BASIC ASYLUM LAW FOR LITIGATORS

By Paul Wickham Schmidt

United States Immigration Judge (Retired)

UVA LAW IMMIGRATON CLINIC

Charlottesville, VA

October 25, 2017

BASIC ASYLUM LAW FOR LITIGATORS

OUTLINE

I. INTRODUCTION

II. WHO IS A REFUGEE?

A. Refugee Definition

B. Standard of Proof

C. What Is Persecution?

D. Nexus

III. PARTICULAR SOCIAL GROUP

A. The Three Requirements

B. Success Stories

C. The Usual Losers

D. What Can Go Wrong?

E. A Few Practical Tips on PSG

IV. PRACTICAL TIPS FOR PRESENTNG AN ASYLUM CASE IN IMMIGRATION COURT

V. CONCLUSION

**I. INTRODUCTION**

Good afternoon, and thanks for attending. As a former U.S. Immigration Judge at both the trial and appellate levels, and someone who has spent over four decades working in the field of immigration at all levels, I want to personally thank you for what you are doing.

Welcome to the “New Due Process Army” and our critical mission of forcing the U.S. Immigration Court system to live up to its unfulfilled promise of “guaranteeing fairness and due process for all.” *Nothing is more important* to achieving that mission than providing effective representation to individuals at the “retail level” of the system – the U.S. Immigration Courts.

There is a due process crisis going on in our U.S. Immigration Court system that threatens the integrity and the functioning of our *entire U.S. justice system*. And, the *biggest* need in the Immigration Courts is for effective legal representation of individuals seeking, expecting, and deserving justice in Immigration Court. *Never* has the need for pro bono attorneys been greater than it is now!

I’m truly delighted to be reunited with my friend and former student from Refugee Law & Policy at Georgetown Law, the wonderful Rachel McFarland. I am *absolutely thrilled* that Rachel has chosen to use her amazing talents to help those most in need and to be a teacher and an inspirational role model for others in the New Due Process Army. In addition to being brilliant and dedicated, Rachel exudes that most important quality for success in law and life: she is just one heck of a nice person! The same, of course, is true for your amazing Clinical Professor Deena Sharuk and her colleague Tanishka Cruz Thank you Deena, Tanishka, and Rachel, for all you are doing! All of you in this room truly represent “Due Process In Action.”

As all of you realize, our justice system is only as strong as its weakest link. If we fail in our responsibility to deliver fairness and due process to the most vulnerable individuals at the “retail level” of our system, then eventually *our entire system will fail*.

Our Government is going to *remove* those who lose their cases to countries where some of them undoubtedly will suffer extortion, rape, torture, forced induction into gangs, and even death. Before we return individuals to such possible fates, it is *critical* that they have a chance to be fully and fairly heard on their claims for protection and that they fully understand and have explained to them the reasons why our country is unwilling or unable to protect them. Neither of those things is going to happen without effective representation.

We should always keep in mind that contrary to the false impression given by some pundits and immigration “hard liners,” including, sadly and most recently our Attorney General, losing an asylum case means *neither* that the person is committing fraud nor that he or she does not have a *legitimate fear* of return. In most cases, it merely means that the dangers the person will face upon return do not fall within our somewhat convoluted asylum system. And, as a country, we have *chosen not* to exercise our discretion to grant temporary shelter to such individuals through Temporary Protected Status, Deferred Enforced Departure, or prosecutorial discretion (“PD”). In other words, *we are returning them knowing that the effect might well be life threatening or even fatal in many cases.*

I also predict that *you* will make a positive difference in the development of the law. The well-prepared and articulate arguments that *you* make in behalf of migrants are going to get attention and consideration from judges at *all levels* far beyond those presented by unrepresented individuals who can’t even speak English. It’s simply a fact of life. And, if you can win *these* cases, everything else you do in the law will be a “piece of cake.” I *guarantee* it.

