OPINION OF ADVOCATE GENERAL
NORKUS
delivered on 10 April 2025 (1)

Case C-136/24 P

Alaa Hamoudi
v
European Border and Coast Guard Agency (Frontex)

(Appeal – Non-contractual liability – Rapid border intervention by Frontex in support of the Greek authorities in the Aegean Sea – Collective expulsions ('pushbacks') allegedly prescribed or assisted by Frontex – Regulation (EU) 2019/1896 – Failure by Frontex to consult a fundamental rights officer – Failure by Frontex to assess the applicability of Article 46(4) and (5) of Regulation 2019/1896 – Manifest error of assessment – Infringement of Articles 1, 2, 3, 4, 18, 21 and Article 19(1) and (2) of the Charter of Fundamental Rights – Right to asylum – Principle of non-refoulement – Actual and certain damage – Burden of proof – Shifting of burden of proof – Conditions – Prima facie evidence – Principle of equality of arms)

I. Introduction

1. In this appeal against the order of the General Court of 13 December 2023, Hamoudi v Frontex, (2) the Court of Justice must assess, in the context of an alleged collective expulsion in the Aegean Sea on 28 and 29 April 2020 involving the Greek authorities and the European Border and Coast Guard Agency (Frontex), (3) whether an applicant, who is an alleged victim of that expulsion, must adduce 'conclusive proof as to the existence … of the damage' claimed in an action for non-contractual damage against the European Union. (4)

2. Given the illegal (5) and often covert nature of such expulsions, (6) the position of extreme vulnerability in which the purported victims thereof may find themselves and the evidence and

information asymmetry (7) between the parties to the action, a question of principle arises as to whether the effective protection of, inter alia, the right to asylum and freedom from collective expulsions and refoulement guaranteed by Articles 18 and 19 of the Charter respectively, together with the right to an effective remedy and to a fair trial protected by Article 47 of the Charter, may require, in certain circumstances, an adjustment of the burden of proof normally incumbent on claimants. At the same time, an excessive or disproportionate burden may not be placed on the respondent, thereby breaching their right to a fair trial.

3. In addition, caution should be exercised when altering the rules on the burden of proof given that, as indicated by the ECtHR, any third-country national could claim to be a victim of collective expulsion by shaping his or her account to match that contained, inter alia, in national or international reports. (8) In many instances, the real question at stake is not whether a collective expulsion took place, but whether the claimant is a victim thereof.

4. In the present appeal, Mr Alaa Hamoudi ('the appellant'), a Syrian national, seeks the annulment of the order under appeal rejecting (9) his action, based on Article 268 TFEU and the second paragraph of Article 340 TFEU, for compensation for the non-material damage he claims to have suffered due to alleged unlawful actions and omissions of Frontex in the context of a rapid border intervention pursuant to Regulation 2019/1896 (10) in support of the Greek authorities in the Aegean Sea in April 2020. The appellant claims, in particular, that on 28 and 29 April 2020 he was a victim of a collective expulsion at the hands of the Greek authorities. He submits, inter alia, that Frontex is the author or co-author (11) of that expulsion which caused him non-material damage.

II. Terminology

5. The appellant refers in his pleadings (12) to collective expulsions (13) and to the colloquial term 'pushbacks'. (14) Such expulsions are characterised, inter alia, by the absence of an individual assessment of a person's right to asylum and right not to be refouled. In that regard, the Court of Justice has stated that the practice of pushbacks to the external borders of the European Union, which effectively removes persons seeking to apply for international protection from the territory of the European Union or removes them from that territory prior to the examination of their application, is contrary to Article 6 of Directive 2013/32/EU. (15) In addition, the practice of pushbacks may be incompatible with the principle of non-refoulement pursuant to Article 18 of the Charter, read in conjunction with Article 33 of the Geneva Convention (16) and Article 19(2) of the Charter, if it consists in sending persons seeking to make, in the European Union, an application for international protection to a third country on whose territory they incur the risk of persecution. The Court also stated that pushbacks constitute serious flaws, inter alia, in the asylum procedure. (17)

III. Background to the dispute

6. Frontex has operated in the Aegean Sea since 2006 through Joint Operation (18) Poseidon. On 1 March 2020, the Kyvernitiko Symvoulio Ethnikis Asfaleias (Government Council for National Security, Greece) ('KYSEA') suspended the Greek asylum system and introduced new border controls for a period of one month ('the KYSEA decision'). (19) On that date, the Hellenic Republic requested Frontex to launch a

rapid border intervention in the Aegean Sea, which was approved the following day by the Executive Director of Frontex ('the ED').

7. In his pleadings before the General Court, the appellant referred in detail to a number of incidents in the Aegean Sea in March and April 2020, claiming that they constituted collective expulsions. In particular, he claims that he was the victim of a collective expulsion on 28 and 29 April 2020, which took place in the context of Frontex's activities in the Aegean Sea. In paragraph 36 of the order under appeal, the General Court stated that the appellant claimed that 'on 28 April 2020, at around 7.30 a.m., 22 people, including himself, arrived on the island of Samos in Greece. They arrived on a beach next to mountains which they began to climb after leaving the boat. … once they reached the top of the mountain, [the appellant] took photos and videos which he sent to an acquaintance of his in Austria. The group spent a few hours asking the residents to call the police. When the police officers arrived, they confiscated their phones and drove the group to the beach in a pickup truck where there was a small ship and a small boat. All the members of the group were subsequently brought on board a small orange boat which, according to the [appellant], was a life raft without any means of propulsion. Once at sea, the group was forced to change boats twice more. According to the [appellant], that push and pull continued overnight and into the afternoon of 29 April 2020, when the Turkish coast guard finally picked them up.' (20)

8. The appellant claimed before the General Court that Frontex, by its actions and omissions, failed to comply with its obligations under Articles 38, 46 and 80 of Regulation 2019/1896 and Articles 1, 2, 3, 4, 18, 21 and Article 19(1) and (2) of the Charter.

9. In his first plea before the General Court, the appellant claimed, inter alia, that the ED failed to consult the fundamental rights officer of Frontex ('the FRO'), as required by Article 46(5) of Regulation 2019/1896, (21) prior to launching the rapid border intervention in the Aegean Sea. Frontex committed a manifest error of assessment, misused its power and failed to act with due diligence, thus failing to observe the principle of good administration. In addition, the ED failed to examine the applicability of Article 46(5) of Regulation 2019/1896 or incorrectly assessed its application prior to launching the rapid border intervention. There were prima facie serious reasons not to launch that intervention in the light of the manifestly unlawful nature of the KYSEA decision and the likelihood that the suspension, inter alia, of national asylum law contained therein would lead to violations of fundamental rights. The appellant claimed that the events on 28 and 29 April 2020 violated his human dignity and integrity, subjected him to torture and inhuman and degrading treatment, and deprived him of the right to asylum and protection from collective expulsion. That expulsion and the resulting suffering would not have occurred if Frontex had not breached its supervisory and protection obligations. The execution of collective expulsions in the context of the KYSEA decision was dependent on Frontex launching the rapid border intervention in the Aegean Sea. Frontex is thus the co-author of the collective expulsion of the appellant.

10. In his second plea before the General Court, the appellant claimed, inter alia, that, at the time of his collective expulsion and notwithstanding prima facie violations of fundamental rights, Frontex failed to adopt the gradual and precautionary measures prescribed by Article 46(4) of Regulation 2019/1896. (22) Frontex's failure to act in accordance with that provision also led to an infringement of Article 80 of Regulation 2019/1896, (23) the ECHR and the case-law of the ECtHR. In the alternative, the appellant claimed that Frontex, by the actions of its ED, 'committed a manifest error of assessment and a misuse of power' in considering that there were no violations within the meaning of Article 46(4) Regulation 2019/1896.

