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The General Court finds Frontex not liable for helping with illegal pushbacks: it was just following orders.

By Gareth Davies

WS v Frontex, case T-600/21, decided by the General Court on the 6th of September 2023, concerns a number of Syrian nationals who arrived in 2016 on the Greek island of Milos with the intention of claiming asylum. They made this intention clear but just a few days after they arrived they were put on a plane which took them to Turkey. They had no idea they were being taken there until they arrived. There followed a period in a Turkish reception centre and other locations and ultimately a journey to Iraq, because they were afraid that the Turkish authorities would return them to Syria.

The applicants claimed that their summary expulsion from Greece to Turkey was unlawful. They also said that as a result of this unlawful pushback they had suffered immaterial and material damage, varying from emotional harm, to the costs of living in Turkey and travelling to Iraq. Since it was accepted by all parties, and found as a matter of fact by the General Court, that the transport to Turkey was a joint operation by the Greek Republic and Frontex, they sued Frontex for compensation for their damage.

The question of causation

The General Court treated this, quite correctly, as a matter concerning the non-contractual liability of the Union and its organs, for which liability there is a three part test (Bergarderm, para 41-42): (1) there must be a rule intended to confer rights on individuals: (2) a sufficiently serious breach of that rule; and (3) damage caused as a result. The first part of

this, as is usually the case, is easily satisfied. If there are rules preventing asylum seekers from being expelled to third countries, those are quite clearly intended to confer rights on individuals. The case therefore turns on whether Frontex committed a sufficiently serious breach of the law, and whether that breach caused harm.

The General Court, strangely, got stuck on the third part of this test, the causality. They found that since it was Greece that had exclusive responsibility for assessing asylum claims, and Frontex's role was – they thought - limited to technical support (para 64), any harm caused by the expulsion was attributable entirely to Greece. Frontex could not be said to have caused any harm since it did not take the relevant decisions (para 66). This proposition is the most essential one in the judgment. The case was therefore dismissed because of a lack of causality between Frontex's actions and the damage.

The General Court confused the intentions behind an act with the consequences that it has, two matters that liability law takes care to treat separately. If a doctor tells a nurse to administer pill X, and this kills the patient, it may well be that the nurse is not liable because they had no way of knowing what would happen. However, it remains the case that the direct cause of death was the administration of the pill. If a magician asks a member of the public to push a sword through a box, and it turns out there is someone in there who is killed, no court will find the innocent helper liable, but the cause of death was nevertheless a sword through the heart. The coroner will not write 'cause of death – psychotic magician'.

The cause of the applicants' damage – or at least some of it, about certain costs there were other disputes - was thus their expulsion. It may be that another cause, one step more distant, is the Greek decision to expel, and perhaps there are even more distant causes – the appointment of Mr X to the immigration service, or budget cuts, war in Syria, or the failure of certain EU negotiations. However, the most direct cause of the damage claimed is the expulsion itself, which Greece and Frontex carried out together. If those applicants ever see a therapist, and she asks 'so where do your nightmares come from', the answer will not be 'the administrative decision taken by the Greek migration authorities'. It will be 'I was put on a plane, surrounded by armed guards, and taken to Turkey against my will'.

An unlawful act: an objective test

This does not show that Frontex is liable. That their actions caused the damage is beyond doubt, but it remains to be decided whether the expulsion was unlawful. That is a matter of international and European migration law, which was, wrongly, ignored by the General Court, and will have to be decided when the case is reheard. If the return was contrary to this law, then it follows that Frontex did in fact commit an unlawful act, the next requirement for their liability. Perhaps they did so unknowingly, but laws can be broken

without bad intent. Indeed, the wrongful implementation of directives, one of the staples of EU liability law, is commonly done without knowledge or intent, which does nothing to change its unlawfulness, being merely relevant to how serious the breach will be considered. The unlawfulness of an act, in EU liability law, is an objective matter (Dillenkofer, para 28).

Joint Liability of the Union and a Member State

The expulsion was something that Frontex did jointly with Greece, admittedly, but it is a general principle of tort law, common to the traditions of the Member States, upon which traditions the EU law of non-contractual liability is based, that when two people commit a tort together, they are both wholly liable. The victim can sue either of them for the whole sum. It is true that in past cases concerning joint liability of the EU and a Member State the Court has hinted that the claimant should sue the Member State first, and only sue the EU if the first action does not result in full compensation. However, these were in a context where an action against the Member State was already started, and the Court was wary of simultaneous judgments leading to double compensation (See the AG in *Kočner* at footnote 33). A general principle that liability falls first on Member States and only residually on the Union would be startling and novel, and is probably not what these cases intend to imply. Prima facie, the applicants could here sue Greece, or Frontex.

When is an unlawful return a 'sufficiently serious breach'?

Returning thus to Frontex, if the expulsion is unlawful it follows that Frontex breached the law in carrying out that expulsion, and its liability turns on whether that breach was sufficiently serious. The case law on sufficient seriousness makes clear that alongside the consequences for the victim, the seriousness of a breach is primarily a matter of how much the party knew or should have known, and whether they did what could have been expected of them to see whether they were acting legally. They are, in short, very commonsensical criteria, which correspond to what any reasonable person would instinctively think is the core of this case: should Frontex have known better?

