Are Losing Arguments Completely Irrelevant to the Equal Access to Justice Act? A Response to Professor Krishnan

TUNG YIN*

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I. INTRODUCTION

Suppose an asylum seeker is denied asylum by an immigration judge and, on appeal, the Board of Immigration Appeals affirms that denial. The asylum seeker then raises multiple grounds for relief in a petition for review in federal court, and the court agrees on some but not all of those grounds, ultimately reversing the BIA. Has the asylum seeker prevailed, and if so, was the government's opposition "substantially justified"? Under the Equal Access to Justice Act,[1] if the answers to those two questions are yes and no, respectively, the asylum seeker is entitled to have their fees and expenses paid by the government.

Whether the government's opposition was substantially justified is the subject of a circuit split, as Professor Jayanth Krishnan explains in *Lawyers for the Undocumented: Addressing a Split Circuit Dilemma for Asylum-Seekers*. Some courts take the position that the government's opposition can be substantially justified even if it loses, so long as the "totality" of its arguments are reasonable; other courts disagree. Professor Krishnan argues that the latter group of decisions are better reasoned because "[i]n reality, the government only had one steadfast position throughout the litigation: to reject the non-citizen's petition for asylum. When the government opted not to challenge that issue on appeal, it lost. Period."[2] As a result, the asylum seeker should recover "full legal fees under the EAJA."[3]

* Professor of Law, Lewis & Clark Law School. Thanks to Professor Krishnan for the invitation to respond, and to Colin Bradshaw ('21) for excellent research assistance.

[1] 28 U.S.C. § 2412 (2019).

[2] Jayanth K. Krishnan, *Lawyers for the Undocumented: Addressing a Circuit Split Dilemma for Asylum Seekers*, 82 OHIO ST. L.J. 163, 183 (2021).

[3] *Id.* at 184.

In this short response to *Lawyers for the Undocumented*, I don't disagree that an asylum seeker who wins relief is the prevailing party, even if only one of many arguments raised was accepted by the courts. I part ways with Professor Krishnan on whether losing arguments play any role whatsoever in the amount of attorneys' fees that the prevailing asylum seeker should recover; he says not at all, while I say, not so fast. In short, Professor Krishnan focuses on the "substantially justified" element of the EAJA to conclude that attorneys' fees should be shifted but does not address the statute's limitation of such fees to "reasonable" ones; I argue that losing arguments might be (but are not necessarily) the result of unreasonable litigation and are thus potentially relevant to the amount of fees that the prevailing asylum seeker should obtain.

II. ARGUMENT IN THE ALTERNATIVE

The impetus for *Lawyers for the Undocumented* is the Fifth Circuit's recent decision in W.M.V.C. v. Barr,[4] in which a Honduran mother and daughter pair appealed the immigration judge's and the Board of Immigration Appeals' denial of their asylum claim. Before the Fifth Circuit, the asylum seekers argued that, among other errors, the BIA failed to address all of their arguments. The government did not defend the BIA's ruling on the merits; instead, it "moved to remand to consider the issues raised in petitioners' opening brief [while] insist[ing] that its motion was not a concession of error . . . ."[5] When the petitioners then sought attorneys' fees under the Equal Access to Justice Act, the Fifth Circuit, in a 2-1 decision, held that the government's position was substantially justified because it prevailed on five of the eight arguments raised by the petitioners. The dissenting judge argued that the government's position was not substantially justified because the petitioners "prevailed on their petition for review."[6]

The crux of Professor Krishnan's analysis is that argument in the alternative is a time-honored litigation strategy. He cites approvingly Judge King's dissent in *W.M.V.C.*, in which she quoted a D.C. Circuit case: "[L]itigation is not an exact science. In some cases, the lawyer's flagship argument may not carry the day, while the court embraces a secondary argument the lawyer rated less favorably."[7]

It is a truism that a lawyer can never be sure which argument will prevail on a matter and, therefore, a lawyer might not want to rely on a single argument when there are multiple ones that could be raised. On the other hand, there are tactical reasons for a lawyer *not* to raise every conceivable argument. Alex Kozinski, a former Ninth Circuit judge, once gave tongue-in-cheek advice about how to lose an appeal, and one of the suggestions was to "bury your winning

