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Advocate General's Opinion in Case C-679/23 P | WS e.a. v Frontex (Joint return operation)

Advocate General Ćapeta: Return Operations – the General Court erred in its assessment of the causal link in an action for damages brought by a Syrian family against Frontex

A family of Syrian Kurds were returned by plane from Greece to Türkiye in a joint return operation coordinated by the European Border and Coast Guard Agency (Frontex). Once in Türkiye, they first rented a house outside of the refugee camp, and afterwards decided to flee to Iraq, fearing that they would be returned to Syria. They claim that the return was illegal and that Frontex did not verify whether a return decision relating to them existed, thus breaching their fundamental rights, including the principle of *non-refoulement*. They now claim material and immaterial damages from Frontex.

The General Court ¹ dismissed the family's action based on the lack of a causal link between the alleged illegal conduct of Frontex and the damage suffered, without assessing the other conditions for liability. It held that, since Frontex did not have the power to assess the merits of return decisions or applications for international protection, it could not be held liable for any damage related to the return of that family to Türkiye.

In the present appeal, the Syrian family claims that the General Court mischaracterised their action as challenging the decision to refuse them international protection or to the (implied) return decision taken in respect of them by the Greek authorities, rather than challenging the alleged illegal conduct of Frontex in the performance of its obligations. Due to this mischaracterisation, they claim that the General Court failed to assess their arguments that Frontex's illegal conduct caused them damage and thus wrongly found that there was no causal link.

In today's Opinion, **Advocate General Tamara Ćapeta proposes that the Court of Justice should set aside the judgment under appeal and refer the case back to the General Court.**

The Advocate General notes that the judgment under appeal may be understood in one of two ways. First, that judgment may be read as if the General Court misunderstood the appellants' arguments at first instance in the sense that they were challenging the validity of the return decision, rather than Frontex's omission in verifying whether a return decision existed at all. In that case, the General Court misapplied the notions of attribution and causation. If the claim brought before the General Court is that Frontex's (in)action is the cause, the General Court cannot answer the question whether there is a link between that cause and the alleged damage by examining the (in)action of a different actor (here, Greece).

Second, according to the Advocate General, that judgment may be read as if the General Court considered that Frontex could not incur liability for damages in so far as it merely supports return operations of Member States. This would mean that Frontex does not have an obligation to verify whether the persons covered by joint return operations are indeed returnees, in the sense that there is an enforceable return decision that concerns them.

In this light, Advocate General Ćapeta finds that, under the applicable EU law, ² **Frontex does have an obligation to**

verify whether a return decision exists in relation to all persons covered by a joint return operation, which is important for fulfilling its obligation to ensure respect for the principle of *non-refoulement* in the performance of its tasks. This effectively means that **the General Court erred in law when it found that there could be no causal link between the allegedly unlawful conduct of Frontex and the damage suffered**.

Furthermore, Advocate General Ćapeta considers that the fact that primary responsibility for returns lies with Member States should not prevent Frontex from also being held liable for the same omissions. Otherwise, Frontex could likely never be held liable for any unlawful actions or omissions during return operations, as similar obligations would also pertain to Member States. In her view, that would unduly diminish the responsibility of Frontex and threaten the protection of fundamental rights. The Advocate General is therefore of the view that, **in situations in which Frontex and Member States share obligations in joint return operations, Frontex can be held liable for damage caused by the breach of such obligations**, even if a Member State can be liable in parallel for the same damage. Consequently, the Advocate General finds that **the General Court could not conclude that there could not be a causal link between Frontex's omission to verify and the damages sustained**.

Advocate General Ćapeta also examines the General Court's findings that the causal link was broken by the Syrian family's own choices. In this regard, she notes that existing cases in which the Court of Justice has found that there has been a break in the causal link due to the injured party's own choices have mostly related to damage suffered in the course of business. The alleged damage in the present case has nothing to do with the usual business risk. Rather, that damage is the result of an alleged breach of fundamental rights, including the principle of *non-refoulement*, of the Syrian family who were at the same time in a vulnerable position. The decisions taken by the Syrian family on being returned to Türkiye thus cannot be characterised as being their 'free choice'.

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 Judgment of 6 September 2023, *WS and Others v Frontex*, [T-600/21](#) (see also Press Release [No 133/23](#)).

² [Regulation \(EU\) 2016/1624](#) of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard.