



In collaboration with



9th Annual Strategic Litigation Roundtable

Recap

In September and October 2021, three Strategic Litigation Roundtable sessions took place. For the first time, the Global Strategic Litigation Council for Refugee Rights joined UNHCR, HIAS and Asylum Access as co-host.

The high number of participants is impressive, with 144 at the peak of the first session, and about 110 at the second session. The virtual format of the Strategic Litigation Roundtable indeed offers added value through diverse and global participation.

The first session took place on September 23rd, 2021. Panel I of this session provided a global roundup of selected strategic litigation developments in the UK, India, the US, and from the Human Rights Committee.

First, *Raza Husain* (Matrix Chambers) presented the United Kingdom (UK) Supreme Court case of *G v. G*. This case touches upon multiple legal issues, including the intersection between the Refugee Convention and the Hague Convention, and the best interest of the child. The decision of the UK Supreme Court comes with the following significant effect: Where a claim for asylum is made on behalf of a child, or where a child is named as a dependent on a parent's asylum claim, a return order under the Hague Convention can only be implemented once the asylum claim has been determined.

As second panelist, *Roshni Shanker* (Ara Trust) shared her inside view and expertise on strategic litigation in India, presenting the case of *Mohammad Salimullah v. Union of India*, which concerns the *refoulement* of Rohingya refugees. It is particularly striking that the Indian Supreme Court did not consider *non-refoulement* as customary international law; and it rejected to apply the principle of *non-refoulement* on the basis that India does not count among the signatories to the Refugee Convention.

Next, *Blaine Bookey* (Center for Gender & Refugee Studies) presented an [update on *Matter of A-B-*](#). This case represents a positive development in the US. In June, Attorney General Garland vacated *Matter of A-B-* and other harmful rulings; his decision offers helpful language, and is expected to bring to life serious claims that have been denied in the aftermath of *Matter of A-B-*.

The last speaker of Panel I was *James Goldston* (Open Society Justice Initiative). Just in time for the 60-year anniversary of the Statelessness Convention, he introduced a significant development on the right of a child to acquire nationality. In [Denny Zhao v. the Netherlands](#), the Human Rights Committee condemned the Dutch practice of leaving children unable to be registered as stateless. Indeed, the systemic failures and lack of legal responses to statelessness constitute a pressing issue, especially in the new era of transborder challenges, including climate change.

Panel II was dedicated to the Global Strategic Litigation Council for Refugee Rights. *Ian Kyse* introduced the newly launched Council. In the course of the Panel, the co-chairs of the Working Groups shared the litigation priorities that have been identified so far (*Dr. Annette Mbogoh* for the Working Group on Legal Status and Lawful Stay, and *Alejandra Macías Delgadillo* for the Working Group on Detention and Due Process). As a next step, the Working Groups will transform their ambitious goals in concrete action. This is indeed what makes the Council one of its kind!

- [Link](#) to apply to become GSLC member
- GSLC [announcement](#) and list of founding members: <https://zolberginstitute.org/initiatives/gslc/>
- [Map](#) of GSLC founding members
- [GSLC Concept Note](#)
- [Multilingual versions](#) of the GSLC Concept Note

Alice Farmer kicked off the Panel III on protection during Covid. She provided an update on Covid-related developments. (Link to UNHCR's [Covid-19 platform](#).)

Sally Gandar (Scalabrini), the first speaker on this Panel, shared a success-story, namely the ruling in the Social Relief Grant Case. Scalabrini argued that the suffering from the economic impact of Covid experienced by asylum-seekers and special-permit holders in South Africa was particularly severe. An effective approach to combatting Covid-19 had to be inclusive because Covid affects people regardless of their nationality. Eventually, the Court found a violation of constitutional rights. (Further details can be found on the [website of Scalabrini](#).)

Second, *Lee Gelernt* (American Civil Liberties Union) shared first-hand information on actions against Title 42 measures in the US. Title 42 is very old law addressing public health and welfare. The Trump administration excessively relied on Title 42 to justify expulsion of asylum seekers at the Mexican border; and the Biden administration is still not taking the necessary steps, using public health law as justification for continued expulsions.