Obviously, in representing your clients it is important to be polite, professional, and to let the excellence of your preparation, research, and arguments speak for you. In an overwhelmed system, judges are *particularly grateful* for all the help they can get. However, they are also under *excruciating* pressure to complete cases, particularly detained cases. So it is important to clearly identify your issues, focus your examination, and make sure that your “phone books” of evidence are properly organized and that there is a “road map” to direct the Immigration Judge and the Assistant Chief Counsel to the key points. You want to help the judge, and your opponent, get to a “comfort zone” where he or she can feel comfortable granting, or not opposing or appealing, relief.

I do want to offer one additional important piece of advice up front. That is to make sure to ask your client if her or his parents or grandparents, whether living or dead, are or were U.S. citizens. Citizenship is *jurisdictional* in Immigration Court, and occasionally we do come across individuals with valid but previously undeveloped claims for U.S. citizenship. You definitely want to find out about that sooner, rather than later, in the process.

My presentation today will be divided into three sections. First, we will go over the basic refugee definition and some of its ramifications. Second, I will provide some basic information about particular social group or “PSG” claims. Third, I will give you fourteen practical pointers for effectively presenting asylum cases in Immigration Court.

Please feel free to ask questions as we go along, or save them until the end.

# II. WHO IS A REFUGEE?

In this section, I will first discuss the INA’s definition of “refugee.” Second, I will talk about the standard of proof. Third, we will discuss the meaning of the undefined term “persecution.” I will conclude this section with a discussion of the key concept of “nexus.”

## A. Refugee Definition

An “asylee” under U.S. law is basically an individual who satisfies the “refugee” definition, but who is in the U.S. or at our border in a different status, or with no status at all. Most of your clients will fall in the latter category.

The definition of “refugee” is set forth in section 101(a)(42) of the INA, 8 U.S.C. **§** 1101(a)(42). There are four basic elements:

1. Generally, outside the country of nationality (not usually an issue in border cases);
2. Unwilling or unable to return (failure of state protection);
3. Because of persecution (undefined) or a well founded fear of persecution;
4. On account of race, religion, nationality, membership in a particular social group, or political opinion (“nexus”).

There are some important exclusions to the refugee definition, the most frequent ones being the one-year filing deadline for asylum, those who have committed serious nonpolitical crimes outside the U.S. or particularly serious crimes in the U.S., persecutors of others, those who have rendered material support to a terrorist organizations, and those who are firmly resettled in another country. I won’t be going into these in detail today, but you should know that they are there, and I’d be happy to take questions on them. The ground most likely to come up in your cases is the one relating to individuals who have committed crimes.

Some individuals who are ineligible for asylum might still be eligible to receive withholding of removal under section 243(b) of the INA, 8 U.S.C., **§** 1253(b) or withholding of removal under the Convention Against Torture (“CAT”). And, everyone can potentially seek so-called “deferral of removal” under the CAT.

Also, please note that because of the requirement of a “nexus” to a “protected ground” *not all types of harm trigger protection*. In particular, crimes, wars, random violence, natural disasters, and personal vengeance or retribution do not automatically qualify individuals for refugee status, although “persecution“ within the meaning of the INA and the Convention *certainly can* sometimes occur in these contexts. However, some of these circumstances that fail to result in refugee protection because of the “nexus” requirement might be covered by the CAT, which has *no nexus requirement*.

The source of the “refugee” definition is he Refugee Act of 1980 which codified and implemented the U.N Convention and Protocol on the Status of Refugees to which the U.S. adhered in 1968. There are, however, some differences between the U.S. definition and the Convention definition, which I won’t go into today. But, again, you should be aware they exist, since some international or U.N. interpretations of the definition might be inapplicable under U.S. law.

## B. Standard of Proof

The standard of proof in asylum cases was established by the Supreme Court in 1987 in *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987). In asylum cases, a “well-founded” fear is something *far less than a probability*. It is an “objectively reasonable fear” or the type of fear that a “reasonable person” would have under the circumstances. Most courts and authorities have adopted the “10% chance” example set forth in Justice Stevens’s plurality opinion in *Cardoza*.

The BIA’s implementation of *Cardoza,* the 1987 precedent *Matter of Mogharrabi*, 19 I&N Dec. 439 (BIA 1987), makes the point that the persecution can be “significantly less than probable.” *Your* challenge as lawyers will be to get judges at all levels of our system to actually *apply* the generous *Cardoza-Mogharrabi* standard rather than just mouthing it. Sadly, the latter still happens too often, in my opinion.