11. In his third plea before the General Court, the appellant claimed that Frontex is the 'true author' of the collective expulsion of 28 and 29 April 2020 which was executed in line with, and was the direct result of, the legally binding operational plan for the rapid border intervention in the Aegean Sea. The operational plan was adopted in breach of Article 38(3)(m) of Regulation 2019/1896 as it referred to an 'inexistent asylum procedure'. The appellant claimed in the alternative that if the General Court should consider that the incident of 28 and 29 April 2020 is not attributable to Frontex on the basis of the operational plan, then that agency is nonetheless liable for aiding and assisting breaches of fundamental rights. '[Frontex] at minimum aided and assisted the execution of the new "tactics" of "preventive" nature with financial, operational and political contribution – from the drafting of the [operational plan for the rapid border intervention in the Aegean Sea], through its launching, financing and coordination, the failure to suspend or terminate it, to the involvement of [a Frontex surveillance aircraft] in the incident itself.' According to the appellant, a Frontex surveillance aircraft flew over the collective expulsion of 28 and 29 April 2020 and thus had specific knowledge of that incident yet failed to report it.

12. The appellant claimed that the collective expulsion of 28 and 29 April 2020 attributable to Frontex caused him non-material damage composed of two different aspects. First, he claimed damage resulting from the breach of his fundamental rights, under Articles 1, 2, 3, 4, 18, 21 and Article 19(1) and (2) of the Charter, in the amount of EUR 250 000. In that regard, the appellant considers that if the operational plan had complied with Regulation 2019/1896 and Frontex had refrained from facilitating the execution of the KYSEA decision, the collective expulsion of 28 and 29 April 2020 would not have occurred. In the alternative, the collective expulsion of 28 and 29 April 2020 would not have occurred without the aid and assistance of Frontex. Secondly, the appellant claimed EUR 250 000 for *sui generis* damage resulting from the fact that the author of the 28 and 29 April 2020 collective expulsion was an agency of the European Union. If Frontex had refrained from 'prescribing or assisting' the commission of the unlawful collective expulsion, the appellant would have been spared from 'feelings of injustice and frustration'.

13. In order to substantiate his claims regarding his presence and involvement in the alleged collective expulsion of 28 and 29 April 2020, the appellant relied on his own witness statement; a Bellingcat media article published online on 20 May 2020; two YouTube videos included in that article; and four photographs which are colour screenshots taken from the videos featured in that article.

14. Frontex disputed those claims. In particular, it claimed that the appellant had not produced conclusive evidence that he was affected by the alleged incident of 28 and 29 April 2020. Frontex stated that it had 'neither been notified about an incident nor received any information linked to the alleged incident of 28 and 29 April 2020. It also [submitted] that the burden of proof lies with the [appellant] regarding him being affected by the alleged incident and that he [had] not produced any conclusive evidence on that point in his application. In that regard, Frontex [called] into question the probative value of the [appellant's] witness statement and [pointed] out that he did not name any of the other 22 people allegedly concerned by the incident as witnesses. In addition, it [submitted] that the applicant cannot be identified either in the photographs included as [an annex] to the application or in the videos in the Bellingcat article of 20 May 2020. It [added] that the photographs are not dated and could, therefore, relate to any event occurring on any date. Furthermore, it [observed] that the [appellant had] never produced the photos and videos allegedly taken on the island of Samos … Lastly, as regards the links to the websites featuring the videos, it [claimed] that it is not for Frontex or the Court to extract information from websites the content of which is not annexed to the application and that, therefore, that information [was] inadmissible.' (24)

15. In the order under appeal, the General Court recalled the three cumulative conditions that must be met in order for the European Union to incur non-contractual liability in respect of damage caused by Frontex or its servants in the performance of their duties, namely unlawful conduct by an agency such as Frontex, actual damage and the existence of a causal link between the unlawful conduct and the damage in question. (25) If one of the cumulative conditions is not satisfied, liability is not incurred.

16. In the light of the fact that there is no requirement to examine those three conditions in any particular order, the General Court opted to examine the condition relating to damage. (26)

17. The General Court held that the evidence produced by the appellant was manifestly insufficient to demonstrate conclusively that he was present at, and was involved in, the alleged incident of 28 and 29 April 2020 and thus held that the appellant had failed to demonstrate the damage alleged. That court dismissed the action as manifestly lacking any foundation in law, without examining whether the other conditions for the non-contractual liability of Frontex were satisfied. (27) In the order under appeal, the General Court thus did not examine the alleged unlawful conduct by Frontex or the existence of a causal link between that conduct and the damage alleged as the condition relating to damage was not satisfied. (28)

IV. The appeal

Arguments of the parties

18. The appellant raised a single ground of appeal. He claims that in the order under appeal the General Court infringed Article 52(3) of the Charter (29) and the general principles relating to the burden of proof. According to the settled case-law of the ECtHR, 'the distribution of the burden of proof and the level of persuasion necessary for reaching a particular conclusion are intrinsically linked to the specificity of the facts, the nature of the allegation made and the [ECHR] right at stake'. (30) Given the vulnerable position of asylum seekers, particularly in expulsion cases, the ECtHR has held that it is important to take into account all the difficulties they may encounter when collecting evidence. Lack of direct evidence cannot therefore be decisive per se. (31) Where there is evidentiary uncertainty, 'owing to the special situation in which [asylum seekers] often find themselves, it is frequently necessary to give them the benefit of the doubt when assessing the credibility of their statements and the documents submitted'. (32) In the case of maritime pushbacks, the ECtHR underscored the need to take into account difficulties in providing evidence on aspects of the case to which only the authorities had been privy. (33) Moreover, in a case such as the present one, where the appellant has furnished prima facie evidence in support of his version of events, the burden of proof should shift to the other party. (34) Video-surveillance footage may be critical evidence for establishing the relevant facts. (35)

19. The appellant claims that he presented prima facie evidence of his participation in the pushback operation at issue and gave a coherent and detailed account of his individual circumstances and participation in the events in question. He provided video footage showing the pushback he described, in which he claims to be identifiable. Moreover, Frontex does not refute the appellant's allegation regarding the incident of 28 and 29 April 2020. (36) The General Court's erroneous interpretation of legal principles on the burden of proof ensured that the minimum level of protection established by the ECHR was not respected, as required by Article 52(3) of the Charter. That court's strict application (37) of the burden of

proof significantly affects the *effet utile* of the Charter rights relied on in the present case and undermines the right to an effective remedy enshrined in the Charter and the principle of the 'complete system of remedies' established by the Treaties.

20. Frontex claims, in essence, that the appeal is manifestly inadmissible as it merely contests the General Court's assessment of the evidence. The case-law of the ECtHR cannot prevail over EU primary law. In that regard, Frontex recalls that, in accordance with the Statute of the Court of Justice of the European Union, an appeal is limited to points of law.

Assessment

21. In the present appeal, what is in question is whether the appellant was the victim of, and thus suffered, damage due to the alleged collective expulsion of 28 and 29 April 2020. This analysis is closely linked to the question of whether Frontex breached EU law, in particular Articles 18 and 19 of the Charter, in the context of those alleged events. The same circumstances may thus be relevant, at least to some extent, for analysing Frontex's alleged unlawful conduct, actual damage and the existence of a causal link between the unlawful conduct and the damage in question.

22. However, in keeping with the Court's request, I shall confine my Opinion to an analysis of the allocation or distribution of the burden of proof in relation to the existence of damage in collective expulsion cases. The purpose of this Opinion is thus to assist the Court in distilling a rule on the distribution of the burden of proof in such cases.

23. In accordance with the second subparagraph of Article 256(1) TFEU and the first paragraph of Article 58 of the Statute of the Court of Justice, an appeal lies on points of law only. Contrary to Frontex's submission in point 20 of the present Opinion, the Court has jurisdiction in appeal cases to review whether the rules relating to the burden of proof have been observed. (38)

Preliminary remarks

24. There is no legislation at EU level governing the concept of proof. The Courts of the European Union have laid down a principle of unfettered production of evidence or freedom as to the form of evidence adduced, which is to be interpreted as the right to rely, in order to prove a particular fact, on any form of evidence, such as oral testimony, documentary evidence, confessions and so on. (39) This approach is rather reminiscent of that applied by the ECtHR. (40)

25. In accordance with the legal maxim *onus probandi incumbit ei qui dicit, non ei qui negat*, (41) the onus or burden of proof in civil cases lies on the claimant and not on the respondent. This long-standing or settled rule is universally accepted by Member States as the general rule on the burden of proof (42) in such cases and is, in any event, the rule applicable, in principle, in the present action for damages.

