for the determination of the claim at the RPD or the RAD. As an example, in terms of personal documents, there seems to be a growing trend in the RPD and RAD to refuse cases on personal identity alone, especially in Somalian cases where there they may not have provided extensive evidence of personal identity or nationality. Be particularly alert and aware of this issue if no passport has been provided. Also, bear in mind that identity comes in different forms; personal, ethnic, nationality.

7. Be an advocate. You're job is to champion and advance your client's case. Don't judge your client. You are not there to pass judgment or turn up your nose. It might be the 5th time or 50th time you've heard this story. Don't wink and occupy yourself with the Member, you're there only for one reason and that is to advance your client's case. You are not there to make friends, curry favours or just for a pay day. I will add one caveat in that, if you have never lied to anyone about anything, lived a completely pure and moral life and not embellished anything to make yourself look better, then maybe you can consider being judgmental. Seeing as this is the Ten Commandments a biblical quote seems appropriate: "Let he who is without sin cast the first stone".

   Be assertive; don't be intimidated to object in a timely fashion. Some Members can be very aggressive and ask for concessions with respect to issues. I rarely concede issues at

the beginning of a hearing as it has not even yet played out. If in doubt, take a break (consult another colleague if necessary, we all do it) or put your concerns on the record. Any interpretation issues have to be raised at the earliest opportunity. If you don't speak the language, consider bringing another individual to the hearing to ensure that the interpretation is adequate, especially if the case is a very nuanced one, with a lot of details and credibility appears to be a potential issue.

Similarly, pay close attention to the viva voce evidence given by your client. Intentionally or not, a Panel may pose a question to a claimant based on an answer that was never given and not in evidence. This will confuse your client and often causes unintentional or incorrect evidence to be given in response. If this happens, you need to immediately object and provide your understanding of the evidence.

If you can't throw yourself fully into advancing your client's case, then refugee advocacy is not for you. Do yourself and your clients a favour.[8] You're not there to interrogate them, pull their story apart, weaken or undermine their case (in any way shape or form). You are not the gatekeeper or the decision maker. You are there to carry them across the goal line. Be honest with yourself and if you can't carry out this obligation, then send them to someone that can.

Sometimes our clients come to us with pre-conceptions perhaps influenced by what they've been told by other members of their community and this "advice" is taken as Gospel. What they first relay to you may be distorted by these influences; cut through the noise and spend time with your clients. This will allow you to get to the heart and truth of the matter.

8. Know the facts and know your file before you walk in through the hearing room door. What this means, of course, is that you have a handle on the narrative, the client's

[8] *Kavihuha v. MCI* 2015 FC 328 stands for the proposition that incompetence of counsel leads to a denial of natural justice and whether counsel's incompetence undermined the Applicant's right to fully present her case is an issue of procedural fairness (*Galyas v. MCI* 2013 FC 250 at 27).

background information and forms, and the country condition evidence. The country condition evidence should be tabbed and ready to go. There should be no surprises! Cross reference the POE, BOC, forms, corroborating letters, medical evidence, and police reports and be prepared to explain any inconsistencies, internal or external. Be aware that whether the Board states it or not, they are highly suspicious of "official documents" from certain source countries (Pakistan and Nigeria come to mind). When presented documents of these nature from your client, examine them extremely closely to ensure your client is ready to answer any and all questions relating to discrepancies or the production of these documents. Again, no disclosure or documents should be provided to the Board without counsel reviewing and vetting same. Innocuous inconsistencies could easily blow up and sink your claim. Also, control the facts. More than a few cases have been undermined by social media. Privacy settings and Facebook should be reviewed with the client as CBSA routinely explores same.

9. Know the law. Make it as difficult as possible for a Panel to say no! Relevant case law should be highlighted to the Panel. You should probably be reading Federal Court refugee case law on a regular basis. Among many other cases *Sheikh*[9], *Baranyi*[10] and

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[9] *Sheikh v. MCI* 2014 FC 264, Justice Zinn notes at paragraph 12

> "... in assessing the objective element of the applicant's subjective fear, one asks what objectively will happen if the situation becomes known; one does not ask whether it is likely that the situation will become known..." and at paragraph 14 " From this perspective, it is irrelevant how likely or unlikely it is that the facts on which the persecution is based, would become known to the agents of persecution. In fact, any analysis on the part of the Board on this question would largely be an exercise in speculation, absent a finding on the evidence that it would never become known. It is also easy to imagine situations where there may be grave consequences for people with certain immutable characteristics, but who may not be easily discovered (homosexuals in Uganda for example). Are those claimants any less entitled to protection because the Board speculates that there is a low probability of that characteristic being discovered?"