Lastly, *Zsolt Szekeres* (Hungarian Helsinki Committee) confronted the audience with the sad truth of the systemic destruction of the Hungarian asylum system, as well as its rule of law crisis. He introduced interesting cases decided by the Court of Justice of

the European Union, who considered Hungary's transit zones as a basis for arbitrary and unlawful detention (see Case C-924/19 PPU FMS and Others v. Immigration Office; Case C-808/18 Commission v. Hungary). Also, against the background of the recent developments in Poland, it is important to highlight that Europe's rule of law crisis implicates reluctance of judges to rely on the direct application of EU law.

The second session of the Strategic Litigation Roundtable on October 26th focused on recent jurisprudence and litigation strategies on Detention and Due Process.

In his welcome speech, *Patrick Eba* (UNHCR) stressed the impact of Covid on fundamental rights of detained refugees and other migrants. The responses of States have resulted in positive as well as concerning developments: On the one hand, for example Spain emptied its detention facilities when deportation became impossible, and many were able to receive support from families and from the civil society at large. On the other hand, forced migrants have been blamed for spreading the virus, and the criminalization of migration has increased.

Álvaro Botero Navarro (UN Committee on Migrant Workers, Organization of American States) was the first Panelist in this session. His presentation circled around the Committee on Migrant Workers' recently adopted [General Comment \(GC\) No. 5 on migrants' rights to liberty, freedom from arbitrary detention and their connection with other human rights](#). The reason for the thematic focus of the GC lies, amongst others, in the current trend of criminalization of migration. The key idea is that personal freedom should always be respected. As a new development, the Committee not only highlighted the prohibition of detention of minors, but went one step further: Those with disabilities or in particularly vulnerable situations should not be detained as well. In addition, the Committee outlined a specific definition of Alternatives To Detention. Eventually, please use GC No. 5 for your work and in litigation!

Next, *Isabel Penido de Campos Machado* (Brazilian Public Defender's Office; Unidade de Monitoramento e Fiscalização das Deliberações da Corte Interamericana de Direitos Humanos do Conselho Nacional de Justiça) reported on developments in Brazil. Particularly noteworthy is that Brazil approved a [new Migration Law](#) in 2017 that incorporates the principle of non-criminalization of migration into the Brazilian legal system. Strategic litigation through habeas corpus interventions, as well as [provisional measures from the Inter-American Court of Human Rights](#) and [Resolution 04/19](#) from the Inter-American Commission on Human Rights, have served as a tool to foster prison reform in Brazil. [Resolution 405](#) established special procedures for migrants, including alternative measures. Also, the Public Defender's Office took measures to implement new possibilities of compensation for people in degrading prison conditions.

Alejandra Macías Delgadillo (Asylum Access) provided her insights on the situation in Mexico, where detention has significantly increased, and massive deportations have taken place without access to asylum procedures. Entering Mexico without documentation is not considered a criminal offense under Mexican law, but refugees and other migrants are sent to so-called migration stations, where they face deplorable conditions. Despite general difficulties because authorities have been blacking a lot of information, Asylum Access achieved success with a collective habeas corpus action;

in his response, the judge recognized the demand for access to communication, the need to resolve status determination as quickly as possible, and to prevent the spread of Covid. Eventually, there is a need for legislation on Alternatives To Detention (ATDs) in Mexico, so that people do not have to remain in migration stations. Since 2016, Asylum Access has promoted ATDs and this program has benefitted 18,000 asylum-seekers.

The third panelist, *Lublanc Prieto* (Refugiados Unidos) shed light on the situation in Columbia. Also in Colombia, criminalization of migration constitutes a pressing issue. *Lublanc Prieto* stressed that irregular migration should not be misused to criminalize people and justify deportation. In particular, she referred to detention in the context of places of transit, especially airlifts.

Eunice Hyunhye Cho (National Prison Project, ACLU, United States) lively presented COVID litigation in US detention centers. She described examples where even basic measures were refused. Just to name a few:

- Masks were given out to women only if they signed a liability waiver that they would not sue the detention center;
- detainees went on hunger strikes to ask for basic needs, including the distribution of sanitizers;
- dangerous transfers occurred between detention facilities, sparking outbreaks of the virus (see Article published in the *Washington Post*: [ICE flew detainees to Virginia so the planes could transport agents to D.C. protests. A huge coronavirus outbreak followed](#)).