26. In applying the general rule on the burden of proof, it would thus be incumbent on the appellant to prove, inter alia, that the alleged collective expulsion occurred and that he was a victim thereof. The Court, however, is invited by the appellant to adjust this general rule in the light of the unique circumstances in the present case in order to achieve a 'fairer' distribution of that burden.

27. While the appellant relies principally on the case-law of the ECtHR regarding the burden of proof and the reversal thereof, there is a longstanding, broad and consistent body of case-law of the Court and EU legislation that provides for the reversal of the burden of proof, which it is opportune to highlight in the first place. I shall then turn to the case-law of the Court and the ECtHR on equality of arms before examining the case-law of the ECtHR that focuses on the reversal of the burden of proof in the specific context of collective expulsions and refoulement.

28. As regards the weight to be attributed to the case-law of the ECtHR in the present action, in accordance with Article 52(3) of the Charter, which is intended to ensure the necessary consistency between the rights contained therein and the corresponding rights guaranteed by the ECHR without adversely affecting the autonomy of EU law, the Court must take into account – when interpreting rights guaranteed by the Charter – the corresponding rights (43) guaranteed by the ECHR, as interpreted by the ECtHR, (44) as the minimum threshold of protection.

29. The appellant relies on a number of judgments of the ECtHR in which that court ruled on the distribution of the burden of proof in actions brought pursuant to Article 34 ECHR concerning the refoulement and/or collective expulsion of the applicant(s). (45) While the aim of those proceedings before the ECtHR – which seek, primarily, a declaration of the existence of a violation of the ECHR or the protocols thereto – ostensibly differs from the present proceedings, which seek the compensation for damage allegedly caused by an EU agency, that difference is more apparent than real. It is in any event insufficient to render irrelevant the case-law of the ECtHR in the context of the present proceedings. In that regard, it must be recalled that, according to the Court's case-law, the European Union may incur non-contractual liability under Article 268 TFEU and the second paragraph of Article 340 TFEU only if a number of conditions are fulfilled, the first one of which requires the existence of a sufficiently serious breach of a rule of law intended to confer rights on individuals. (46) There is thus a certain parallelism between Article 340 TFEU and Article 34 ECHR. (47) In addition, there is a clear overlap between the rights under the ECHR and the rights under the Charter invoked in the ECtHR case-law in question and the present proceedings. (48)

The case-law of the Court and EU legislation

– *Anti-discrimination / equal treatment*

30. In the seminal judgment in *Danfoss*, (49) the Court held that in order to ensure that the principle of equal pay laid down in the directive thereon (50) is applied and that effective means are available to ensure that it is observed, that directive must be interpreted as meaning that, where an undertaking applies a system of pay which is totally lacking in transparency, it is for the employer to prove that its practice in the matter of wages is not discriminatory if a female worker establishes, in relation to a relatively large number of employees, that the average pay for women is less than that for men. (51) The *onus probandi* or burden of proof may thus shift when it is necessary to avoid depriving workers who appear to be the victims of discrimination of any effective means of enforcing the principle of equal pay. In that regard, the Court stated that where there is a prima facie case of discrimination, the onus or burden of proof shifts and it is for the employer to show that there are objective reasons for the difference in pay. (52)

31. In anti-discrimination cases, a shift in the burden of proof is thus conditional on the claimant establishing a prima facie case of discrimination. Where such a prima facie case is established, it is incumbent on the respondent employer to establish that the principle of non-discrimination has not been

breached or to provide an objective justification for the disparate treatment. In its judgment in *Brunnhofer*, the Court stressed that the burden of proof will not shift where an employee is not confronted by practical difficulties in producing evidence and that the normal rules on the burden of proof thus apply. (53)

32. The principles established by the Court on the burden of proof in anti-discrimination cases, such as, inter alia, the judgments in *Danfoss*, *Enderby* and *Brunnhofer*, were consolidated and strengthened by the EU legislature in Article 19(1) of Directive 2006/54/EC, (54) Article 9(1) of Directive 2004/113/EC, (55) Article 10(1) of Directive 2000/78/EC (56) and Article 8(1) of Directive 2000/43/EC, (57) which state that 'Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.'

33. It follows that if a prima facie case of discrimination is established and the respondent cannot rebut (58) that there has been no direct or indirect discrimination, then there is an obligation on the national judiciary to find discrimination. In that regard, the national judiciary has no discretion.

34. Advocate General Kokott has stated that the rules on the reversal of the burden of proof in all the anti-discrimination directives do not breach the right to a fair hearing at the expense of the respondent. Rather, the EU legislature made a clear choice to maintain a fair balance between the interests of the victim of discrimination and the interests of the other party to the proceedings. In particular, those rules do not completely remove the burden of proof from the presumed victim of discrimination, but merely modify it. (59)

– *Other examples*

35. The Court's case-law on the reversal of the burden of proof is not limited to anti-discrimination cases. In the judgment in Harman International Industries, (60) the Court held that a trader alleging exhaustion of trade mark rights bears, in principle, the burden of proving that the applicable conditions are satisfied. However, that burden must be reversed where otherwise it would be liable to allow the proprietor of the trade mark to partition national markets. The Court relied inter alia on the information asymmetry between the claimant (trader) and the respondent (proprietor of the trade mark) and the fact that the claimant did not have access to the respondent's database in relation to the marketing of its products within the European Economic Area.

36. Moreover, in its judgment in Beemsterboer Coldstore Services, (61) the Court held that, in accordance with generally accepted rules on the allocation of the burden of proof, it is the responsibility of the customs authorities which wish to carry out post-clearance recovery to adduce, in support of their claim, evidence that the issue of incorrect certificates was due to an inaccurate account of the facts provided by the exporter. However, where it is impossible for the customs authorities to establish whether the information provided for the issue of a certificate was correct or not, since the exporter had not retained possession of the supporting documents, notwithstanding an obligation to do so, the onus is on the person liable for the duty to prove that those certificates were based on an accurate account of the facts.

37. The EU legislature has altered or relaxed the standard rules on the burden of proof by creating presumptions in favour of certain claimants, for example in relation to consumer contracts and the lack of conformity of goods when delivered. (62) In addition, the burden on applicants for international protection to adduce evidence before competent national authorities and courts has been alleviated to some extent. While, in accordance with Article 4(1) of Directive 2011/95/EU, (63) Member States may consider it the duty of the applicant to submit as soon as possible all elements needed to substantiate his or her application for international protection, the authorities of the Member States must, if necessary, cooperate actively with the applicant in order to determine and supplement the relevant elements of the application. Furthermore, if Member States make use of the power conferred on them by Article 4(1) of Directive 2011/95, Article 4(5) thereof provides that, where aspects of the applicant's statements are not supported by documentary or other evidence, those aspects do not need confirmation if the five cumulative conditions set out therein are met. (64) Article 4(5) of Directive 2011/95 places particular emphasis on the coherence and plausibility of the applicant's statements and his or her general credibility. (65) The fact that some details of a claimant's account may appear somewhat implausible does not necessarily detract from the overall general credibility of his or her claim. (66)

– *The principle of equality of arms*

38. The principle of equality of arms, which is an integral part of the principle of effective judicial protection of the rights that individuals derive from EU law, enshrined in Article 47 of the Charter, may also influence the distribution of the burden of proof. That principle, together with, inter alia, the principle *audi alteram partem*, is a corollary of the concept of a fair hearing and implies an obligation to offer each party a reasonable opportunity to present its case in conditions that do not place it in a clearly less advantageous position compared with its opponent. The aim of that principle is to ensure a procedural balance between the parties to judicial proceedings, guaranteeing the equality of rights and obligations of those parties as regards, inter alia, the rules that govern the taking of evidence and the adversarial hearing before the court and also those parties' rights to bring an action. (67)

39. In certain instances, however, the ECtHR's assessment of whether the right to a fair trial pursuant to Article 6 ECHR has been violated has centred on whether the applicant had an (effective) opportunity to present evidence before the national courts rather than on any alleged unequal treatment of the parties in the procedure before those courts. This may imply that, in certain circumstances, equal treatment (*sensu stricto*) before the national courts is not sufficient to ensure (de facto) equality of arms and that the right to a fair trial is respected. (68)

Relevant case-law of the ECtHR on refoulement and collective expulsions

40. The appellant, relying on a number of judgments of the ECtHR, considers that given that he produced prima facie evidence in support of his version of the events of 28 and 29 April 2020, the burden of proof in the present case should shift to Frontex. (69)

41. The recent judgment in *A.R.E.* of the ECtHR (70) is particularly instructive on the approach adopted by that court in respect of the assessment of evidence and the establishment of facts in cases analogous to the present appeal. (71) It is therefore necessary to set out in detail the facts of the case and the reasoning of the ECtHR.