[4] W.M.V.C. v. Barr, 926 F.3d 202 (5th Cir. 2019).
[5] *Id.* at 207.
[6] *Id.* at 214 (King, J., dissenting).
[7] *Id.* at 216.

argument among nine or ten losers."[8] James McElhaney, who wrote a long-time column on litigation and evidence for the ABA Journal, gave similar advice:

> Never make a dishonest argument, an inapt analogy or an unfair comparison. If you do, the reader can't trust you or what you have to say.
>
> That is why you need to get rid of every weak argument you have. Weak arguments reflect on the credibility of the writer, so they drag the entire brief down to their level.[9]

Thus, effective lawyering does not always mean raising every conceivable argument that one can think of; frivolous, ridiculous, and even weak arguments should be eliminated from briefing. To be sure, I'm not suggesting that Professor Krishnan or Judge King are actually arguing in favor of intentionally making bad arguments. However, the rule propounded by Judge King's dissent—and by extension, Professor Krishnan's article—is that a prevailing asylum seeker is entitled to full recovery of attorneys' fees so long as the asylum seeker wins asylum. After all, Judge King cited *Hensley v. Eckerhart*[10] approvingly for the proposition that "[l]itigants in good faith may raise alternative legal grounds for a desired outcome, and *the court's rejection of . . . certain grounds is not a sufficient reason for reducing a fee*."[11] Perhaps Judge King meant that losing arguments were a necessary but insufficient basis for reducing the award of attorneys' fees to prevailing plaintiffs, but the next sentence in her opinion suggests otherwise: "The result is what matters."[12]

In Part IV.C. of *Lawyers for the Undocumented*, Professor Krishnan provides additional reasoning to bolster his and Judge King's position, relying on Goodyear Tire & Rubber Co. v. Haeger,[13] in which the Supreme Court characterized prevailing plaintiffs' attorneys' fee provisions as a type of sanction for bad faith or abusive conduct by a litigant. In that case, plaintiffs settled a protracted products liability case and then discovered through newspaper reports that Goodyear had, in an unrelated case, produced test results that the Haegers had requested repeatedly in discovery and failed to receive. The Haegers then asked for sanctions against Goodyear for discovery fraud, which the district court granted in the amount of $2.7 million—an amount representing the total amount of legal fees and costs that the Haegers had incurred throughout the litigation. The Supreme Court reversed on the ground that the district court had improperly awarded sanctions beyond the "bad-faith acts on which [they were] based." Instead, the Court explained that a court engaging in fee shifting as a sanction must "establish a causal link—between the litigant's misbehavior

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[8] Alex Kozinski, *The Wrong Stuff*, 1992 BYU L. REV. 325, 327 (1992).

[9] James W. McElhaney, *Legal Writing that Works*, ABA J. (July 1, 2007), https://www.abajournal.com/magazine/article/legal_writing_that_works.

[10] Hensley v. Eckerhart, 461 U.S. 424, 435 (1983).

[11] *Id.* (emphasis added).

[12] *Id.*

[13] Goodyear Tire & Rubber Co. v. Haeger, 137 S. Ct. 1178 (2017).

and legal fees paid by the opposing party." Rather than the full $2.7 million they spent in attorneys' fees on the case, the Haegers were entitled only to the amount spent in litigating access to the test results.

Professor Krishnan argues that where an asylum seeker prevails in litigation, the government's misbehavior consists of opposing the asylum petition in the first place, and, therefore, he reads *Goodyear* as requiring the government to pay for the attorneys' fees that the asylum seeker incurred in litigating that opposition: "[T]he following presumption should be employed going forward: where the government loses at the merits-phase of an asylum hearing, it will be obliged to reimburse the non-citizen for legal fees."

