**PRACTICAL TIPS FOR PRESENTING AN ASYLUM CASE**

**IN IMMIGRATION COURT** (Rev. Feb. 2017)

by

Paul Wickham Schmidt[[1]](#footnote-1)1

Retired U.S. Immigration Judge

Arlington, Virginia

 **First, read a good book.** All winning asylum theories are found in Chapter 1208 of Title 8 of the *Code of Federal Regulations*. Shift the burden of proof to the DHS. Win your case without showing a current fear of persecution. Read and master 8 C.F.R. § 1208.13, and then use this powerful tool to build your client’s case. *See also* *Essohou v. Gonzales,* 471 F.3d 518 (4th Cir. 2006) (hiding is not a “reasonably available internal relocation alternative” that rebuts the presumption of future persecution); *Haoua v. Gonzales*, 472 F.3d 227 (4th Cir. 2007) (an IJ’s under-calculation of risk of harm impairs internal relocation analysis).

 **Second, get real.** The REAL ID Act, P.L. 109-13, 119 Stat. 231 (2005), deals with credibility and burden of proof issues in asylum cases and applies to applications “made” on or after May 11, 2005. See *Matter of S-B-*, 24 I&N Dec. 42 (BIA 2006) (noting that an application is “made” when *initially* filed either with the Asylum Office or the IJ); *Matter of M-A-F-*, 26 I&N Dec. 651 (BIA 2015) (filing date of *later* I-589 controls where it raises new protected grounds or significant new facts). Read the REAL ID Act (as incorporated into the I&N Act) and decide how it can help you and how you can respond to DHS arguments.

 **Third, know one when you see one.** The one-year filing requirement of INA

§ 208(a)(2)(B) bars asylum in some cases. Your burden of proof on the one-year filing issue is very high: “clear and convincing evidence.” Judicial review is limited. There are exceptions, however, to the one-year bar. Read the statute and the regulations at 8 C.F.R. § 1208.4 to find out how the filing requirement works and what arguments might be made to preserve a late asylum application. Remember that the one-year requirement does *not* apply to withholding of removal or Convention Against Torture applications.

 **Fourth, play to tell the truth**. Particularly in light of the REAL ID Act, credibility is the key to most asylum cases. Read *Matter of A-S-*, 21 I&N Dec. 1106 (BIA 1998), enter the world of credibility determinations, and see why the Immigration Judge is so important. It’s all about *deference*.

 **Fifth, don’t believe everything you read.**  Don’t get fooled by the hype that credible testimony is enough to get the brass ring. Read *Matter of S-M-J-*, 21 I&N Dec. 722 (BIA 1997)

and *Matter of J-Y-C-*, 24 I&N Dec. 260 (BIA 2007) to find out what it *really* takes to win an asylum case in most Immigration Courts.

 **Sixth, paper your case.** Thorough documentation can be your friend. Read *Camara v. Ashcroft*, 378 F.3d 361 (4th Cir. 2004) and *Zuh v. Mukasey*, 547 F.3d 504 (4th Cir. 2008) to discover how the power of independent documentary evidence can overcome even a sustainable adverse credibility finding.*But see* *Gandziami-Mickhou v. Gonzales*, 445 F.3d 351 (4th Cir. 2006) (affidavits from friends and family are not the independent evidence that *Camara* contemplates).

 **Seventh, read your paper.** Read *Matter of O-D-*, 21 I&N Dec. 1079 (BIA 1998) and see how presenting false documentation to the Immigration Court can sink your ship. You and your client are *responsible* for all the documentation you present in your case. Make sure you know exactly what is in your documentation package and precisely how it got there.

 **Eighth, pile it on.** Can cumulative events put you over the top on past persecution? You bet! Read *Matter of O-Z- & I-Z-*, 22 I&N Dec. 23 (BIA 1998), *reaffirmed in Matter of L-K-*, 23 I&N Dec. 677, 683 (BIA 2004), and see how one family’s misfortune may be your good fortune.

