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Sissy Katsoni
Postdoctoral Researcher, IFHV

NACHFRAGEN:
Spyridoula.Katsoni@rub.de

Iftach Cohen

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Restoring the Equality of Arms in Pushback Litigation

On 18.12.2025 the Court of Justice of the European Union ('CJEU') issued its much-anticipated judgment on the appeal against the General Court's order in *Hamoudi v. Frontex*. In a 'rare', 'landmark' ruling, which has been vividly celebrated by refugee law experts, the CJEU set aside the General Court's dismissal of the applicant's claims against Frontex. This could be the first step toward the end of the de-facto legal immunity of Frontex, which has yet to be held liable for its well-reported years-long involvement in pushbacks. This blogpost will revisit the judgment and will draw conclusions on its significance for the advancement of asylum-seekers' rights in the EU and for their acknowledgement as holders of knowledge concerning their lived experiences.

Background of the Judgment

The judgment originated from the action for damages submitted by Alaa Hamoudi, a Syrian refugee, who claims to have been subjected to a pushback operation on April 28 and 29, 2020. The applicant contended that shortly after his arrival from Türkiye to Samos, the Greek authorities intercepted him, confiscated his mobile phone, and returned him – alongside 21 other asylum-seekers – to sea, while two Frontex activities were taking place in the same operational area and a camera-equipped, Frontex-operated airplane flew over the scene twice. The group was abandoned adrift overnight in Turkish territorial waters and was taken aboard by the Turkish Coast Guard only the day after. After being disembarked in Turkey, Mr. Hamoudi and the other pushback survivors were detained for 10 days, had his Syrian passport confiscated, and received an expulsion order. Eventually, he fled to Germany, where he sought and was granted international protection.

Through his action, Mr. Hamoudi sought compensation for the non-material damage that he suffered because of Frontex's unlawful actions and inactions in connection with the pushback operation. As the applicant contended, these acts constituted infringements of the Frontex Regulation, and of the applicant's rights under the EU Charter of Fundamental Rights ('EU Charter').

The General Court dismissed the applicant's action, holding that the evidence presented was manifestly insufficient to demonstrate conclusively that he was present at and involved 'in the alleged incident' (paras 39-48). The evidence presented included the applicant's written statements, a Bellingcat article, and four screenshots from videos taken by third parties recording the pushback, in which Mr. Hamoudi identified himself and which – as Frontex admitted – allowed for reasonable comparison. The General Court held that the applicant's action 'manifestly lacked any foundation in law' (para. 62), without acting on Mr. Hamoudi's requests for Frontex to produce certain documents in its possession, which could have supported his action. Therefore, Mr. Hamoudi brought an appeal before the CJEU, requesting that it set the General Court's order aside, as the General Court infringed the principles governing the burden of proof and disregarded the European Convention for the Protection of Human Rights ('ECHR') Articles 6(1) and 13, which must be respected as a minimum level of protection pursuant to EU Charter Article 52(3).

The CJEU's Findings

The CJEU recalled that for the determination of the EU's non-contractual liability it is essential that there is a sufficiently serious breach of a rule of law, a real and certain damage, and a direct causal link between the two (paras 68–70). It further held that although, in principle, it is for the applicant to provide conclusive proof that these conditions are met (para. 71), the application of the rules on the burden of proof and the taking of evidence may not impose an excessive or impossible burden (*probatio diabolica*) on a party or undermine the equality of arms (para. 77).

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Considering the vulnerability of pushback survivors and the difficulty or even the impossibility of collecting evidence proving their allegations (para. 88), as well as Frontex's extensive powers and duties during Frontex operations (paras 89–101), the Court noted that Frontex is, in principle, likely to possess information proving the existence of pushbacks (paras 96–97). Siding with the Advocate General's Opinion on the appeal and following the ECtHR's consistent relevant case-law, the Court held that under such circumstances, failing to adapt the burden of proof and requiring asylum-seekers to adduce conclusive evidence would risk hindering all legal action against Frontex, granting it *de facto* immunity and jeopardising the effective protection of fundamental rights (para. 105). Thus, the CJEU concluded that the General Court erred in law in assessing the evidence produced by the appellant in the light of a standard of proof that was too high (paras 106–110).
Although that was sufficient to warrant setting aside the order under appeal, and to leave to the General Court the assessment of the evidence adduced by Mr. Hamoudi, this time – in light of the proper standard of proof – the CJEU decided first to assess for itself whether the appellant had presented prima facie evidence, in order to ensure full compliance with his right to an effective legal remedy, before proceeding to refer the case back to the General Court. In its assessment, the CJEU held that the appellant's detailed, specific and consistent witness statement, supported by the Bellingcat article, indeed constituted *prima facie* evidence and could not be dismissed due to a minor imprecision or the absence of additional witnesses (paras 118–128). This was especially the case given the General Court's competence – and duty – to take further steps in the proceedings and to obtain from Frontex any and all relevant information at its disposal for the clarification of the facts (paras 129–133, 148–150), and to organize a hearing focusing on an oral testimony by the appellant (paras 151–152). Hence, the CJEU referred the case back to the General Court for a proper investigation of the case (paras 153–155).