42. Ms A.R.E. claimed that she entered Greece on 4 May 2019 in order to apply for international protection and that she was arrested and detained there before being returned to Türkiye where she was arrested the following day. She asserted a violation of Articles 2, 3, 5 and 13 ECHR. The Greek Government rejected her version of the facts as vague, inconsistent and unsubstantiated in its entirety. (72) In particular, the Greek Government denied any involvement of the Greek authorities in the alleged refoulement and disputed the applicant's very presence on Greek territory and therefore her refoulement to Türkiye, on the alleged dates. (73)

43. The ECtHR observed that the case raised extremely delicate questions on, inter alia, the burden of proof. (74) It concluded that the principles and standards on the assessment of evidence and the establishment of the facts laid down in cases relating to secret detention, and in certain cases of alleged refoulement, should be applied.

44. According to the ECtHR, in secret detention cases it is for the applicant to provide prima facie evidence. However, if the respondent government, in its reply to the allegations, does not disclose documents essential to enable the ECtHR to establish the facts or does not provide a satisfactory and convincing explanation of the events in question, that court may draw strong inferences from them. According to the ECtHR, the strict application of *affirmanti cumbit probatio* is inappropriate where the events in question are known exclusively to the authorities. In such cases, the burden of proof lies with the authorities, which must provide a satisfactory and convincing explanation. In the absence of such an explanation, the Court is entitled to draw conclusions that may be unfavourable to the respondent government. In cases where there are divergent versions of the facts, the ECtHR draws the conclusions which, in its view, are supported by an unfettered assessment of all the evidence, including the inferences which it may draw from the facts and the observations of the parties. (75)

45. In expulsion or refoulement cases, the ECtHR has stated that given that the absence of identification and personalised treatment by the authorities of the respondent State, which has contributed to the difficulty experienced by the applicants in adducing evidence of their involvement in the events at issue, is at the very core of the applicants' complaint, where the latter provide a detailed, specific and consistent account of the events at issue, the ECtHR considers, in principle, that there is prima facie evidence of refoulement and that the burden of proof must be reversed and placed on the government. (76)

46. In the judgment in *A.R.E.*, the ECtHR considered that the applicant had provided several items of evidence capable of constituting, taken separately, prima facie evidence in favour of her version of the facts, and that it was for the Greek authorities to prove that the applicant had not entered Greece and had not been refouled to Türkiye on the alleged dates. However, the Greek Government did not advance any argument or other evidence capable of rebutting the prima facie evidence provided by the applicant. The ECtHR emphasised that it had no direct evidence of the applicant's refoulement as such. It observed, however, that such proof would, in the particular circumstances of that case, be impossible to provide due to the fact that her mobile phone had been confiscated by the Greek authorities at the time of her refoulement, (77) which, moreover, took place at night. That court attached particular importance to the fact that it had been sufficiently demonstrated that the applicant was present in Greece and had last been seen in the custody of Greek officials on 4 May 2019 before returning to Türkiye on 5 May 2019, where she was arrested. (78)

47. While not strictly relevant in the context of the limited scope of this Opinion on the burden of proof and the reversal thereof, it is opportune to briefly summarise the nature of some of the evidence which the ECtHR considered relevant in collective expulsion or refoulement cases in order to establish a prima facie case. (79)

48. In that regard, the ECtHR takes into account testimonies gathered by national and international human rights institutions that corroborate an applicant's account and reports of civil society organisations, national human rights protection structures and international organisations in order to establish that there was prima facie evidence in favour of the version of events submitted by the applicant. However, an applicant claiming to be the victim of refoulement may, in principle, discharge the burden of proof without having to claim that his or her refoulement is part of a systematic or generalised practice of refoulement or to provide evidence of the existence of such a practice.

49. Where evidence of such a systematic practice is adduced, an assessment by the ECtHR of the existence or otherwise of such a practice will assist it in taking account, where appropriate, of the relevant general context prevailing at the material time. The ECtHR therefore examines the question whether there is a systematic practice of refoulement at the relevant time and place before assessing the evidence provided by the applicant. (80)

50. Even if a systematic practice of refoulement is established, the applicant must nonetheless adduce prima facie evidence in support of his or her allegations. (81) In such a case, the applicant must establish that his or her alleged refoulement is linked to that practice by providing a detailed, specific and consistent account of the refoulement supported by detailed and consistent evidence. In that event, the burden of proof will be reversed and will be borne by the respondent government. In that regard, the ECtHR highlighted that particular importance should be attached to the documents in the file. (82) The question of the authenticity and probative value of audiovisual material may prove to be crucial, in particular where no other evidence, directly or indirectly supporting the account of the person concerned, is present. (83) The ECtHR may also take into account any other evidence relied on by the applicants or placed on the file, such as the testimony of other persons.

Application of experience gained from the case-law of the Court and the ECtHR and EU legislation in the context of the present case

51. The issue at stake in cases such as the present appeal is particularly acute. It concerns the burden on the claimant to establish facts and produce evidence that may be in the possession or under the control of the respondent alone (in this case, Frontex) and/or another third party (in this case, the Greek authorities). Concrete evidence of collective expulsions, if it exists at all, may therefore be in the hands of the alleged perpetrators rather than of the victims thereof.

52. Failure to adjust or relax the burden of proof may hinder virtually all judicial proceedings by the victims of such expulsions, thereby systematically jeopardising the rights protected by, inter alia, Articles 18 and 19 of the Charter. (84) Illegal action may (de facto) go unchallenged and the perpetrators thereof may thus act with impunity. This in turn may undermine the claimant's rights under Article 47 of the Charter. In the light of the judgment in *A.R.E.*, I consider that once a claimant has established prima facie evidence of his or her collective expulsion or refoulement by a respondent State, the ECtHR will reverse the burden of proof and shift it to the respondent State. In the present case, however, the respondent is

not a Member State but an EU agency. The question thus arises as to whether, and if so, to what extent, the case-law of the ECtHR on the reversal of the burden of proof in collective expulsion cases may be applied by analogy in the present context.

53. At the same time, and of equal importance, when examining the question of the reversal of the burden of proof, the situation of the respondent cannot be ignored and a *probatio diabolica* cannot be imposed thereon. In the quest for a 'fairer' distribution of the burden of proof, a disproportionate or unreasonable burden may not be placed on the respondent. In that regard, a respondent such as Frontex cannot be obliged to prove a negative, which is impossible to prove, (85) or to prove something, which from an objective perspective would be wholly unreasonable to require of it, (86) for example where the facts in question are 'completely outside its sphere of influence and knowledge'. (87)

54. Moreover, the mere existence of asymmetry between litigating parties in the access to information or indeed legal resources and assistance, while perhaps unfortunate, is not something that a court, in principle, can reasonably be expected to, or indeed should, resolve on an ad hoc basis by applying some idealised measure of justice or equity. (88)

55. The judiciary and the legislature may, however, in certain circumstances, choose or be required to intervene in a positive or constructive manner in order to ensure the effective protection of certain rights or principles and/or access to justice. (89) The reasons for, and the extent of, such intervention must, in my view, be dictated and constrained by cogent and compelling reasons. Where intervention occurs, it is often based on long-standing practice and experience in a particular field. (90) This is particularly evident from the Court's case-law on anti-discrimination and the ECtHR's case-law on collective expulsions and refoulement, as outlined in the present Opinion. Moreover, intervention should be strictly measured and proportionate to the 'mischief' it seeks to remedy.

56. There is a common thread running through the case-law of the Court and the ECtHR on the reversal of the burden of proof which is based on the co-existence of a number of conditions.

