

No. 19-15716

**In The United States Court of Appeals
for the Ninth Circuit**

INNOVATION LAW LAB, et al.,

Ⓡ

Ⓢ

v

KEVIN M. MCALEENAN,

Ⓡ

Ⓢ

Ⓢ

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA

**THE UNITED NATIONS HIGH COMMISSIONER
FOR REFUGEES' AMICUS CURIAE BRIEF IN SUPPORT OF
APPELLEES' ANSWERING BRIEF**

ALICE FARMER
UNITED NATIONS HIGH

CORPORATE DISCLOSURE STATEMENT

The Office of the United Nations High Commissioner for Refugees (“UNHCR ”) is a nonprofit entity that does not have a parent corporation. No publicly held corporation owns 10 percent or more of any stake or stock in UNHCR.

Respectfully submitted,

s/ Ana C. Reyes

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TABLE OF CONTENTS

INTEREST OF AMICUS CURIAE	1
SUMMARY OF ARGUMENT	4
ARGUMENT	6
I. THE UNITED STATES IS BOUND BY THE 1951 AND ITS 1968 PROTOCOLS RELATING TO THE STATUS OF REFUGEES	6
II. AS RECOGNIZED BY U.S. AND FOREIGN COURTS, UNHCR PROVIDES AUTHORITATIVE GUIDANCE FOR INTERPRETING INTERNATIONAL REFUGEE LAW	8
III. TRANSFER ARRANGEMENTS REQUIRE SAFEGUARDS UNDER INTERNATIONAL REFUGEE LAW	10
A. International Law Requires that Transfer Arrangements Contain Safeguards to Protect Against Abuse	11
B. A Formal, Enforceable, Bilateral Agreement Is Required to Transfer Asylum-Seekers.....	14
C. International Law Requires an Adequate Screening Mechanism to Guard Against Abuse and Safeguard Rights.....	16
CONCLUSION	16

Gen. Conclusion on Int'l Protection, Rep. of Exec. Comm.
on Its Fortieth Session, U.N. Doc. A/44/12/Add.1 (Oct.

UNHCR, 2011

INTEREST OF AMICUS CURIAE¹

The Office of the United Nations High Commissioner for Refugees (“UNHCR”) has a direct interest in this matter as the organization entrusted by the United Nations General Assembly with responsibility for providing international protection to refugees and

UNHCR in the exercise of its mandate and to facilitate its supervisory role. UNHCR 's guidance is relevant to this Court's interpretation of the 1951 and its 1967 , as implemented in Section 101(a)(42) of the Immigration and Nationality Act ("INA "), 8 U.S.C. § 1101(a)(42) (2006).

UNHCR

UNHCR exercises its supervisory responsibility by issuing interpretative guidelines on the meaning of the 1951 Convention and its 1967 Protocol and other international refugee instruments, including the 1951 Convention and the 1967 Protocol. The UNHCR Handbook on the Status and Rights of Refugees (U.N. Doc. HCR/1P/4/ENG/REV. 4 (1979, reedited Jan. 1992; reissued Dec. 2011; re-issued Feb. 2019) (“2017/4 D

and content of the principle of non-refoulement is important to this case.

Through this brief, UNHCR addresses the nature of non-refoulement

obligations, and expresses no opinion on the applicability of the principle of non-refoulement to the facts of this case.

rights standards, including—but not limited to—protection from

UNHCR, [2011](#)

UNHCR, [2013](#), ¶ 3(vi) (May 2013)

<https://www.refworld.org/docid/51af82794.html> (hereinafter “Bilateral

Transfer Arrangement Note”); UNHCR, [2018](#)

[2018](#)

UNHCR, [2018](#)

UNHCR, [2018](#), ¶ 4 (April 2018)

<https://www.refworld.org/docid/5acb33ad4.html> (hereinafter “Legal

Considerations Paper”).

A return or transfer arrangement that does not provide asylum-seekers with these protections is at variance with the core principle of

and the fundamental tenets of the 1951

and its 1967

ARGUMENT

I. THE UNITED STATES IS BOUND BY THE 1951 CONVENTION AND

Congress enacted the Refugee Act of 1980, Pub. L. No. 96-12, 94 Stat. 102 (1980), expressly to bring United States refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees” ~~16~~ ~~5~~ , 480 U.S.421,436-37,437 n.19(1987)(citing H.R. Rep. No. 96-781, at 19); ~~6~~ ~~16~~ - ~~9~~ , 526 U.S. 415, 427 (1999). The Refugee Act brings the United States into compliance with its international obligations under the 19 ~~0~~ ~~0~~ and, by extension, the 19 ~~0~~ ~~0~~ . It should be interpreted and applied in a manner consistent with those instruments. ~~00~~ ~~5~~ , 480 U.S. at 437 (~~0~~ enacting the Refugee Act, Congress intended “that the new statutory definition of ‘refugee’ be interpreted in conformance with the Protocol’s definition”); ~~01~~ ~~00~~ , 6 U.S. (2 Cranch) 64, 118 (1804)[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains’).

