Focus On

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Practical Tips for Presenting an Asylum Case in Immigration Court

Other than the economy, few topics today excite as much comment and controversy as the immigration laws of the United States. Often at the heart of the debate is asylum law and practice.

I am judge in the U.S. immigration court in Arlington, Va. In other words, I work at the “retail level” of the asylum system, where we often decide in the first instance who is granted asylum. In this essay, I will condense nearly 38 years of professional experience at all levels of the asylum system into 12 simple rules for effective asylum litigation. I will focus on the asylum law as it exists within the jurisdiction of the U.S. Court of Appeals for the Fourth Circuit, where the Arlington immigration court is located. However, almost all my tips are generally applicable.

For those of you who are new to the practice of asylum law, the Arlington immigration court is part of the Executive Office for Immigration Review—affectationally referred to as EOIR for Winnie the Pooh fans—a separate branch of the U.S. Department of Justice. Immigration judges are administrative judges appointed by the attorney general of the United States and operating under his delegated authority.

Twelve Practical Tips

1. Read a good book. My strong recommendation is to read the book that has always been at the top of the Arlington Immigration Court’s best seller list: Title 8 of the Code of Federal Regulations. In particular, I direct your attention to chapter 1208, which contains the seeds of all winning theories of asylum law—past, present, and future. In practical terms, the information presented in that chapter is far more helpful than information provided by court cases, treaties, and legislative history. The chapter will also give you gems like how to shift the burden of proof to the U.S. Department of Homeland Security (DHS) and how to win your case even if your client does not have a well-founded fear of persecution.

2. Get real. The REAL ID Act, enacted in 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 the act, decide how it can help you, and learn how you can respond to arguments by DHS, which represents the government in immigration court.

3. Know one when you see one. The statutory one-year filing requirement bars asylum in some cases. The burden of proof on the one-year filing issue is quite high: “clear and convincing evidence.” Judicial review may be limited, but there are exceptions. Read the statute and the regulations 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.

4. Play “To Tell the Truth.” At the beginning of each asylum case, I ask 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, and so forth. The issue they sometimes fail to identify is the one that is always first on my list. That issue is credibility, the key issue in almost all asylum litigation. That is why 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 determinations about the credibility of testimony are difficult to overturn on appeal. It’s all about deference.

5. Don’t believe everything you read. Because credible testimony might not be enough to win your case, I strongly advise you not to believe everything you read. Both appellate and trial court decisions often recite rote quotations from the regulations 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 most immigration courts, you will probably need a combination of credible testimony and reasonably available corroborating evidence. Read Matter
of S-M-J, largely codified by REAL ID, and find out what it really takes to win an asylum case in immigration court.

6. **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. Judges must still examine the record as a whole, including all the documentation supporting the claim, to determine whether independent documentary evidence establishes eligibility for asylum. Read *Camara v. Ashcroft,* and discover how the power of proof can overcome even a sustainable adverse credibility finding. Also, the REAL ID Act directs immigration judges to consider “the totality of the circumstances, and all relevant factors.”

7. **Read your paper.** It is important to read the documents you have written. 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 have come across very few attorneys who are able to dig out of that hole. Don’t let that happen to you.

8. **Pile it on.** Sometimes, as demonstrated in *Matter of O-Z- & I-Z-,* you will be able to refer to a series of events that happen to your respondent, his or her family, or close associates—none of which individually perhaps rises to the level of persecution but combined may amount to persecution—and use them to gain a victory for your client.

9. **Don’t get caught by the devil.** Remember that the devil is in the details. If you don’t find that devil, the assistant chief counsel at the Department of Homeland Security almost certainly will, and you will burn as a result. The attorneys with the DHS counsel office in Arlington are all very nice folks. They are also smart, knowledgeable, well prepared, and ready to vigorously litigate their clients’ positions. They handle more trials in a year than most litigators do in a lifetime. So beware and be prepared for a legal battle.

10. **Know your geography.** Not all immigration courts and circuit courts of appeals are located on the West Coast. The Board of Immigration Appeals (BIA) certainly is not on the West Coast. You must know and deal with the law in the jurisdiction in which you are litigating your case—not the one you might wish you were in. When you are in the Arlington immigration court, you’re above the Ballston Metro stop. That is in Virginia, which is not part of the Ninth Circuit. Coming to the Arlington court from a job where the majority of asylum cases arose in the Ninth Circuit once caused me trouble. But I got over it, and so can you.