Here it is very relevant that responsibility for assessing asylum claims falls clearly, as a result of legislation, on the Member States (para 64). One of Frontex's tasks is to assist with returns, but it will not be expected to double-check every dossier and re-examine every decision taken. Given the division of functions laid down between Member States and Frontex, a return carried out by Frontex which is not in fact compatible with EU law, but which was done in good faith, and following apparently lawful instructions, with

nothing in the circumstances that should have caused suspicion, would probably not be a sufficiently serious breach.

On the other hand, this does not amount to a generalized ''just following orders'' defence. One of Frontex's duties is to monitor forced returns in the light of fundamental rights, and there might well be circumstances in which a reasonably competent and responsible Frontex agent could, or should, have been aware that an expulsion was problematic and possibly unlawful, in which case there would be a responsibility to check or at least to raise the matter. If Member State authorities say ''throw these guys on a plane to Syria. It might be against the law, but if we do it quickly maybe no-one will notice'' then all the arguments in the world about ''only technical support'' would not rescue Frontex from liability. The question is where the line between lies between these extremes, and which side of that line this case was on.

Frontex: innocent assistants or responsible experts?

The factual question on which this case turns – and which the General Court will have to be instructed to consider when the appeal is decided – is therefore how much Frontex knew about these expulsions, and whether they knew, or could, or should, have known, that they were acting in violation of international and EU law. That will require an extensive investigation of the facts and circumstances surrounding the expulsion and the operation of Frontex in Greece.

The legal frame for that investigation will not just be the law on non-contractual liability and the law on asylum and non-refoulement, but also the provisions of regulation 1612/2016, the regulation which at that time governed Frontex (it is now replaced by regulation 2019/1896). This regulation gives a picture of the specific nature, competences and obligation of Frontex, all of which are relevant to what can reasonably be expected of it, and so to whether a breach of the law is culpable enough to be 'sufficiently serious'.

The General Court did refer to one provision of this regulation (para 66), Article 42(1), which it seemed to think reflected the subordinate role of Frontex and the exclusive responsibility of Greece for asylum lawsuits:

Where members of the [Frontex] *teams are operating in a host Member State, that Member State shall be liable in accordance with its national law for any damage caused by them during their operations.*

The use of this provision suggests that the General Court had not read, or at least not understood, the rest of the regulation. The provision above is clearly – as its reference to national law shows – intended to govern more everyday situations, such as the Frontex

truck which hits a civilian's car, ensuring that the local population have access to a local court to deal with their everyday complaints and will not have to go to Luxembourg for every minor tort that a Frontex employee commits. It is not, by contrast, intended to suggest that Frontex has no autonomous responsibility, or to preclude its own liability, as other provisions make clear, such as Article 60(3);

In the case of non-contractual liability, the Agency [Frontex] *shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its departments or by its staff in the performance of their duties.*

and perhaps most strikingly here, a sentence in Article 28(3):

The participating Member States and the Agency shall ensure that the respect for fundamental rights, the principle of non-refoulement, and the proportionate use of means of constraints are guaranteed during the entire return operation

Frontex unequivocally has an obligation to ensure its actions are in compliance with the law on non-refoulement, and can be held liable when they are not. It is expected to understand that law, and to be aware of whether it is being applied properly and take action if not. Other provisions of the regulation refer to its monitoring of compliance with fundamental rights, its duty to raise the issue if it has concerns, and the specific obligation of all Frontex team members to respect international and European law (see e.g. Articles 8, 14, 28, 29, 34 and 40 of the regulation). Frontex may provide technical assistance and it may act in a supporting role while Member States take the lead, but that does not mean it is passive or ignorant. Rather, the regulation portrays it as an expert organization, there to make sure Member States do things right, an advisor, auditor, monitor, the representative of the EU in the field, in a sense 'the grown up in the room'.

Is Frontex allowed to turn a blind eye?

Things do not look good for Frontex. Given that the dubious legality of many actions at Europe's borders is a matter of common knowledge, and certainly among those in the field, blindly following Greece's instructions without question is not compatible with a genuine commitment – such as Frontex is obliged to have - to obeying the law. Any organization taking regulation 1612/2016, or the law on asylum, or the Charter of Fundamental Rights seriously is obliged, in the current state of the world, to take a critical and pro-active approach to any instructions given by a Member State. A failure to do will lead to breaches of the law which will, given their forseeability and consequences, be sufficiently serious.

The Court of Justice must now sort out this mess on appeal, for it seems inevitable that an appeal will happen and certainly it should. The General Court's idea that an absence of causality is sufficient to dismiss the case is without any legal or logical basis, a confusion of competences with causes. Rather, it is clear that Frontex (jointly) acted in a way causing harm, and it is therefore unavoidable that the substantive legality of its actions, and what it knew or should have known, are examined. That may be unwelcome for the Member States, but it is not the job of courts to make politicians happy. The Court of Justice might like to bear in mind that while the lives and futures of human beings are the most important matters at stake here, the credibility and legitimacy of the EU court system are on the line too.