II. AS RECOGNIZED BY U.S. AND FOREIGN COURTS, UNHCR PROVIDES AUTHORITATIVE GUIDANCE FOR INTERPRETING INTERNATIONAL REFUGEE LAW

UNHCR exercises its supervisory responsibility by issuing interpretive guidance on the meaning of provisions contained in the 19 ~~0~~ ~~0~~ and its 19 ~~0~~ ~~0~~

~~§~~, 400 F.3d 785, 798 (9th Cir. 2005); ~~§~~ ~~§~~ -~~§~~

~~§~~ 850 F.3d 1051, 1071 (9th Cir. 2017) (en banc).

III. TRANSFER ARRANGEMENTS REQUIRE SAFEGUARDS UNDER INTERNATIONAL REFUGEE LAW

The ~~§~~, ~~§~~ and ~~§~~ all affirm that,

while ~~70 Stat. 218, 3p (11) 308, 9. 6. 76-3 at the (d)-6 (e)-4r(St)-0 6 (hi)nt4 (d).7~~

33, ¶1. Any State with de facto or de jure jurisdiction over an individual remains responsible for fulfilling the guarantees contained within the 1951 and its 1968 .

Article 33 applies to both returns and removals equally. b (noting the prohibition on 6 “in any manner whatsoever”);

B

import of this is that ~~it~~ is prohibited to the frontiers of ~~a~~ territory in which the person concerned will be at risk – regardless of whether those territories are the country of origin of the person concerned”).

The transferring State does not absolve itself of responsibility to prevent ~~it~~ by transferring the individual to a receiving State.

~~Article~~ ~~3(vii)~~. Consequently, the transferring State remains responsible if the receiving State goes on to ~~it~~ the transferred person. ~~id.~~ ¶ 4; Guy Goodwin-Gill & Jane McAdam, *The Refugee in International Law*, 252-53 (3d ed. 2007) (“While a State that ~~it~~ returns a refugee to persecution . . . remains primarily responsible for that act, the first State, through its act of expulsion, may be jointly liable for it.”).

The prohibition on ~~it~~ applies to refugees who have not yet completed a status determination procedure, in other words, to asylum-seekers. ~~Article~~ ¶ 28. Asylum-seekers must be treated on the assumption that they are refugees until their status has been determined, “[o]therwise the principle of ~~it~~ would not provide effective protection for refugees[.]”

Protection, Rep. of Exec. Comm. on the Work of Its Forty-Fourth Session, ¶ 11, U.N. Doc. A/AC.96/815 (Aug. 31 1993)

<https://www.refworld.org/docid/3ae68d5d10.html>

B. A Formal, Enforceable, Bilateral Agreement Is Required to Transfer Asylum-Seekers.

Asylum-seekers should ordinarily be processed in the State in which they seek asylum. ¶ UNHCR, ~~1993~~

~~1993~~

~~1993~~

~~1993~~

~~1993~~

, ¶ 2 (Nov. 2010)

<https://www.refworld.org/docid/4cd12d3a2.html>

(hereinafter

jurisdiction and responsibility

¶ 8. Without specific implementation mechanisms in a legally binding instrument such that asylum-seekers could enforce its guarantees in a court of law, a transfer-like arrangement lacks the capacity to ensure that the transferred asylum-seekers retain the rights due to them. Consequently, such an arrangement would be at variance with international standards.

C. International Law Requires an Adequate Screening Mechanism to Guard Against Refoulement and Safeguard Rights.

A State cannot ~~not~~ transfer asylum -seekers to a third country to await asylum proceso1.8 (s)-1.051.a 1 Tf -0a.1 (d)JTJ -0.0sy2.8 (.h

In the context of individualized screening for a possible transfer, the State must assess whether the asylum seeker fears persecution in the receiving State, or whether there is a risk that the receiving State will force the individual to yet another State.

will be treated as manifestly unfounded or abusive unless its fraudulent character or its lack of any connection with the relevant criteria is truly free from doubt.” UNHCR, ~~5/~~ -~~1500~~

~~6~~ -~~6000~~

~~16/01/19~~ , ¶ 19,

U.N. Doc. EC/SCP/29 (Aug. 26, 1 ()4.2 (A)01.8 (t)8 0.248 0 28.684

and/or receive notice of upcoming court dates, or otherwise be assured

CONCLUSION

For the foregoing reasons, UNHCR submits that a transfer arrangement without the requirements listed above would be at variance with the United States' international obligations under the 1951 Refugee Convention and its 1967 Protocol.

Dated: JUNE 26, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on June 26, 2019. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Ana C. Reyes

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