11. **Get physical.** Be aware that the Fourth Circuit has emphasized “the infliction or threat of death, torture, or injury to one’s person or freedom” in defining persecution. Even though the Fourth Circuit and the BIA have also recognized nonphysical threats and harm, your strongest case probably will be to emphasize the physical aspects of the harm where they exist. I particularly recommend the Fourth Circuit’s recent decision in *Crespin-Valladares v. Holder,* which found that the BIA erred in rejecting the immigration judge’s 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.”

12. **Practice, practice, practice.** The *Immigration Court Practice Manual,* available online at the Executive Office for Immigration Review’s website, went into effective July 1, 2008, replacing all prior local rules. All filings with the immigration court must comply with the deadlines and formats established in this *Practice Manual.* The manual has a helpful index and covers just about everything you will ever want to know about practice before the immigration courts. The manual 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, the *Immigration Court Practice Manual* is applicable nationwide, so you can use what you learn in all immigration courts in the country.

**Conclusion**

In summary, I have told you to read the applicable regulations, familiarize yourself with the REAL ID Act, be cognizant of the one-year bar to asylum, pay attention to details, understand the concept of credibility, provide reasonably available documentation, take responsibility for your exhibits, argue cumulative past persecution where possible, be aware of the DHS assistant chief counsel’s important role, use the law that applies to the proper circuit, understand the physical and nonphysical aspects of persecution, and follow the *Immigration Court Practice Manual.* Now you have everything you need to do a terrific job for your
summary judgment to Montana, holding that the Montana owned the riverbeds and therefore PPL Montana owed compensation to the state. The issue of title largely turns on whether the river is “navigable.” PPL Montana argues that navigability should be determined by looking at individual segments of rivers and the rivers’ actual commercial use when Montana became a state. Montana contends that the proper navigability test is the susceptibility of travel through longer river stretches, which can be informed by current use. The Supreme Court’s decision may affect public benefits offered by the rivers and the reliance interests of riverbed owners. Full text is available at topics.law.cornell.edu/supct/cert/10-218. TFL

Paul Wickham Schmidt was appointed a U.S. immigration judge in 2003. Previously, he was the chairman and a member of the Board of Immigration Appeals, the deputy general counsel and the acting general counsel of the Immigration and Naturalization Service; the managing partner of Fragomen, Del Rey, and Bernsen in Washington, D.C.; and a partner at Jones Day. He was also a founding member of the International Association of Refugee Law Judges. The views in this article are his views and do not represent the official position of the U.S. attorney general, the U.S. Department of Justice, the Executive Office for Immigration Review, the Office of Chief Immigration Judge, colleagues at the Arlington Immigration Court, or anyone else of any importance whatsoever. The views also do not represent the author’s position on any case that he has decided in any capacity in the past, that is pending before him, or that might come before him in the future. This article is an expanded annotated version of a speech he has given, with accompanying handouts, at numerous pro bono and CLE events. © 2012 by Paul Wickham Schmidt. All rights reserved.

Endnotes

2In particular, see 8 C.F.R. § 1208.13 which discusses establishing asylum eligibility.

Prepared by Meredith Carpenter and Charlotte Davis. Edited by Jacqueline Bendert.

Setser v. United States (10-7387)

Appealed from the U.S. Court of Appeals for the Fifth Circuit (May 11, 2010)
Oral argument: Nov. 30, 2011

Monroe Setser’s arrest in Lubbock, Texas, for drug- and firearms-related crimes resulted in criminal charges in state and federal court as well as the revocation of his probation for an unrelated offense. Setser pleaded guilty in federal court and received a 151-month prison sentence that would run concurrently with his state sentence for the same incident but consecutively to the sentence imposed pursuant to the revocation of his probation. Setser appealed, and the Fifth Circuit affirmed. Setser now argues that federal district courts lack the authority to impose federal sentences that run consecutively to anticipated state sentences. He notes that Congress has not demonstrated any intention to the contrary. By invitation of the Supreme Court, attorney Evan Young responds that district courts have broad discretion in determining how federal sentences will be served. Young argues that this determination must remain an exclusive judicial function. Full text is available at topics.law.cornell.edu/supct/cert/10-7387. TFL

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clients at all levels of the U.S. asylum system. Good luck, and do great things for your clients and for the cause of justice. TFL

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