57. First, prior to assessing whether the burden of proof should be reversed and placed on the respondent, it must be ascertained whether the claimant has adduced prima facie evidence in support of his or her action. While there may be an abundance of cogent and objective evidence of a particular collective expulsion, if the claimant's account placing him or her at the heart of the events (91) is inconsistent or incoherent and/or there are strong doubts as to his or her credibility, the claimant will not have adduced prima facie evidence in support of the action. The initial burden of proof, which always lies with the claimant, will therefore not have been discharged and the action should be dismissed. (92)

58. It follows that only in the event that the claimant has adduced prima facie evidence in support of his or her action does the question of the burden of proof and the reversal thereof arise and need to be addressed.

59. Secondly, even if the claimant has adduced prima facie evidence in support of his or her action, in order for the burden of proof to shift to the respondent there must be a clear or structural asymmetry between those parties in respect of their access to evidence. The claimant must face considerable difficulty in adducing evidence while the respondent must be in a better or more 'privileged' position. (93) The latter

therefore would not face a *probatio diabolica* and could reasonably be expected to be in a position to rebut the claimant's allegations.

60. Thirdly, failure to shift the burden of proof once the claimant has established a prima facie case would deprive him or her of, or render ineffective his or her, (fundamental) rights protected by EU law and may, in addition, undermine the claimant's rights under Article 47 of the Charter while that shift would not undermine the respondent's rights thereunder. (94)

61. Fourthly, there is a presumption in EU anti-discrimination legislation (95) and collective expulsion and refoulement cases before the ECtHR *against Contracting States* that the claimant is at a disadvantage in adducing evidence in support of his or her action while the respondent is in a better or more 'privileged' position to rebut the claimant's allegations. Once the claimant in such cases has adduced prima facie evidence in support of their allegations, the burden of proof to refute those allegations (automatically) shifts to the respondent. (96)

62. Fifthly, in the case of alleged collective expulsion or refoulement involving actors *other than the authorities of a Member State* – in this case, Frontex – the presumption outlined in the fourth condition does not apply. Given that such actors have limited powers as compared to the authorities of a Member State, it is not evident if and to what extent their actions contribute to the difficulty experienced by claimants in adducing evidence of their involvement in the events at issue. Moreover, given the more limited powers of such actors, it is not immediately clear whether they are in a better or more 'privileged' position to rebut the claimant's allegations. It follows that the first, second and third conditions outlined in points 57 to 60 of the present Opinion apply in full to cases such as the present one involving actors other than the authorities of a Member State. (97)

63. It is not evident, in view of the limited examination of the case at first instance, whether the second and third conditions can be met in the present case. The General Court did not examine in any manner Frontex's implication in, and knowledge of, the alleged events of 28 and 29 April 2020. That court focused exclusively on the question of damage to the appellant and whether he was present and involved in those events. While an examination of Frontex's implication in, and knowledge of, the alleged events in order to ascertain whether, in accordance with the second and third conditions as outlined in points 59 and 60 of the present Opinion, the burden of proof should shift would not require the full examination of the independent requirements of unlawful conduct and causation, the nature and extent of Frontex's implication in, and responsibility for, the events, (98) are entirely unclear in the light of the current state of the proceedings. It is thus not apparent whether evidence to rebut the appellant's allegations may be (deemed to be) in Frontex's possession or under its control.

64. In the present appeal, the Court of Justice, prior to ruling on whether the burden of proof should have shifted from the appellant to Frontex, should examine whether the state of the proceedings and in particular the findings of fact of the General Court place the Court in a position to assess whether the appellant adduced prima facie evidence of damage.

65. In that regard, it must be recalled that the General Court considered, in the order under appeal, that the action before it was manifestly lacking any foundation in law as the evidence adduced by the appellant before that court was manifestly insufficient to demonstrate conclusively that he was present at and involved in the alleged incident of 28 and 29 April 2020. (99) The terms 'manifestly insufficient' would tend

to indicate that prima facie evidence has not been adduced. However, the concurrent use of the term 'conclusively' would suggest that the 'evidentiary bar' was set too high in the first place.

66. If the Court of Justice considers, first, that it is in such a position and, secondly, that the appellant has failed to adduce prima facie evidence demonstrating that he was present at and involved in the alleged incident of 28 and 29 April 2020, the appeal should be dismissed. If, however, the Court considers that it is not in such a position or alternatively that the appellant has adduced prima facie evidence demonstrating that he was present at and involved in the alleged incident of 28 and 29 April 2020, the appeal is well founded, the order under appeal should be set aside and the case should be referred back to the General Court to rule on whether the conditions on the reversal of the burden of proof are applicable.

V. Conclusion

In the light of the foregoing, I suggest that the Court of Justice should assess whether the state of the proceedings before the General Court, and in particular its finding of fact, permit the Court of Justice to assess whether the appellant adduced prima facie evidence of damage in its action before the General Court. If the Court of Justice considers, first, that it is in such a position and, secondly, that the appellant has failed to adduce prima facie evidence demonstrating that he was present at and involved in the alleged incident of 28 and 29 April 2020, the appeal should be rejected. If, however, the Court considers that it is not in such a position or alternatively that the appellant has adduced prima facie evidence demonstrating that he was present at and involved in the alleged incident of 28 and 29 April 2020, the appeal is well founded, the order under appeal should be set aside and the case should be referred back to the General Court to rule on whether the conditions on the reversal of the burden of proof are applicable.

1 Original language: English.

2 T-136/22, 'the order under appeal', EU:T:2023:821.

3 Article 1 of Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624 (OJ 2019 L 295, p. 1) establishes a European Border and Coast Guard. In accordance with that provision, Frontex's role is to 'ensure European integrated border management at the external borders with a view to managing those borders efficiently in full compliance with fundamental rights and to increasing the efficiency of the Union return policy. [It] addresses migratory challenges and potential future challenges and threats at the external borders. It ensures a high level of internal security within the Union in full respect of fundamental rights, while safeguarding the free movement of persons within the Union. It contributes to the detection, prevention and combating of cross-border crime at the external borders.'

4 See the order under appeal (paragraph 29).

5 Article 19(1) of the Charter of Fundamental Rights of the European Union ('the Charter') provides that 'collective expulsions are prohibited.' In addition, according to Article 19(2) thereof, 'no one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.' That provision enshrines the principle of non-refoulement and is linked to Article 4 of the Charter on the prohibition of torture and inhuman or degrading treatment or punishment. See, also, judgment of 29 February 2024, Staatssecretaris van Justitie en Veiligheid (Mutual trust in the event of transfer) (C-392/22, EU:C:2024:195, paragraphs 50 to 53 and the case-law cited).

6 In the judgment of 7 January 2025, *A.R.E. v. Greece* (CE:ECHR:2025:0107JUD001578321, § 230; 'the judgment in *A.R.E.*'), the European Court of Human Rights ('the ECtHR') referred to the inherently secret and unofficial nature of the conduct in question. In my view, it is customary for such collective expulsions to take place in clandestine circumstances and for documentary evidence or indeed any evidence thereon to be limited. It follows that, even if there is evidence explicitly demonstrating such unlawful conduct, it may be fragmentary and sparse. See, by analogy, judgment of 7 January 2004, Aalborg Portland and Others v Commission (C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, EU:C:2004:6, paragraphs 55 to 57), relating to evidence of participation in a cartel.

7 The perpetrators of such expulsions are thus unlikely to admit readily to their actions and evidence thereof may be difficult to establish. In the judgment in *A.R.E.* (§ 218), the ECtHR referred to the fact that the applicants may find themselves in a difficult evidentiary position and therefore be unable to establish the veracity of their account.

8 See the judgment in *A.R.E.* (§ 218).

9 As manifestly lacking any foundation in law. See Article 126 of the Rules of Procedure of the General Court of the European Union.

10 The term 'rapid border intervention' is not defined by Regulation 2019/1896. Recital 49 of that regulation states, however, that 'where there is a specific and disproportionate challenge at the external borders, [Frontex] should, either on its own initiative and with the agreement of the Member State concerned or at the request of that Member State, organise and coordinate rapid border interventions and deploy both teams from the standing corps and technical equipment, including from the rapid reaction equipment pool. … [Frontex] and the Member State concerned should agree upon an operational plan.'

