**Practical Tips for Presenting an Asylum Case in Immigration Court**

**by**

**Paul Wickham Schmidt, Retired U.S. Immigration Judge**

**David A. Clarke School of Law**

**University of the District of Columbia**

**Washington, DC**

**February 21, 2017**

**I.**

**Thank you, Professors. Good afternoon. I am *honored* to be here. I am particularly pleased to be here at the invitation of two folks I really admire, my friends and your teachers, the amazing Professor Kristina Campbell and the equally amazing Professor Lindsay Harris. They are scholars, advocates, teachers, writers, and simply terrific role models. You are so lucky to be able to learn and interact with them.**

**And, speaking of great role models, I’m totally honored to be here this afternoon with my good friend and former colleague Judge Dorothy Harbeck. Judge Harbeck is not only a great judge, but has a demonstrated lifetime commitment to scholarship and continuing legal education to raise the level of practice before the U.S. Immigration Courts to “the best that it can be.” I have read and used some of her practical, down to earth, “here’s how you do it” materials, and I strongly recommend that you follow her wisdom and guidance.**

**As you probably know, this afternoon’s topic, asylum and related matters such as withholding of removal and relief under the Convention Against Torture, forms a major part of the docket at the Arlington Immigration Court, where I used to work, and indeed at most Immigraton Courts throughout the country.**

**Now, normally at this point, as your Professors well know, having heard me before, I would launch into my extended disclaimer giving everyone in the Immigration Court system instant deniability for anything controversial that I might say. But, I’m retired now, so I don’t have to go through all of that.**

**In the next few minutes, I’m going to condense approximately 44 years of professional experience into fourteen (it used to be eight) simple rules for successful asylum litigation in the Arlington Immigration Court. For those of you who are new to the practice, the Arlington Immigration Court is part of the Executive Office for Immigration Review – affectionately known as “EOIR” for *Winnie the Pooh* fans – a separate branch of the U.S. Department of Justice.**

**Also, because today is *Tuesday* and *you* are such a great audience, I have a *special bonus gift* for you. That’s *right* folks, it’s the much-sought-after February 2017 revised edition of my *comprehensive* three-page treatise entitled *Practical Tips for Presenting an Asylum Case in Immigration Court*, which is included in your course materials *absolutely* *free of extra charge*.**

**And, that’s not all folks! With due respect to my good friend Judge Harbeck, I’m also giving you my *absolute, unconditional, money-back guarantee* that *this* talk will be *completely free* from computer-generated slides, power points, or any other type of distracting modern technology that might interfere with your total comprehension or listening enjoyment. In other words, *I* am the “power point” of this presentation.**

**II.**

**My first tip is, “Read a Good Book.” My strong recommendation is the one that has always been at the top of the Arlington Immigration Court Best Seller List: *Title 8 of the Code of Federal Regulations, 2017 edition*.**

**Specifically, I invite your attention to Chapter 1208, which contains the seeds of all winning theories of asylum law, past, present, and future. It will also give you gems like how to shift the burden of proof to the DHS and how to win your case even if your client does not presently have a well-founded fear of persecution.**

**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 and other cases and applies to applications “made” on or after May 11, 2005. Read it 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 section 208(a)(2)(B) of the INA bars asylum in some cases. Your burden of proof on the one-year filing issue is very high: “clear and convincing evidence.” Judicial review might be limited. But, there are exceptions. 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 under the I&N Act or Convention Against Torture (“CAT”) applications.**

**At the beginning of each asylum case, I asked the parties to identify the issues. Respondents’ attorneys invariably tell me about past persecution, future persecution, nexus, gender-based persecution, exceptions to the one year filing deadline, weird social groups, and so forth. The issue they sometimes fail to identify is the one that’s always first on my list. What is it?**

**That’s right, *credibility*, is the key issue in almost all asylum litigation. So, my fourth rule is “Play To Tell the Truth.” You must understand what goes into making credibility determinations and why the role of the Immigration Judge is so critical. Often, adverse credibility determinations are difficult to overturn on appeal. It’s all about *deference*.**

**But, credible testimony might not be enough to win your case. That’s why my fifth rule is “Don’t Believe Everything You Read.” Both appellate and trial court decisions often recite rote quotations about asylum being granted solely on the basis of credible testimony.**

**However, to give *your* client the *best* chance of winning his or her asylum case in the Arlington Immigration Court, under the law applicable in this Circuit, you’re likely to need a *combination* of credible testimony *and* *reasonably available* corroborating evidence. Read *Matter of S-M-J-*, 21 I&N Dec. 722 (BIA 1997), largely codified by REAL ID, and find out what it *really* takes to win an asylum case in most Immigration Courts.**