A different and higher “more likely than not” standard applies to withholding of removal under the INA and to withholding and deferral of removal under the CAT. One *great tool* for satisfying the standard of proof for asylum or withholding under the Act is the rebuttable regulatory presumption of future persecution arising out of *past persecution* set forth in 8 C.F.R. 1208.13. This is a really important regulation that you should basically learn “by heart.” I will reference it again in the “practical tips” section of this presentation.

Withholding and CAT are more limited forms of relief than asylum. While they usually provide work authorization, they do not lead to green card status, allow the applicants to bring relatives, or travel abroad. They are also easier to revoke if conditions change. Nevertheless, there is *one* major advantage to withholding and CAT: they save your client’s life. Sometimes, that’s the best you can do. And, fundamentally*, saving lives* is really what this business is all about.

## C. What Is Persecution?

Remarkably, neither the Convention nor the INA defines the term “persecution.” Consequently, U.S. Immigration Judges, the Board of Immigration Appeals (“BIA”), and the U.S. Courts of Appeals are constantly referring to certain types of harm as “mere discrimination or harassment” not “rising to the level” of “persecution.” Often these highly subjective conclusions seem to be more in the mind of the judicial beholder than in the record or the law.

In the absence of a firm definition, I have found the most useful practical guidance to be in an opinion by the famous, or infamous, Judge Richard Posner, who recently retired from the Seventh Circuit Court of Appeals, in a 2011 case *Stanojkova v. Holder*, 645 F.3d 943, 947-48 (7th Cir. 2011). Judge Posner gave three examples.

“The three forms are *discrimination, harassment, and persecution*. The first [*discrimination*] refers to unequal treatment, and is illustrated historically by India’s caste system and the Jim Crow laws in the southern U.S. states. Discrimination normally does not involve the application of physical force, except as punishment for violation of the discriminatory laws.”

Second: “*Harassment* involves targeting members of a specified group for adverse treatment, but without the application of significant physical force. Had [police] furious at [the respondent’s] being soft on Albanians followed his taxi (he was a taxicab driver in Macedonia) and ticketed him whenever he exceeded the speed limit by one mile per hour, that would be an example of harassment. A common form of sexual harassment is pestering a subordinate for a date or making lewd comments on her appearance, or perhaps hugging her, which is physical but generally not violent.”

Third: “*Persecution* involves, we suggest, the use of significant physical force against a person’s body, or the infliction of comparable physical harm without direct application of force (locking a person in a cell and starving him would be an example), or nonphysical harm of equal gravity—that last qualification is important because refusing to allow a person to practice his religion is a common form of persecution even though the only harm it causes is psychological. Another example of persecution that does not involve actual physical contact is a credible threat to inflict grave physical harm, as in pointing a gun at a person’s head and pulling the trigger but unbeknownst to the victim the gun is not loaded.”

These definitions are, of course, not binding outside the Seventh Circuit. But, I find them to be practical, usable definitions that I certainly found helpful in making asylum decisions in the Fourth and other circuits.

## D. Nexus

The concept of “nexus” or “on account of” has become critical in asylum adjudication. Indeed, that is where many of your upcoming battles will be focused. In many cases these days the DHS will concede the “particular social group” (“PSG”) and just argue that the harm has no “nexus” to that PSG or any other protected ground.

The REAL ID Act amended the INA to require that for an asylum applicant to prove ”nexus” or “on account” of any protected ground, he or she must show that the protected ground is “at least one central reason” for the feared persecution. INA **§** 208(b)(1)(B)(i), 8 U.S.C. **§** 1208(b)(1)(B)(i) While this did not eliminate the frequently encountered “mixed motive” situation, it was intended to “tighten up” prior case law that had referred to the persecution as stemming “in whole or in part” from a protected ground.

