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Advocate General's Opinion in Case C-136/24 P | Hamoudi / Frontex

Action for damages against Frontex: AG Norkus analyses the allocation of the burden of proof in relation to the existence of damage in collective expulsion cases

A Syrian national claimed that, on 28 and 29 April 2020, he was the victim of a collective expulsion. He claimed that on 28 April, 22 people, including himself, arrived on the island of Samos, Greece in order to seek asylum and that, on that same day, local police confiscated the group's phones and drove them to the beach where they were sent back out to sea. The day after, a vessel of the Turkish coast guard took him aboard and relocated him to Turkish territory. According to him, during his time at sea, a private surveillance aeroplane, operated by the European Border and Coast Guard Agency (Frontex), flew over the scene several times.

In an action before the General Court of the European Union, that Syrian national requested that Frontex be ordered to pay him a total sum of €500,000 in damages as compensation for the non-material damage he claimed to have suffered due to the collective expulsion.

The General Court,¹ after assessing the evidence adduced by the Syrian national, dismissed the action as manifestly lacking any foundation in law, since the said national had failed to demonstrate the actual damage he claimed to have suffered. The Syrian national appealed this order before the Court of Justice.

In today's Opinion, Advocate General Rimvydas Norkus focuses on the analysis of the allocation of the burden of proof in relation to the existence of damage in collective expulsion cases.

The Advocate General notes that while there is no legislation at EU level governing the concept of proof, the EU Courts have laid down a principle of unfettered production of evidence or freedom as to the form of evidence adduced.

Having examined the case-law of the Court of Justice and that of the European Court of Human Rights (ECHR), the Advocate General finds that there is a common thread concerning the reversal of the burden of proof that is based on the co-existence of the following conditions:

1. A claimant must first present *prima facie* evidence to support their case. If their account is inconsistent or incoherent and/or the claimant lacks credibility, they fail to meet this burden and the case should be dismissed. The question of reversing the burden of proof, therefore, only arises if the claimant has successfully adduced *prima facie* evidence.
2. For the burden to shift there must be a clear or structural imbalance in access to evidence, with the claimant facing considerable difficulty in adducing evidence and the respondent being in a better or more 'privileged' position to rebut the allegations.
3. Failing to shift the burden once the claimant has established a *prima facie* case would undermine the

claimant's rights under EU law, particularly the right to an effective remedy and to a fair trial as laid down in the Charter of fundamental rights of the EU while that shift would not undermine the respondent's rights thereunder.

4. There is a presumption in EU anti-discrimination legislation and in collective expulsion and refoulement cases before the ECHR against contracting States that the claimant is at a disadvantage in adducing evidence. Once the claimant has adduced prima facie evidence in support of their allegations, the burden of proof typically shifts to the respondent.
5. However, this presumption does not apply to actors other than the authorities of a Member State, such as Frontex, as their limited powers make their evidentiary 'privilege' less clear.

Advocate General Norkus thus puts forward two options for the Court's consideration: it should either reject the appeal if it has sufficient facts to determine that the Syrian national did not provide prima facie evidence of damage, or, annul the General Court Order, and refer the case back to the General Court to rule on whether the conditions on the reversal of the burden of proof outlined above are applicable.

NOTE: The Advocate General's Opinion is not binding on the Court of Justice. It is the role of the Advocates General to propose to the Court, in complete independence, a legal solution to the cases for which they are responsible. The Judges of the Court are now beginning their deliberations in this case. Judgment will be given at a later date.

NOTE: An appeal, on a point or points of law only, may be brought before the Court of Justice against a judgment or order of the General Court. In principle, the appeal does not have suspensive effect. If the appeal is admissible and well founded, the Court of Justice sets aside the judgment of the General Court. Where the state of the proceedings so permits, the Court of Justice may itself give final judgment in the case; otherwise, it refers the case back to the General Court, which is bound by the decision given by the Court of Justice on the appeal.

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The [full text](#) of the Opinion is published on the CURIA website on the day of delivery.

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¹ Order of 13 December 2023, *Hamoudi v Frontex*, [T-136/22](#) (see also Press Release [No 188/23](#)).