 **Ninth, don’t get caught by the devil.** The devil is in the details. If you don’t find him or her, DHS counsel certainly will, and you will *burn*. DHS counsel handle more asylum cases in a year than most private attorneys do in a lifetime. Be prepared or beware. The EOIR Virtual Law Library on the Internet at <http://www.usdoj.gov/eoir/> is an excellent resource for the latest BIA precedents and administrative developments. You would also be wise to contact the Assistant Chief Counsel *in advance* of any merits hearing to discuss ways of narrowing the issues and possible “Plan Bs.”

 **Tenth, know your geography.** Not all Immigration Courts and Circuit Courts of Appeals are located on the West Coast. The BIA certainly is not. You must know and deal with the law in the jurisdiction where your case actually is located, not in the one you might *wish* it were located.

 **Eleventh, get physical.** In defining persecution,the Fourth Circuit has emphasized “the infliction or threat of death, torture, or injury to one’s person or freedom.” *Niang v. Gonzales*, 492 F.3d 505 (4th Cir. 2007). Read *Matter of A-K-*, 24 I&N Dec. 275 (BIA 2007) for tips on how, and how not, to present asylum claims involving harm to family members, and *Crespin-Valladares v. Holder,* 632 F.3d 117 (4th Cir. 2011), *Mirisawo v. Holder,* 599 F.3d 391 (4th Cir. 2010) and *Matter of T-Z-*, 24 I&N Dec. 163 (BIA 2007) for tips on how to present cases involving threats and nonphysical forms of suffering or harm.

 **Twelfth, practice, practice, practice**. The *Immigration Court Practice Manual*, available online at <http://www.usdoj.gov/eoir/vll/OCIJPracManual/ocij_page1.htm>, became effective July 1, 2008, and replaced all prior local rules. All filings with the Immigration Court must comply with the deadlines and formats established in this *Practice Manual.*

**Thirteenth, it’s always wise to have “Plan B.”** Asylum litigation has many variables and opportunities for a claim to “go south.” Therefore, it is prudent to have a “Plan B” (alternative) in mind. Among the “Plan Bs” that came up in Arlington during my tenure were: prosecutorial discretion (“PD”), Special Rule Cancellation of Removal (“NACARA”), Temporary Protected Status (“TPS”), non-Lawful Permanent Resident Cancellation of rRemoval (“EOIR 42-B”), Deferred Action for Childhood Arrivals (“DACA”), Special Immigrant Juvenile (“SIJ”) status, I-130 petition with a “stateside waiver” (“I-601A”), “Wilberforce Act” special processing for unaccompanied children (“UACs”), T nonimmigrant status (for certain human trafficking victims), and U nonimmigrant status (for certain victims of crime). *But see*, “Pointer Fourteen,” below.

**Fourteenth, hope for the best, but prepare for the worst.** As some have said “there’s a new Sheriff in town,” and he’s announced a “maximum immigration enforcement “program targeting *anyone* who has had *any* run-in with the law, *whether convicted or not*. So, you can expect more arrests, more detention (some perhaps in far-away, inconvenient locations), more bond hearings, more credible and reasonable fear reviews, more pressure to move cases even faster, and an even higher stress level in Immigration Court. The “Plan Bs” involving discretion on the part of the Assistant Chief Counsel, like PD, DACA, and stateside processing, and even waiving appeal from grants of relief, are likely to disappear in the near future, if they have not already. In many cases, litigating up through the BIA and into the Article III Federal Courts (where the judges are, of course, bound to follow the law but not necessarily to accept the President’s or the Attorney General’s interpretation of it) might become your best, and perhaps only, “Plan B.”

(02-19-17)

1. 1These are my views, and they do not represent the official position of anyone. I thank and recognize pro bono and “low bono” attorneys, past, present and future, for giving unselfishly of their time and expertise. © Paul Wickham Schmidt, 2017. All Rights Reserved. [↑](#footnote-ref-1)