The BIA ruled in *Matter of C-T-L-,* 25 I & N Dec. 341 (BIA 2010) that the “one central reason” test also applies to nexus in the withholding of removal context. However, the Ninth Circuit rejected the BIA’s interpretation in *Barajas-Romero v. Lynch*, 846 F.3d 351 (BIA 2014), maintaining that the more generous “in whole or in part” test should continue to apply to withholding cases under the INA. To my knowledge, the Fourth Circuit has not directly addressed the issue. So, I believe that *C-T-L-* would apply in the Immigration Courts in the Fourth Circuit at present.

Unfortunately, the BIA has given a very narrow reading to the “one central reason” test. In a recent precedent, *Matter of L-E-A*-, 27 I &N Dec. 40 (BIA 2017), the respondent was a member of a family social group. He clearly was targeted by a cartel in Mexico because he was a member of a family that owned a grocery store. In other words, “but for” the respondent’s family membership, he would not have been targeted by the gang.

Nevertheless, instead of granting the case, the BIA looked beyond the initial causation. The BIA found that “the respondent was targeted only as a means to achieve the cartel’s objective to increase its profits by selling drugs in the store owned by his father. Therefore the cartel’s motive to increase its profits by selling contraband in the store was one central reason for its actions against the respondent. Any motive to harm the respondent because he was a member of his family was, at most, incidental.” 27 I&N Dec. at 46 (citations omitted). Accordingly, the BIA denied the case.

Unfortunately, the BIA cited and relied upon an analysis of nexus in a similar case by the Fifth Circuit in *Ramirez-Mejia v. Lynch*, 794 F.3d 485n (5th Cir. 2015). The BIA, and to some extent the Fifth Circuit, have essentially used the “nexus” requirement to “squeeze the life” out of the family PSG. We can see that the normal rules of legal causation have been suspended. The respondent would not have been targeted by the cartel had he not belonged to this particular family. Yet, the BIA searched for and found an “overriding motive” that did not relate to a protected ground and determined that to be the “central reason” and the family PSG to be “tangential.”

What kind of case could succeed under *L-E-A-?* Well, perhaps not wanting to give anyone any practical ideas on how to qualify, the BIA searched history and came up with the execution of the Romanov family by the Bolsheviks as an example of a where family was a “central reason” for the persecution. So, maybe if the respondent’s father were a major donor to a political party that opposed cartels, a member of a religion that opposed drugs, or a member of a hated minority group, the respondent’s family membership could have been “at least one central reason.”

But the Romanov family case would have been grantable on actual or imputed political opinion grounds. The other examples I gave would have been more easily grantable on actual or implied political opinion, religion, or nationality grounds. So the BIA appears designed to make the family PSG ground largely superfluous.

This leaves you as litigators in a tricky situation. The IJ will be bound by *L-E-A,*

and the BIA is unlikely to retreat from *L-E-A-.* On the other hand, the Fourth Circuit might not go along with the *L-E-A-* view, although Judge Wilkins appeared anxious to endorse *L-E-A-* in his separate concurring opinion in *Valasquez v. Sessions*, 866 F.3d 188 (4th Cir. 2017).

To my knowledge, *L-E-A-* has not actually been considered and endorsed by any circuit to date. To me, it appears to be inconsistent with some of the existing family-based nexus case law in the Fourth and Ninth Circuits. *See, e.g.,* [*Zavaleta-Policiano v. Sessions*](https://1.next.westlaw.com/Document/Id8999d0098c311e7ae06bb6d796f727f/View/FullText.html?navigationPath=Search%2Fv3%2Fsearch%2Fresults%2Fnavigation%2Fi0ad6ad3e0000015f6e81a19f05b70b01%3FNav%3DCASE%26fragmentIdentifier%3DId8999d0098c311e7ae06bb6d796f727f%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=cf621e188733cf51e1ae4d516d825803&list=ALL&rank=1&sessionScopeId=e31c4b2e922844582db1e445aa824223fa7f666e439b3d1ed6bd503cd5971484&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29)*,* 873 F.3d 241 (4th Cir. 2017) (slamming BIA for misapplying concept of “mixed motive”). So, I wouldn’t be shocked if a “circuit split” eventually develops and the issue finally wends its way to the Supreme Court. Who knows, maybe one of *you* will be arguing it.