11 The Courts of the European Union have jurisdiction, in accordance with Article 268 and the second paragraph of Article 340 TFEU, to hear claims seeking compensation for harm allegedly suffered as a result of the conduct of an EU agency such as Frontex where it participates in illegal collective expulsions conducted by the authorities of a Member State (see, by analogy, judgment of 30 November 2023, Sistem ecologica v Commission, C-787/22 P, EU:C:2023:940, paragraph 92). See also Article 97 of Regulation 2019/1896 entitled 'Liability', paragraph 4 of which provides that 'in the case of non-contractual liability, [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, including those related to the use of executive powers.' Article 7 of Regulation 2019/1896, entitled 'Shared responsibility', refers to the responsibilities of Frontex and the Member States and their national authorities. The exact distribution of responsibility is, however, somewhat unclear and there is currently no case-law clarifying that provision or indeed its interaction with Article 97 of Regulation 2019/1896.

12 Before the General Court and the Court of Justice.

13 This term is not in fact used in the order under appeal. See, however, Article 19(1) of the Charter which is relied upon by the appellant. See, also, Article 4 of Protocol No 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), which provides that 'collective expulsion of aliens is prohibited.' The alleged events concerned 22 people and the actions were thus collective in nature rather than directed at a single individual.

14 The European Commission notes that 'while there is no internationally agreed legal definition of the term push back in the area of migration, it can be understood as behaviour violating the general rule of non-refoulement'; available at https://home-affairs.ec.europa.eu/networks/european-migration-network-emn/emn-asylum-and-migration-glossary/glossary/push-back_en.

Pushbacks have also been defined as 'various measures taken by States … which result in migrants, including [applicants for international protection], being summarily forced back, without an individual assessment of their human rights protection needs, to the country or territory, or to sea … from where they attempted to cross or crossed an international border'. Furthermore, '[t]he absence of an individualised assessment … [could lead to a violation of] the prohibition of refoulement'. See United Nations, *Report on means to address the human rights impact of pushbacks of migrants on land and at sea – Report of the Special Rapporteur on the human rights of migrants*, 12 May 2021, presented to the Human Rights Council at its 47th session, June 2021; available at https://docs.un.org/en/A/HRC/47/30.

15 Directive of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (OJ 2013 L 180, p. 60).

16 The Convention Relating to the Status of Refugees of 28 July 1951, as supplemented by the New York Protocol of 31 January 1967.

17 Judgment of 29 February 2024, Staatssecretaris van Justitie en Veiligheid (Mutual trust in the event of transfer) (C-392/22, EU:C:2024:195, paragraphs 50, 52, 53 and 57). According to the ECtHR, while Contracting States of the ECHR have the right to control the entry, residence and removal of aliens, the challenges they may encounter in managing migratory flows or in the reception of asylum seekers cannot justify recourse to practices which are incompatible with the ECHR and its protocols. An expulsion is deemed to be 'collective' for the purposes of Article 4 of Protocol No 4 to the ECHR if it compels aliens, as a group, to leave a country, 'except where such a measure is taken on the basis of a reasonable and objective examination of the particular case of each individual alien of the group' (see ECtHR, 13 February 2020, *N.D. and N.T. v. Spain*, CE:ECHR:2020:0213JUD000867515, §§ 167, 170 and 193; 'the judgment in *N.D. and N.T. v. Spain*'). The Registrar of the ECtHR has indicated that there are 'currently over 30 cases pending before [that court] against Lithuania, Latvia and Poland concerning the situation at the Belarusian borders from spring 2021 to summer 2023' (press release of 4 July 2024, ECHR 176 (2024)).

18 In accordance with Article 37(1) of Regulation 2019/1896, 'a Member State may request that [Frontex] launch joint operations to face upcoming challenges, including illegal immigration, present or future threats at its external borders or cross-border crime, or provide increased technical and operational assistance when implementing its obligations with regard to external border control. …'.

19 The appellant claimed in his application before the General Court that the KYSEA decision not only suspended the asylum system, it also introduced a new State policy which included collective expulsions. In his appeal, the appellant claims that the decision contained four intertwined components: the prevention of illegal entry into the Hellenic Republic, the temporary suspension of asylum applications by those entering that Member State illegally, the immediate return 'without registration' of those entering that Member State illegally and the submission of a request to Frontex for the 'development of the "Rapid Border Intervention Teams"'.

20 See also paragraphs 2 to 5 of the order under appeal where the General Court stated: '[The appellant] claims that, on 28 April 2020, when he arrived from Türkiye by boat, he entered Greek territory, namely the island of Samos, with a group of other people in order to seek asylum. He states, moreover, that, after disembarking on that island, the local police intercepted him and the others and, that same day, the Greek authorities sent him back out to sea where, the day after, a vessel of the Turkish coast guard took him aboard and relocated him to Turkish territory … [He] claims that on 29 April 2020, during his time at sea, a private surveillance aeroplane, allegedly equipped with a camera and operated by Frontex, flew over the scene twice.

The [appellant] states that, following the alleged incident of 28 and 29 April 2020, he was transferred to a detention centre in Türkiye where he was detained for 10 days. He subsequently received an expulsion order and had his Syrian passport confiscated. Consequently, he was trapped in Türkiye without access to the asylum system, and lived as a clandestine under imminent threat of refoulement to Syria. … [In the meantime, the appellant] managed to enter the territory of the EU Member States and lodge an application for international protection in Germany.'

21 According to Article 46(5) of Regulation 2019/1896, 'the [ED] shall, after consulting the [FRO], decide not to launch any activity by [Frontex] where he or she considers that there would already be serious reasons at the beginning of the activity to suspend or terminate it because it could lead to violations of fundamental rights or international protection obligations of a serious nature. The [ED] shall inform the Member State concerned of that decision.' The appellant considered that the infringement of that provision constituted a sufficiently serious breach of a rule of law intended to confer rights on individuals. See judgment of 4 July 2000, Bergaderm and Goupil v Commission (C-352/98 P, EU:C:2000:361, paragraph 42). The appellant underscored the fact that the requirement to consult the FRO, set out under Article 46(5) of Regulation 2019/1896, leaves no margin of discretion.

22 Article 46(4) of Regulation 2019/1896 provides that 'the [ED] shall, after consulting the [FRO] and informing the Member State concerned, withdraw the financing for any activity by [Frontex], or suspend or terminate any activity by [Frontex], in whole or in part, if he or she considers that there are violations of fundamental rights or international protection obligations related to the activity concerned that are of a serious nature or are likely to persist.'

23 Which requires Frontex to guarantee the protection of fundamental rights, in particular the principle of non-refoulement, in the performance of its tasks.

24 See the order under appeal, paragraph 38.

25 Ibid., paragraphs 19 to 21.

26 Ibid., paragraphs 23 and 24.

27 Ibid., paragraph 62.

28 Ibid., paragraphs 61 and 62. See, by analogy, judgment of 6 September 2023, WS and Others v Frontex (T-600/21, EU:T:2023:492), in which the General Court dismissed an action based on Article 268 TFEU and the second paragraph of Article 340 TFEU following an examination of the existence of a causal link between the alleged damage and breach of EU law. In that case, the applicants claimed compensation for damage allegedly suffered by them following a joint return operation carried out by Frontex and the Hellenic Republic, which resulted, inter alia, in the applicants being transferred to Türkiye. An appeal against that judgment was brought on 14 November 2023; see Case C-679/23 P.

29 That provision states that 'in so far as this Charter contains rights which correspond to rights guaranteed by the [ECHR], the meaning and scope of those rights shall be the same as those laid down by the [ECHR]. This provision shall not prevent Union law providing more extensive protection.'

30 See the judgment in *N.D. and N.T. v. Spain* (§ 85) and ECtHR, 18 November 2021, *M.H. and Others v. Croatia* (CE:ECHR:2021:1118JUD001567018, § 268; 'the judgment in *M.H. and Others v. Croatia*').

31 ECtHR, 23 August 2016, *J.K. and Others v. Sweden* (CE:ECHR:2016:0823JUD005916612 §§ 92 to 97; 'the judgment in *J.K. and Others v. Sweden*').