The Judgment's Importance for the Equality of Arms in Pushback Litigation
The judgment sets important precedents for future pushback litigation before the CJEU, as it acknowledges the inequality of arms that arises when asylum-seekers are called upon to provide conclusive evidence of the pushback operation to which they have been subjected. With its judgment, the CJEU acknowledged the vulnerability and the practical difficulties involved in collecting evidence under such circumstances, as well as Frontex's failure to cooperate diligently with the legal proceedings by providing evidence and information at its exclusive disposal, and the General Court's failure to comply with its duty to investigate the case in a manner consistent with the applicant's right to effective judicial protection.
By holding that pushback survivors should be required to only provide *prima facie* evidence and that, once that threshold is met, the burden of proof to rebut that prima facie evidence should shift to Frontex, the Court signaled that it will no longer tolerate Frontex's established strategy, whereby the Agency allows itself to simply discredit pushback survivors' allegations as speculative statements, without even providing its own factual position and evidence on the disputed facts.
Through this judgment, the CJEU ensured that the General Court will proactively contribute to unveiling the truth behind allegations made by persons claiming to have been victims of Frontex-orchestrated pushback operations once such cases against Frontex are brought before it. The General Court's duty to take further steps in the proceedings and to obtain from Frontex all relevant information and evidence – on its own motion and acting on reasoned requests coming from the applicant – is deeply intertwined with the pushback-survivor's right to effective judicial protection. That duty is also intertwined with the presumption that Frontex is likely to possess evidence and information concerning the very allegations made by the applicants.

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The Grand Chamber found that Frontex is, in principle, likely to possess information and evidence concerning the existence of pushbacks taking place in the same geographical zones where the Agency carries out specific operational activities (paras 89, 96, 97). It cannot absolve itself by simply arguing that it was not notified of alleged incidents. In the case at hand, i.e. in the context of the rapid border intervention in the Aegean Sea, "Frontex must have had at its disposal" information concerning the alleged pushback taking place in the Aegean Sea on 28 and 29 April 2020 (paras 127, 133).

The presumption that Frontex knows of and holds information about pushbacks related to its activities stems directly from the Agency's fundamental rights obligations, in particular its duty to ensure the application of EU fundamental rights during Frontex operations and to implement its operations in compliance with the Operational Plan, which is drafted jointly by the Executive Director and the Member State(s) involved and is binding on both Frontex and these States (paras 98-100).

That presumption rests also on Frontex's monitoring obligations in the geographical areas where it implements an operation (paras 96-97), and on the Executive Director's obligation under Article 46(4) of the Frontex Regulation to suspend or terminate any activity "if he or she considers that there are violations of fundamental rights" related to that activity that are persistent or serious (para. 101). Article 46(4) requires the Executive Director, at a minimum, to allow existing violations to be registered with him or her, so that he or she can assess whether there are related violations linked to a specific activity, and whether Frontex is legally obliged to suspend or terminate that activity. The CJEU appears to have taken into consideration the finding in the OLAF report that the concealment of information and distortion of evidence relating to pushback operations in the Aegean Sea prevented "Frontex from exercising its powers in accordance with Article 46(4-5)" of the Frontex Regulation (para. 143).

According to the judgment, Article 46(4) gives rise not only to a legal obligation on the Executive Director to suspend or terminate contentious activities – whether or not an action has been brought before the Court - but also to a duty on Frontex to "cooperate diligently" with any administrative investigation or judicial proceedings once such an action has been brought (paras 101–102).

In a Frontex operational zone, the Executive Director cannot wear blinkers to circumvent his or her legal obligations under Article 46(4), and in the courtroom, Frontex cannot hide behind smoke and mirrors to avoid losing a legal action. In the eyes of the Grand Chamber, Frontex must act as an officer of the court, rather than merely a party to the proceedings, given its fundamental rights obligations. Frontex has a duty to "voluntarily" cooperate diligently with judicial proceedings against it, as the Agency's utmost interest must also be to ascertain the truth on any allegation of violations related to its activities.

The duty acknowledged by the CJEU in its judgment might be the actual antidote to the entrenched "organizational culture within Frontex of 'turning a blind eye' to infringements of migrants' fundamental rights", which was highlighted by the appellant (para. 143). In the context of all judicial proceedings brought to date against Frontex for unlawful actions or inactions under Article 46(4) and (5), Frontex has insistently raised formal pleas of inadmissibility without going into the substance of the allegations presented by applicants claiming to have been victims of pushbacks related to its contested activities. In other words, Frontex has not voluntarily cooperated with the judicial proceedings to ascertain the truth of the allegations against it but was instead invested in obscuring them.