This presumption is based on his observation that in the "vast majority of precedent discussed [earlier in the article] . . . the government's opposition has not been substantially justified."[14] But this presumption seems to rely on a bit of a tautology: because the courts have frequently found the government's position in the asylum cases not to be substantially justified, we should presume the government's position not to be substantially justified in all cases going forward where it loses on the merits. Our legal system generally doesn't penalize a litigant by presuming an element of a cause of action against them due to their having lost that same element repeatedly in unrelated litigation.[15] On the other hand, perhaps this is meant to be a rebuttable presumption. If so, however, it is difficult to see what the presumption adds. If the government loses, then the asylum seeker has prevailed and is entitled to attorneys' fees unless the government can show that its position was substantially justified; in other words, the government already bears the burden of proving that its position was substantially justified.

III. REASONABLE AND UNREASONABLE LOSING ARGUMENTS

Although *Goodyear* supports Professor Krishnan's position to make the government pay for a prevailing asylum seeker's attorneys' fees as compensation for wrongly denying asylum, it also supports denying those fees for unreasonable arguments. The Court explained that the causal link between misbehavior and legal fees means that sanctions are appropriate only for legal costs related to the misconduct, as opposed to the entire litigation. It used *Fox v. Vice* as an example:

> [A] prevailing defendant sought reimbursement under a fee-shifting statute for legal expenses incurred in defending against several frivolous claims. The trial

[14] Krishnan, *supra* note 2, at 195.

[15] Perhaps the closest analogy is the ability of a court to declare someone a "vexatious litigant" based on past "abuse of process," in which case a court might require the vexatious litigant to put up security to guarantee payment of any sanctions that might be imposed for subsequent misconduct. *See, e.g.*, L.R. 83-8 C. D. Cal.. But even that local rule does not presume that the vexatious litigant's subsequent litigation is sanctionable once they lose on the merits.

> court granted fees for all legal work relating to those claims—regardless of whether the same work would have been done (for example, the same depositions taken) to contest the non-frivolous claims in the suit. We made clear that was wrong.[16]

The key point is that the wronged party is not necessarily entitled to compensation for all of its fees incurred, only those incurred because of the other side's frivolous or abusive conduct. This also suggests that compensation should not extend to the prevailing party's own frivolous or unreasonable positions because these are not appropriate responses. Here it is worthwhile to observe that the Equal Access to Justice Act limits recovery to "reasonable attorney fees."[17]

As a counterexample, what if a non-citizen is forced to litigate entitlement to asylum and raises a number of arguments, one of which directly contradicts binding Supreme Court precedent. A zealous advocate could plausibly include such an argument to preserve the issue for appeal, but it would be unreasonable to devote any more time to researching the issue or drafting and editing lengthy analysis and argument for a lower court once the advocate discovered the adverse controlling authority; after all, the Supreme Court has on multiple occasions reminded the Courts of Appeals pointedly that it alone can overrule one of its precedents.[18] Under Professor Krishnan's approach, though, the asylum seeker would be able to recover all of the attorneys' fees expended in this quixotic effort. This is, admittedly, an extreme example, but it is not the only way in which part of a plaintiff's litigation effort might be unworthy of fee-shifting.

Other well-known fee-shifting statutory provisions, such as 42 U.S.C. § 1988 for civil rights actions and 42 U.S.C. § 2000e-5(k) for Title VII actions, would not yield the same result as that suggested by Professor Krishnan with regard to the Equal Access to Justice Act. These fee-shifting provisions serve the same purpose as the EAJA: "to encourage meritorious civil rights litigation."[19] However, they award *reasonable* attorneys' fees for prevailing plaintiffs. Note the qualification of "reasonable" fees, as well as "meritorious" litigation. The prevailing civil rights plaintiff gets an award of attorneys' fees from the defendant, but it might well be less than 100 percent of what was sought.

The basic principle is well-stated by *Coutin v. Young & Rubicam P.R.*: "If a prevailing party is successful on all (or substantially all) of her claims, . . . it goes without saying that reasonable fees should be paid for time productively

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[16] *Haeger*, 137 S. Ct. at 1187 (citing Fox v. Vice, 563 U.S. 826, 830, 836 (2011)).

[17] 28 U.S.C. § 2412(d)(2)(A) (2019).

[18] Bosse v. Oklahoma, 137 S. Ct. 1, 2 (2016); United States v. Hatter, 532 U.S. 557, 567 (2001); State Oil Co. v. Khan, 522 U.S. 3, 20 (1997); Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 484 (1989).

[19] Bittner v. Sadoff & Rudoy Indus., 728 F.2d 820, 829 (7th Cir. 1984).

spent, without any discount for limited success,"[20] the key being "time *productively* spent." Time spent on a losing argument might have been productive – or it might have been unproductive. Much as they do when fee-shifting under Title VII or section 1988, courts are able to determine if unsuccessful claims and arguments were frivolous, and there is no reason to doubt that the same would be true for asylum claims under the EAJA.

IV. THE NITTY-GRITTY DETAILS OF APPORTIONING FEES

How do courts limit fees under Title VII or section 1988 when there are multiple arguments? One representative case is Diaz v. Jiten Hotel Management, Inc., in which the plaintiff brought six employment-related claims, eventually prevailing on a count of discrimination under state law. Of the other five claims, she dismissed three voluntarily (which the district court interpreted as her concession that they were not viable), the defendant obtained summary judgment on another because it was preempted, and the remaining unsuccessful claim (discrimination under federal law) was rejected by the jury.[21] The plaintiff prevailed and sought attorneys' fees under the state law-equivalent to Title VII for the full amount of time spent by her attorney on the case. The district court, however, reduced the amount sought by two-thirds because four of the six claims were unviable, and "[h]ours spent working on such untenable claims 'cannot be deemed to have been "expended in pursuit of the ultimate result achieved."'"[22] At the same time, the district court awarded attorneys' fees for time spent on the federal discrimination claim even though it failed before the jury, because it "was largely based on the same core of facts as the successful state age discrimination claim."[23] In short, the losing claims were not irrelevant to the amount of attorneys' fees that the plaintiff was entitled to, but nor were they dispositive. The *unreasonable* lost claims resulted in no fee award, but the reasonable one did.[24]

Ideally, the asylum seeker's lawyer would submit sufficiently detailed billing records so that the reviewing court would be able to determine the amount of time spent on the unreasonable arguments and exclude that time from the fee-shifting calculation. In practice, however, billing records are unlikely to be that detailed. In analogous instances involving a mixture of reasonable and unreasonable claims, courts have roughly apportioned time equally to each claim; thus, in *Diaz*, the district court, having concluded that two of the six claims were tenable and four were not, awarded one-third the amount sought.

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[20] Coutin v. Young & Rubicam P.R.,124 F.3d 331, 339 (1st Cir. 1997).

[21] Diaz v. Jiten Hotel Mgmt., Inc., 762 F. Supp. 2d 74, 80 (D. Mass. 2011).

[22] *Id.* (internal citations omitted).

[23] *Id.*

[24] For another entertaining example, see Murray v. Mills, 354 F. Supp. 2d 231 (E.D.N.Y. 2005), in which the prevailing plaintiff's lawyer sought to be paid for the 1320.1 hours that he claimed to have spent to obtain a temporary restraining order. The court reduced the hours to 156.9 and cut the hourly rate sought by almost two-thirds.

In some instances, a judge might well conclude that such rough apportionment would shortchange the asylum seeker because the amount of time spent on the unreasonable or frivolous argument was, in the judge's assessment, much less than that spent on other arguments. The judge should of course feel free to adjust the fees as would be appropriate without following rigid apportionment. Even in such an instance, though, it is apparent that losing (and frivolous or unreasonable) arguments play an important role in determining the amount of fees to be shifted; at a minimum, they can serve as a starting point in apportionment.

V. CONCLUSION

Professor Krishnan is surely correct in arguing that the determination of substantial justification of the government's position in an asylum case should be based on the overall outcome, not the individual arguments. But a prevailing plaintiff and a lack of substantial justification of the government's position led to an award of reasonable attorneys' fees, not any and all fees. The reasonableness of the attorneys' fee award is a separate determination from the entitlement to such fees in the first place, and losing arguments can—and should—play a role in determining the former.