32 Ibid., § 93.

33 ECtHR, 7 July 2022, *Safi and Others v. Greece* (CE:ECHR:2022:0707JUD000541815).

34 See the judgment in *N.D. and N.T. v. Spain* (§ 85) and the judgment in *M.H. and Others v. Croatia* (§ 268).

35 The judgment in *M.H. and Others v. Croatia* (§ 271).

36 The judgment in *N.D. and N.T. v. Spain* (§ 85).

37 If not the impossible application of that burden in the context of pushbacks.

38 The Court of Justice has no jurisdiction to establish the facts or, in principle, to examine the evidence which the General Court accepted in support of those facts. Provided that the evidence has been properly obtained and the general principles of law and the Rules of Procedure in relation to the burden of proof and the taking of evidence have been observed, it is for the General Court alone to assess the value which should be attached to the evidence produced before it. Save where the evidence adduced before the General Court has been distorted, that assessment therefore does not constitute a point of law which is subject to review by the Court of Justice. However, the jurisdiction of the Court of Justice to review the findings of fact by the General Court extends, inter alia, to the question whether the rules relating to the burden of proof and the taking of evidence have been observed (see, to that effect, judgment of 27 January 2021, The Goldman Sachs Group v Commission, C-595/18 P, EU:C:2021:73, paragraphs 48 and 49 and the case-law cited).

39 See, to that effect, judgments of 23 March 2000, Met-Trans and Sagpol (C-310/98 and C-406/98, EU:C:2000:154, paragraph 29), and of 19 December 2013, Siemens and Others v Commission (C-239/11 P, C-489/11 P and C-498/11 P, EU:C:2013:866, paragraph 130); Opinion of Advocate General Mengozzi in Archer Daniels Midland v Commission (C-511/06 P, EU:C:2008:604, points 113 and 114) and judgment of 10 May 2023, Ryanair and Condor Flugdienst v Commission (Lufthansa; COVID-19) (T-34/21 and T-87/21, EU:T:2023:248, paragraph 81).

40 See point 44 of the present Opinion.

41 This concept is also encapsulated by the maxim *affirmanti incumbit probatio*.

42 In the context of competition law, which may admittedly have both quasi-criminal and civil aspects, see Article 2 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles [101 and 102 TFEU] (OJ 2003 L 1, p. 1), which provides, in essence, that in any proceedings concerning the application of Articles 101 and 102 TFEU, whether they be national or EU proceedings, the burden of proving an infringement of Article 101(1) or of Article 102 TFEU rests on the party or the authority alleging the infringement. See, however, judgment of 20 April 2023, Repsol Comercial de Productos Petrolíferos (C-25/21, EU:C:2023:298, paragraph 67), in which the Court of Justice considered, in effect, that in certain competition cases a rebuttable presumption of infringement arises, thereby shifting the burden of proof to the respondent. The Court held that Article 101 TFEU, as implemented by Article 2 of Regulation No 1/2003 and read in combination with the principle of effectiveness, must be interpreted as meaning that the infringement of competition law found in a decision of a national competition authority, against which an action for annulment had been brought before the competent national courts but which became final after having been confirmed by those courts, must be deemed to be established, in the context of both an action for a declaration of nullity under Article 101(2) TFEU and an action for damages for an infringement of Article 101 TFEU, by the applicant until proof to the contrary is adduced, thereby shifting the burden of proof defined by that Article 2 to the respondent. The shifting of the burden of proof is subject to the requirement that the nature of the alleged infringement that is the subject of those actions, as well as its

material, personal, temporal and territorial scope, must coincide with those of the infringement found in the decision in question. The Court highlighted the fact that the enforcement of claims for damages due to infringements of Article 101 TFEU would be rendered excessively difficult if the final decisions of a competition authority were to be accorded no effect whatsoever in civil actions for damages or in actions seeking to establish the invalidity of agreements or decisions prohibited under that article (ibid., paragraph 61).

43 Where applicable.

44 See to that effect, judgment of 26 September 2024, Ordre des avocats du barreau de Luxembourg (C-432/23, EU:C:2024:791, paragraph 48 and the case-law cited).

45 Article 34 ECHR provides that 'the [ECtHR] may receive applications from any person … or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the [ECHR] or the Protocols thereto. …'.

46 See judgment of 5 March 2024, Kočner v Europol (C-755/21 P, EU:C:2024:202, paragraph 117).

47 Under Article 41 ECHR, 'if the [ECtHR] finds that there has been a violation of the [ECHR] or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the [ECtHR] shall, if necessary, afford just satisfaction to the injured party.' While an action for damages pursuant to Article 268 TFEU and the second paragraph of Article 340 TFEU is a separate and independent action from an action for annulment (Article 263 TFEU) or an action for failure to act (Article 265 TFEU) and is not dependent on a finding of an infringement of either of the latter provisions, the ECtHR must find a violation prior to awarding just satisfaction. In the judgment in *A.R.E.*, the applicant was awarded EUR 20 000 for non-material damage (§ 310).

48 Compare Article 3 ECHR and Article 4 of the Charter, Article 13 ECHR and Article 47 of the Charter, and Article 4 of Protocol No 4 to the ECHR and Article 19(1) of the Charter.

49 Judgment of 17 October 1989, Handels- og Kontorfunktionærernes Forbund i Danmark (109/88, 'the judgment in *Danfoss*', EU:C:1989:383, paragraphs 14 to 16).

50 See Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women (OJ 1975 L 45, p. 19), which was in force at the relevant time.

51 See, also, judgment of 26 June 2001, Brunnhofer (C-381/99, 'the judgment in *Brunnhofer*', EU:C:2001:358, paragraphs 52 to 54 and the case-law cited).

52 Judgment of 27 October 1993, Enderby (C-127/92, 'the judgment in *Enderby*', EU:C:1993:859, paragraphs 14 and 18). The judgments in *Danfoss*, *Enderby* and *Brunnhofer* thus rely heavily on the principle of effectiveness in order to justify their departure from the normal rules on the burden of proof.

53 See the judgment in *Brunnhofer* (paragraphs 56 to 58).

54 Directive of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (OJ 2006 L 204, p. 23).

55 Council Directive of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services (OJ 2004 L 373, p. 37).

56 Council Directive of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ 2000 L 303, p. 16).

57 Council Directive of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (OJ 2000 L 180, p. 22).

58 A prima facie case of discrimination may be refuted with a body of consistent evidence (see judgment of 25 April 2013, Asociaţia Accept, C-81/12, EU:C:2013:275, paragraph 58).

59 See Opinion of Advocate General Kokott in Belov (C-394/11, EU:C:2012:585, point 92).

60 Judgment of 17 November 2022 (C-175/21, EU:C:2022:895, paragraphs 50 and 72).

61 Judgment of 9 March 2006 (C-293/04, EU:C:2006:162, paragraphs 37 to 46).

62 See Article 11(1) of Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC (OJ 2019 L 136, p. 28), which provides that 'any lack of conformity which becomes apparent within one year of the time when the goods were delivered shall be presumed to have existed at the time when the goods were delivered, unless proved otherwise or unless this presumption is incompatible with the nature of the goods or with the nature of the lack of conformity. …'. See, also, judgment of 4 June 2015, Faber (C-497/13, EU:C:2015:357, paragraphs 52 to 54), in which the Court stated that the 'relaxation of the burden of proof in favour of the consumer is based on the determination that where the lack of conformity becomes apparent only subsequent to the time of delivery of the goods, it is "well-nigh impossible for consumers" to prove that that lack of conformity existed at the time of delivery, whereas it is generally far easier for the professional to demonstrate that the lack of conformity was not present at the time of delivery and that it resulted, for example, from improper handling by the consumer'.

63 Directive of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (OJ 2011 L 337, p. 9).

64 See judgment of 11 June 2024, Staatssecretaris van Justitie en Veiligheid (Women identifying with the value of gender equality) (C-646/21, EU:C:2024:487, paragraph 56 and the case-law cited). The ECtHR also referred to the 'shared duty of an [asylum seeker] and the immigration authorities to ascertain and evaluate all relevant facts of the case in the asylum proceedings' (the judgment in *J.K. and Others v. Sweden*, § 96).