In the pending *FM v. Frontex*, which concerns Frontex's unlawful failure to suspend or terminate the sharing of information on the location of refugee boats in the central Mediterranean with Libyan

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militias, Frontex again refrained from engaging with the substance of the case and instead raised its habitual formal plea of inadmissibility. This time, however, the General Court rejected Frontex's request and decided, for the first time, to reserve its decision on admissibility until the final judgment. It remains to be seen whether, in similar cases in the future, Frontex will raise such a plea, or whether it will instead comply with the CJEU's judgment, voluntarily and diligently cooperating with the judicial proceedings, so as to bona fide ascertain whether the alleged serious or persistent violations exist, thus compelling it to take a decision under Article 46(4).

Countering Epistemic Injustice

Another innovative aspect of the CJEU's judgment in light of the existing relevant jurisprudence on pushbacks lies in the particular emphasis that the Court placed on Mr. Hamoudi's testimony. The CJEU stressed that the General Court erred in law in finding that an applicant's own witness evidence has little probative value. It further underlined that the General Court should have concluded that the appellant's witness statement 'was sufficiently detailed, specific and consistent to constitute *prima facie* evidence that the appellant was, in fact, a victim of an operation involving pushback' (para. 119). In this way, the Court opened the door to the consideration of such statements by applicants as *prima facie* evidence, although it remains unclear whether it would have done so had the appellant not provided additional external evidence confirming his version of the events.

Indeed, in his tragic experience, the appellant was lucky enough to be able to rely on such external evidence. However, not all pushback operations are recorded by third parties or reconstructed and reported by resourceful media outlets. Asylum-seekers are frequently stripped of their phones immediately upon interception. In such cases it is the applicants' own version of the events alone that sufficiently encapsulates *prima facie* evidence capable of reversing the burden of proof and requiring the General Court to take further steps in its investigation of the pushback allegation. The good faith cooperation of Frontex, against which judicial proceedings were filed, is also key to unearthing the truth in such instances. It is precisely to this ideal inquiry and to lowering the unattainably high expectations for evidence, already advocated in scholarly writings, that the CJEU opened the door through its judgment. Through that judgement, the Court essentially urged the General Court to listen to a pushback survivor and to acknowledge his or her testimony as a piece of evidence that shall not be neglected or viewed as merely superfluous, as had been the case in relevant earlier jurisprudence.

The Court's principal attention to the appellant's witness statement was also a very important step towards countering the epistemic injustice that pushback survivors have experienced throughout the years. This jurisprudential shift signals an emerging recognition of refugees as legitimate knowers of their own experiences and constitutes an initial step toward disrupting the pattern of epistemic violence that they have suffered for so long. The Court has decided to no longer be indifferent to the disregard that has been shown by human rights fora to pushback survivors in relevant jurisprudence, where all that the respondent state had to do to get away with refoulement was cast doubt on the credibility of the applicant's statements and avoid looking into pushback allegations during domestic investigations. The CJEU's judgment in *Hamoudi* has given the General Court the opportunity to correct the epistemic violence done against the appellant, to engage meaningfully with his testimony

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about his experiences, and to fulfil its obligation to seek and identify the actual truth of what happened. While the versions of some Frontex victims may not be deemed sufficiently detailed, specific, coherent, and credible – and their legal actions may therefore be rejected as unfounded – the very attentive examination of their versions of the events by human rights fora would already constitute, in itself, a form of respect and recognition for refugees' agency in knowing and telling their own lived experiences.

Concluding Remarks

In our view, the judgment has been rightly celebrated as an important win for pushback survivors, whose testimonies are finally acknowledged as important pieces of evidence in relevant litigations. The judgment has further mitigated the inequality of arms created through the proceedings before the General Court and has clarified that the burden of proof shall be adapted in cases where *prima facie* evidence of alleged pushbacks has been provided. Admittedly, this finding is still fragile, and it remains to be seen how the General Court will implement the CJEU's judgment while re-assessing the application. Nonetheless, the CJEU's acknowledgement of pushback survivors as legitimate holders of the truth of their own experiences shall be praised. Meanwhile, all eyes will remain on the General Court, in hope of the eventual end of Frontex's persistent unaccountability for its well-reported involvement in pushbacks.

Disclosure: *The authors work within front-LEX, i.e. the organisation that represented Mr. Hamoudi throughout the whole proceedings before the General Court and the Court of Justice of the European Union. The opinions expressed herein are solely those of the authors.*

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