In any event, in my view, it is too early for you to “waive” strong nexus arguments even if they will be rejected under *L-E-A-*. On the other hand, that’s not likely to solve your client’s *current* problems.

So, what can you do? First, look for *legitimate* ways to distinguish *L-E-A-.* Assume that the DHS will “pull out the stops” in arguing that everything *but* family was the central reason --greed, lust, crime, random violence, personal vengeance, envy, resentment, etc. Look for evidence in the record that the dispute really was, to a major extent, about f*amily*, rather than one of the non-qualifying grounds.

Second, look for some qualifying non-family PSG or a “more conventional” religious, nationality, racial, or political motive.

Third, consider the possibility of CAT protection. The advocacy community probably underutilizes CAT. CAT doesn’t have a specific nexus requirement and often can be proved by extensive documentary or expert evidence, both UVA Clinic specialties. Sure, the standard of proof is high and CAT is a lesser form of relief than asylum. But, it saves your client’s life! And, if the nexus law changes in your favor, you can always file a motion to reopen to re-apply for asylum under the changed law.

This is an area of the law where creativity, preparation, and persistence often pay off in the long run. So, don’t give up. Keep on fighting for a reasonable and proper application of the “refugee” definition and for the rights of your clients.

# III. PARTICULAR SOCIAL GROUP

In this section I will talk about the three basic requirements for a PSG, the success stories, the usual failures, things that can go wrong, and offer you a few practice pointers directly related to PSG claims.

## A. The Three Requirements

The BIA has established three requirements for a PSG.

1. Immutability or fundamental to identity;
2. Particularity; and
3. Social distinction.

These three requirements are usually used to *deny* rather than grant protection. Indeed, most of the BIA’s recent precedents on PSG are rendered in a decidedly *negative* context.

There was a time about two decades ago when many of us, including a number of BIA Members, thought that *immutability* or *fundamental to identity* was the sole factor. But, following our departure, the BIA attached the *additional* requirements of “particularity” and “social visibility” now renamed “social distinction” to narrow the definition and facilitate denials, particularly of gang-based PSG claims.

The particularity and social distinction requirements basically work like a “scissors” to cut off claims. As you make your definition more specific to meet the “particularity” requirement it often will become so narrow and restrictive that it fails to satisfy “social distinction.” On the other hand, as your proposed PSG becomes more socially distinct, it’s likely that it will become more expansive and generic so that the BIA will find a lack of “particularity.”

While the UNHCR and many advocacy groups have argued for a return of immutability as the basic requirement with “social distinction” as an *alternative*, not an *additional requirement*, the BIA recently reaffirmed its “three criteria” approach. These cases, *Matter of M-E-V-G-*, 26 I &N Dec. 227 (BIA 2014) and its companion case *Matter of W-E-G-*, 26 I &N Dec. 208 (BIA 2014), are “must reads” for anyone doing PSG work.

About the only bright spot for advocates was that the BIA in *M-E-V-G–* *rejected the commonly held view that no gang-based case could ever succeed.* The BIA said that its decisions “should not be read as a blanket rejection of all factual scenarios involving gangs. Social group determinations are made on a case-by-case basis. For example, a factual scenario in which gangs are targeting homosexuals may support a particular social group claim. While persecution on account of a protected ground cannot be inferred merely from acts of random violence and the existence of civil strife, it is clear that persecution on account of a protected ground may occur during periods of civil strife if the victim is targeted on account of a protected ground.” 26 I&N Dec. at 251 (citations omitted).

In other words, the Board is asking for evidence intensive case-by-case adjudications of various proposed PSGs. Leaving aside the fairness of doing this in a context where we know that most applicants will be detained and unrepresented, I cannot think of an organization better suited to give the BIA what it asked for than the UVA Clinic – you guys!

**B. Success Stories**

There are four basic groups that have been relatively successful in establishing PSG claims.