**In this respect, you should remember my corollary sixth rule “Paper Your Case.” According to Fourth Circuit precedent, even a proper adverse credibility ruling against your client might not be enough for an Immigration Judge to deny the asylum claim. The Judge must still examine the record as a whole, including all of the documentation supporting the claim, to determine whether independent documentary evidence establishes eligibility for asylum. Read *Camara v. Ashcroft*, 378 F.3d 361 (4th Cir. 2004) and discover how the power of independent documentary evidence can overcome even a sustainable adverse credibility finding. Also, remember that the REAL ID Act directs Immigration Judges to consider “the totality of the circumstances, and all relevant factors.”**

**“Read Your Paper” is my seventh important rule. You and your client are *responsible* for all the documentation you present in your case. Nothing will give you nightmares faster than having a client present false or fraudulent documentation to the Immigration Court. In my experience, I’ve had very few attorneys able to dig out of that hole. So, *don’t* let this happen to you.**

**My eighth rule is “Pile it On.” Sometimes, as demonstrated in one of my very favorite cases *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), you will be able to take a series of events happening to your respondent, his or her family, or close associates, none of which individually perhaps rises to the level of persecution, and *combine* them to win for your client.**

**My ninth rule is “Don’t Get Caught by the Devil.” The devil is in the details. If you don’t find that devil, the DHS Assistant Chief Counsel almost certainly will, and you will *burn*.**

**As your Professors can tell you, the DHS Assistant Chief Counsel in Arlington are all very nice folks. They are also smart, knowledgeable, well prepared, and ready to vigorously litigate their client’s positions. They handle more trials in a *year* than most litigators do in a *lifetime*. So, *beware* and be *prepared*. 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.”**

**My tenth rule is “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.**

**When you are in the Arlington Immigration Court, you’re in Crystal City. Folks, that is in *Virginia*, which is *not* presently part of the Ninth Circuit.**

**This is something that I once had trouble with, coming to the Arlington Court from a job where the majority of asylum cases arose in the Ninth Circuit. But, I got over it, and so can *you*.**

**My eleventh rule is to “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). While the Fourth Circuit and the BIA have also recognized non-physical threats and harm, your strongest case probably will be to emphasize the physical aspects of the harm where they exist. *Mirisawo v. Holder,* 599 F.3d 391 (4th Cir. 2010); *Matter of T-Z-*, 24 I&N Dec. 163 (BIA 2007).**

**I particularly recommend the Fourth Circuit’s decision in *Crespin-Valladares v. Holder*, 632 F.3d 117 (4th Cir. 2011), which found that the BIA erred in rejecting *my* conclusion that “unrebutted evidence of death threats against [the respondent] and his family members, combined with the MS-13's penchant for extracting vengeance against cooperating witnesses, gave rise to a reasonable fear of future persecution.” In other words, I was *right*, and the BIA was *wrong*. But, who’s keeping track?**

**My twelfth rule is “Practice, Practice, Practice.” The *Immigration Court Practice Manual*, available online at the EOIR web site** [**http://www.usdoj.gov/eoir/vll/OCIJPracManual/ocij\_page1.htm**](http://www.usdoj.gov/eoir/vll/OCIJPracManual/ocij_page1.htm) **was 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*. The *Practice Manual* has a very helpful index, and it covers just about everything you will ever want to know about practice before the Immigration Courts. It contains useful appendices that give you contact information and tell you how to format and cite documents for filing in Immigration Court. Best of all, it’s applicable nationwide, so you can use what you learn in Arlington in other Immigration Courts.**

**My thirteenth, rule is “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 regularly came up in Arlington were: prosecutorial discretion (“PD”), Special Rule Cancellation of Removal (“NACARA”), Temporary Protected Status (“TPS”), non-Lawful Permanent Resident cancellation of removal (“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). In my experience, many, perhaps the majority, of the “happy outcome” asylum cases coming before me were resolved on a basis “OTA,” that is “other than asylum.”**

**But, unfortunately in my view, the “Plan B” world is rapidly changing. So, please listen very carefully to the caveat that comes next.**

**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.”**

**III.**

**That’s it! *Now*, you have everything you need to do a *terrific* job for your clients at *all* levels of our Immigration Court system. Thank you for listening, good luck, and do great things. I would be pleased to answer your questions.**

**© Paul Wickham Schmidt 2017. All Rights Reserved.**

**(02-21-17)**