[10] 2015 FC 221. Words and intentions aren't enough to find adequate state protection:

> [46] In addition, the political and socio-economical state of affairs of any country is complex and multi-faceted, a state protection analysis also entails complex considerations. This is why, as referenced above, the jurisprudence advises that a mere willingness by a state to address the situation of the Roma minority in Hungary cannot be "equated to adequate state protection" (Bors v Canada (Minister of Citizenship and Immigration), 2010 FC 1004 (CanLII) at para 61; Balogh v Canada (Minister of Citizenship and Immigration), 2002 FCT 809 at para 37). As stated by Justice Zinn in Orgona, above at

Hidalgo Tranquino[11]are some examples of cases that are of great help to many refugee claims. Do you know what was stated in *MCI* v. *Akgul* 2015 FC 834 regarding the treatment of conscientious objectors in Turkey?

> [12] In this case, the reasons do permit the court to appreciate why the RPD found that the treatment in Turkey would amount to persecution; namely, the treatment that conscientious objectors receive from the authorities. The relevant treatment is not simply repeated terms of imprisonment. Rather, the record shows that conscientious objectors are viciously assaulted and inhumanely treated by authorities and others at the encouragement of the authorities simply because they have refused military service. Accordingly, the RPD's decision is well within the range of reasonable outcomes.

There are hundreds of hidden gems in Federal Court case law. It goes without saying that Board Members are obliged to follow and apply jurisprudence from the Federal Court. Keep in mind:

> "I am bound by decisions of Queen's Bench judges, by decisions of the Alberta Court of Appeal and by decisions of the Supreme Court of Canada. Very simply, Masters in Chambers of a superior trial court occupy the bottom rung of the superior court's judicial ladder. I do not overrule decisions of a judge of this court.

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para 11: "Actions, not good intentions, prove that protection from persecution is available". In other words, theory does not always bridge over into practice.

[11] *Hidalgo Tranquino v. MCI* 2010 FC 793.

> [7] As the Federal Court of Appeal observed in *Shanmugarajah v. Canada (Minister of Employment and Immigration)*, 34 A.C.W.S. (3d) 828, [1992] F.C.J. No. 583, at paragraph 3 "it is almost always foolhardy for a Board in a refugee case, where there is no general issue as to credibility, to make the assertion that the claimants had no subjective element in their fear…". See also Justice Dawson's comments in *Ribeiro v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1363 (CanLII), 143 A.C.W.S. (3d) 147 at para.11.

The judicial pecking order does not permit little peckers to overrule big peckers. It is the other way around".[12]

10. Finally, consider alternatives to the Refugee Claim. Not everyone who comes in to your office and wants to make a refugee claim should make a refugee claim. There are many adverse consequences to individuals who make a refugee claim. There may well be other options such as an H&C, a TRP or a sponsorship. Gone are the days that an H&C would take many years to determine. We are seeing first stage decisions done well within a year and in our experience, at least, this seems to indicate higher acceptance rates. Justice Moldaver dissented in *Kanthasamy*[13] in part because he felt that "Giving it [the H&C] an overly broad interpretation risks creating a separate, freestanding immigration process, something Parliament did not intend." It appears clear that the H&C has become, and has been for some time, a "separate, freestanding immigration process" and one that now has some advantages over making a refugee claim. Remember, when you make refugee notification, you and your client is "all in". Many avenues to permanent residence close as a result of the consequential removal order. An otherwise clean immigration history will be permanently affected. Further, a successful H&C allows for return or visits to the country of origin; protected persons must always bear the jeopardy of cessation in mind.

    We hope you found this helpful and know that it is certainly not meant to be exhaustive. Work hard, be creative, be knowledgeable and fight for your clients. You do all these things and you will win a lot more than you will lose and really get to change the lives of many people for the better, which is an accomplishment and feeling that never gets old.

    Thank you,

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[12] *South Side Woodwork (1979) Ltd. v. R. C. Contracting Ltd.* (1989), 95 A.R. 161 (Master Funduk).

[13] 2015 SCC 6.