1. LGBT individuals under *Matter of Toboso-Alfonso*, 20 I&N Dec. 819 (BIA 1990);
2. Women who fear or suffered female genital mutilation (“FGM”) under my decision in *Matter of Kasinga*, 21 I&N Dec. 357 (BIA 1996);
3. Victims of domestic violence under *Matter of A-R-C-G-*, 26 I&N Dec. 388 (BIA 2014); and
4. Family under the Fourth Circuit’s decision in *Crespin-Valladares v. Holder*, 632 F.3d 117 (4th Cir. 2011), a case in which I was the Immigration Judge and Jones Day was pro bono counsel.

You should note that the first three of these success stories had something in common: *strong support across a wide spectrum of the political universe.* In fact, in LGBT, FGM, and domestic violence cases the DHS eventually *changed* its position so as to not oppose the recognition of the PSG. This, in turn, either facilitated or perhaps effectively forced the BIA to recognize the PSG in a precedent.

Family, on the other hand, has generally not developed the same type of political consensus as a PSG for asylum purposes. I have already discussed in detail how notwithstanding the clear logic of family as a PSG, the BIA uses a highly restrictive reading of the “nexus” requirement that prevents many family groups from qualifying for protection.

There are two additional important points established by *Kasinga*. First, the respondent does *not* have to establish that the persecutor acted or will act with “malevolent intent.” Persecution may be established even where the persecutor was inflicting the harm with the intent to “help” or “treat” the respondent. This comes up frequently in connection with LGBT claims.

Second, *Kasinga* holds that to justify a discretionary denial of asylum for a respondent who otherwise meets all of the statutory requirements, the adverse factors must be “egregious” so as to outweigh the likely danger of persecution.

You *are* likely to find a number of cases involving LGBT individuals, domestic violence, and family. In the Arlington Immigration Court during my tenure these cases succeeded at an extremely high rate, so much so that many of them went on my “short docket.” However, that was then and this is now. As they say, “There’s a new sheriff in town and, unfortunately in my view, he looks a lot like the infamous “Sheriff Joe.”

Finally, there are some “up and comer” PSG’s that have had success in some of the circuits and might eventually gain widespread acceptance. Among these are witnesses, landowners, and women subjected to forced marriages. The latter often can more successfully be presented under the domestic violence category. The Fourth Circuit actually has recognized “former gang members” as a potential PSG, although many such individuals will have difficulties under the criminal exclusions from the refugee definition. *Martinez v. Holder*, 740 F.3d 902 (4th Cir. 2014).

**C. The Usual Losers**

PSGs that don’t fit any of the categories I just mentioned are usually “losers.” Chief among the “usual losers” are victims of crime other than domestic violence, informants, extortion victims, and those resisting gang recruitment. You’ll probably see a fair number of such cases. Your challenge will be how to present them in a way that overcomes the negative connotations normally associated with such claims.

**D. What Can Go Wrong?**

Lots of things can go wrong with a PSG case. First, there is the issue of “circularity.” Generally, a PSG cannot be defined in terms of itself. For example “victims of crime” would generally be a “circular” social group.

An easy test is to use your proposed PSG in a simple sentence: “This respondent was harmed to overcome the characteristic of being \_\_\_\_\_\_\_\_\_. If you can’t say with a straight face in open court, don’t use it. For example, “this respondent was raped to overcome her characteristic of being a victim of rape” isn’t going to make it as a PSG.

We’ve already talked about how PSG claims can be attacked by denying the *nexus*. There are also the old favorites of lack of credibility or corroboration. Then, there is failure to meet the one-year filing deadline, no failure of state protection, reasonably available internal relocation, and fundamentally changed country conditions.

That’s why if you’re considering a PSG claim, it’s always wise to have “Plan B.” The problem today, however, is that the Administration has restricted or limited many of the “Plans B.” For example, until recently, the number one “Plan B” was to request prosecutorial discretion (“PD”) from the Assistant Chief Counsel if the respondent had sympathetic humanitarian factors, a clean criminal record, and strong ties to the U.S. However, for all practical purposes, this Administration has eliminated PD.

Nevertheless, its always worthwhile to think about whether things like Wilberforce Act treatment for certain unaccompanied juveniles, Special Immigrant Juvenile Status, “T” visas for trafficking victims, “U” visas for victims of crime, or benefits under the Violence Against Women Act (“VAWA”) might be realistic possibilities for your client.