Until recently, ICE had no coherent vaccine roll out plan. 29,032 detainees tested positive; 11 have died in detention because of Covid, but the actual number of Covid related deaths in detention is likely higher.

Overall, ACLU filed more than 40 cases. Key Cases include:

- *Fraihat v. ICE*, No. 20-55634 (9th Cir. Oct. 20, 2021)

Facility-specific cases:

- *Hernandez v. Roman*, 977 F.3d 935 (9th Cir. 2020) (Adelanto)
- *Zepeda Rivas v. Jennings*, 445 F. Supp. 3d 36 (N.D. Cal. 2020) (Mesa Verde, Yuba County)
- *Rodriguez Alcantara v. Archambeault*, --F. Supp. 3d--, 2020 WL 2315777 (S.D. Cal. May 1, 2020) (Otay Mesa, Imperial)
- *Malam v. Adducci*, 452 F. Supp. 3d. 643 (E.D. Mich. 2020) (Clayton County)
- *Gomes v. DHS*, 460 F. Supp. 3d. 132 (D.N.H. 2020) (Strafford County)
- *Yanes v. Martin*, 464 F. Supp. 3d 467 (D.R.I. 2020) (Wyatt County)
- *Vazquez Barrera v. Wolf*, 455 F. Supp. 3d 3330 (S.D. Tax) (Montgomery Processing Center)

Session three took place on October 28th, 2021, with focus on the Right to Decent Work and Workplace Rights.

First, *Cornelis Wouters* (UNHCR) presented the [UNHCR Guidelines on International Legal Standards Relating to Decent Work for Refugees](#), which provide an overview and basic legal interpretive guidance on the right to decent work. The Guidelines are

centered around the Refugee Convention, but also drawn on other human rights and labor rights standards. The underlying principles, namely refugee inclusion, resilience and self-reliance, have gradually been recognized (progress started with the [New York Declaration for Refugees and Migrants \(full text\)](#)), and has been fostered through the [Global Compact for Refugees](#)). Further notable authorities include:

- ILO, Recommendation R205 - [Employment and Decent Work for Peace and Resilience Recommendation](#), 2017 (No. 205); and
- Statement by the Committee on Economic and Social Rights, [Duties of States towards refugees and migrants under the International Covenant on Economic, Social and Cultural Rights](#).

Second, *Yusra Ali Herzi* (Work Rights Program at Asylum Access Malaysia) spoke about the situation in Malaysia, a non-signatory to the Refugee Convention, where refugees still do not have the right to work legally. There is no distinction between undocumented migrants and refugees under Malaysian law. A tendency exists for refugees to work in jobs that are not first preference for locals. They face exploitation and various other work-related violations, and they are at constant risk of being arrested. One notable case is [Ali Salih Khalaf v Taj Mahal Hotel \[2014\], Industrial Court Kuala Lumpur 4 ILJ 15](#). This decision has opened access for refugees to Malaysia's labor and industrial relation departments. Moreover, in 2017, Asylum Access Malaysia introduced a Work Rights Program, based on three pillars: (i) mediation, (ii) community legal empowerment, as well as (iii) strategic litigation and advocacy.

The third and last panelist was Barrister *Ali Bandegani*. He shared historical context and information on current litigation in the UK. UK Immigration rules allow asylum seekers to apply for work only if their asylum application has been pending for a year or more and the delay is not due to fault of the respective applicant. This restriction was at issue in [Cardona, R \(On the Application Of\) v. Secretary of State for the Home Department](#) [2021] EWHC 2656 (Admin) (Oct. 4, 2021). The case dealt with considerations of the best interest of the child in the context of a work permit application of the guardian. The Court found that the government policy did not ensure that decision-makers properly take into account the best interest of the child.

After an intense Q&A discussion, *Grainne O'Hara* (Director, Division of International Protection at UNHCR) closed the three-part event with inspiring remarks. "Why is strategic litigation such a strong tool?" As a core message, *Grainne O'Hara* emphasized the major balancing role coming from strong judicial decisions, in a time where the political situation around asylum and refugee rights and human rights remains difficult.