**E. A Few Practical Tips on PSG**

I’m going to close this section by offering you a few practical tips on presenting PSG cases that will also tie into my next major section.

*First*, think “25 words or fewer.” Just like the old boxtop contests from my youth. There are few, if any, known examples of success using lengthy, convoluted social group definitions.

*Second*, remember folks, it isn’t “making sausages.” The definition that goes in must be the same one that comes out the other end. Social groups that “morph” during the hearing just have no chance.

*Third*, be prepared to explain how your proposed particular social group meets the current BIA criteria of immutability, particularity, and social distinction, formerly known as “social visibility.”

*Fourth*, make sure that your respondent is actually a *member* of the particular social group you propose. You would be surprised at the number of counsel who propose a particular social group definition and then fail to offer proof that their client actually fits within that group.

*Fifth*, as I just mentioned, check your particular social group for "circularity."

*Sixth*, and finally, be prepared for an onslaught of other arguments against your case, the chief of which probably will be "no nexus." Normally, the DHS will “pull out all the stops” to prevent the recognition of a new PSG.

**IV. PRACTICAL TIPS FOR PRESENTING AN ASYLUM CASE IN IMMIGRATION COURT**

You should all have received a copy of my comprehensive three-page treatise on asylum law entitled “Practical Tips For Presenting an Asylum Case In Immigration Court,” Feb. 2017 Revised Edition. I’m going to quickly take you through the fourteen practical tips outlined there.

My *first* tip is, “Read a Good Book.” My strong recommendation is the one that has always been at the top of the 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, which will be all of your cases. 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 INA or to CAT applications.

At the beginning of each asylum case, I asked the parties to identify the issues. Respondents’ attorneys invariably told 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 immigration Court, under the law applicable in most circuits, 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 Court.

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*. Also, make sure to put your client at ease by carefully explaining the process and by going over the direct and cross-examinations in advance. Remember the cultural and language barriers that can sometimes interfere with effective presentation of your case.

I found the DHS Assistant Chief Counsel in Arlington were all very nice folks. They were also smart, knowledgeable, well prepared, and ready to vigorously litigate their client’s positions. They handled 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 “Plans B.”

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.

For example, the Arlington Immigration Court is in Crystal City. 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, some Circuits have emphasized “the infliction or threat of death, torture, or injury to one’s person or freedom.” *See, e.g.,* *Niang v. Gonzales*, 492 F.3d 505 (4th Cir. 2007). While the Circuits 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> 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 all Immigration Courts.

My *thirteenth, rule* is “It’s Always Wise to Have ‘Plan B.’” As I have pointed out, 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 “Plans B” 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*. He also intends to detain all undocumented border crossers or applicants for admission at the border. So, you can expect *more* arrests, *more* detention (particularly in far-away, inconvenient locations like, for instance, Farmville, VA), *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 “Plans B” 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.”

**V. CONCLUSION**

In conclusion, I have told you about the basic elements of the refugee definition and how it is used in adjudicating asylum cases. I have also discussed the requirements and the pros and cons of the PSG protected ground. And, I have shared with you some of my practical tips for presenting an asylum case in U.S. Immigration Court.

Obviously, I can’t make you an immigration litigation expert in in afternoon. But, I trust that I have given you the basic tools to effectively represent your clients in Immigration Court. I have also given you some sources that you can consult for relevant information in developing your litigation strategy and your case.

I encourage you to read my blog, immigrationcourtside.com, which covers many recent developments in the U.S. Immigration Courts. As you come up with victories, defeats, good ideas, appalling situations, or anything else you think should be made more widely available, please feel free to submit them to me for publication. I also welcome first-hand accounts of how the system is, or isn’t, working at the “retail level.”

*Thanks again for joining the* ***New Due Process Army*** *and undertaking this critical mission on behalf of the U.S. Constitution and all it stands for! Thanks for what you are doing for America, our system of justice, and the most vulnerable individuals who depend on that system for due process and justice.*

Thanks for listening, good luck, do great things, and *Due Process Foreve*r! I’d be pleased to answer any additional questions.

(10-30-17)