65 See, also, the judgment in *J.K. and Others v. Sweden* (§§ 91 to 96), in which the ECtHR highlighted that that the burden of proof should not render ineffective the applicant's rights under Article 3 ECHR not to be subjected to torture or to inhuman or degrading treatment or punishment and that it is important to take into account all the difficulties which an asylum seeker may encounter abroad when collecting evidence. In her concurring Opinion (§ 4), Judge O'Leary stated that the ECtHR's statement in § 97 of that judgment that Article 4(5) of Directive 2011/95, inter alia, recognises 'that the benefit of the doubt should be granted in favour of an individual seeking international protection' must be tempered by applying the five conditions contained in that provision.

66 Ibid., § 93.

67 Judgment of 16 October 2019, Glencore Agriculture Hungary (C-189/18, EU:C:2019:861, paragraphs 61 and 62 and the case-law cited). See, also, ECtHR, 27 October 1993, *Dombo Beheer B.V. v. The Netherlands* (CE:ECHR:1993:1027JUD001444888, §§ 31 to 33), which concerns the right of both parties to a civil action to adduce similar evidence (witness testimony) on an equal footing. In that regard, see also judgment of 22 October 2020, Silver Plastics and Johannes Reifenhäuser v Commission (C-702/19 P, EU:C:2020:857, paragraph 59).

68 See ECtHR, 18 June 2002, *Wierzbicki v. Poland* (CE:ECHR:2002:0618JUD002454194, § 39). See also, by analogy, ECtHR, 31 May 2016, *Tence v. Slovenia* (CE:ECHR:2016:0531JUD003724214), in which the ECtHR found a violation of Article 6(1) ECHR. Ms Tence's lawyer appealed a first-instance judgment by sending a six-page fax on the last day of the time limit for lodging an appeal. The appeal was successfully transmitted to the appeal court's fax machine and remained in the fax's memory but was not printed out. In addition, it was also sent to the relevant court the following day by registered post. The appeal was rejected as out of time. The Vrhovno sodišče (Supreme Court, Slovenia) later confirmed that any faults in the transmission of a document sent by fax, even if attributable to the court, had to be borne by the party submitting such a document. In her action before the ECtHR, Ms Tence alleged that the overly restrictive interpretation of domestic procedural rules violated her right of access to a court under Article 6 ECHR. The ECtHR agreed. It was undisputed that Ms Tence had sent an encrypted six-page document to the relevant court within the time limit and that she had no influence on whether it would be printed out or whether the fax machine worked properly. The respondent government, relying on the grounds for rejection on Ms Tence's action before the domestic courts, argued however that she could not prove that the document sent by fax was the appeal in question. The ECtHR considered that in the light of the circumstances of the case and the fact that faxes are encrypted and their content cannot be proved, the domestic courts' approach of placing the entire burden of proof on the applicant was overly rigid. That approach made it practically impossible for the applicant to be successful in her appeal and made her bear a disproportionate burden. In his concurring Opinion, Judge Kūris considered that the placement of the burden of proof on Ms Tence was not only 'overly rigid', but also legally unsubstantiated and unfair.

69 See points 18 and 19 of the present Opinion.

70 Which the parties to the appeal discussed at the hearing before the Court of Justice on 4 February 2025.

71 See also the decision of the ECtHR, 7 January 2025, *G.R.J. v. Greece* (CE:ECHR:2024:1203DEC001506721; 'the decision in *G.R.J.*').

72 There are a number of similarities between the facts and the form of evidence relied on by the appellant in the present case and those relied on by Ms A.R.E. in her case before the ECtHR. See her account of the facts in the judgment in *A.R.E* (§§ 11 to 48).

73 The ECtHR highlighted that the case giving rise to the judgment in *A.R.E* diverged on the facts from other cases before that court on refoulement or collective expulsions in which prima facie evidence from the applicant had been accepted. The ECtHR thus referred first to those cases where the respondent government did not challenge the presence of the applicants on their territory or at their borders, but only their claim that they had expressed a wish to lodge an application for international protection. See the judgment in *A.R.E* (§§ 204 and 205). See also the decision in *G.R.J.* (§§ 169 and 170). See, for example, ECtHR, 8 October 2024, *M.A. and Z.R. v. Cyprus* (CE:ECHR:2024:1008JUD003909020, §§ 81 and 82). In that case, the ECtHR reiterated that as a general principle of law the initial burden of proof in relation to an allegation is borne by the party that makes it. In certain instances, however, only the respondent government has access to information capable of corroborating or refuting the applicant's allegations: consequently, a rigorous application of the above principle is impossible. If that is the case and the respondent government fails to provide a satisfactory and convincing explanation in respect of events that lie wholly or in large part within the exclusive knowledge of the State authorities, the ECtHR can draw inferences that may be unfavourable for it provided there are elements supporting the applicant's allegations. Secondly, in the judgment in *A.R.E.*, the ECtHR referred to those cases in which the applicants complained of an infringement of Article 4 of Protocol No 4 to the ECHR and the respondent governments unsuccessfully contested only the presence of the applicants among the groups, which had been subject to collective expulsion rather than the collective expulsion as such (§§ 206 and 207). See, also, the decision in *G.R.J.* (§§ 171 and 172). In the judgment in *N.D. and N.T. v. Spain* (§§ 81 to 88), the Spanish Government acknowledged the existence of a systematic practice of collective summary expulsions at its Melilla (Spain) border. That government contested, however, the applicants' participation in the events in question. The ECtHR considered that the applicants had presented prima facie evidence of that participation and assumed the truth of the account of the facts presented by the applicants. The ECtHR relied not only on the consistency of the evidence provided by the applicants, but also on the fact that the respondent governments did not dispute the existence of the expulsions at issue. That court also underscored that 'the absence of identification and personalised treatment by the authorities of the respondent State in the present case, which has contributed to the difficulty experienced by the applicants in adducing evidence of their involvement in the events in question, is at the very core of the applicants' complaint. Accordingly, the Court will seek to ascertain whether the applicants have furnished prima facie evidence in support of their version of events. If that is the case, the burden of proof should shift to the Government'.

74 See the judgment in *A.R.E.* (§ 204) and the decision in *G.R.J.* (§ 169). The text of the former (§§ 204 to 221 and 226 to 229) corresponds to that of the latter (§§ 169 to 186 and 187 to 190).

75 The degree of conviction required to reach a particular conclusion and the allocation of the burden of proof are intrinsically linked to the specific nature of the facts, the nature of the allegation made and the ECHR right in question. The ECtHR is free to assess the probative value of each piece of evidence in the file (see the judgment in *A.R.E*, § 212).

76 Ibid., § 214. See, also, the judgment in *N.D. and N.T. v. Spain* (§§ 85 and 86) and the judgment in *M.H. and Others v. Croatia* (§ 268).

77 The ECtHR had previously found the applicant's claim that her mobile phone had been confiscated and destroyed by the Greek authorities credible in the light of the information contained in several reports from national and international institutions (the judgment in *A.R.E*, § 253).

78 The ECtHR found that there had been a violation of Article 3 ECHR and of Article 13 ECHR in conjunction with Article 3 thereof by reason of the applicant's refoulement to Türkiye, that there had been a violation of Article 5(1), (2) and (4) ECHR by reason of the applicant's detention prior to her refoulement to Türkiye, and that there had been a violation of Article 13 ECHR in conjunction with Articles 2 and 3 thereof given the risk to life and ill-treatment at the time of refoulement.

79 This matter was also discussed by the parties at the hearing on 4 February 2025.

80 In the judgment in *A.R.E.*, the ECtHR concluded that at the time of the alleged facts there was a systematic practice by the Greek authorities of returning third-country nationals from the Evros region to Türkiye. The Greek Government did not succeed in refuting the evidence which suggested the existence of such a practice by providing a satisfactory and convincing alternative explanation (§ 228).

81 The ECtHR held that Ms A.R.E's detailed, specific and consistent account largely corresponded to the modus operandi found in the reports of the competent national and international institutions on refoulement from the region of Evros to Türkiye. That fact was not, however, sufficient to prove her refoulement. In addition, the applicant had to show that she had entered Greece and had found herself in Türkiye on the alleged dates and to establish a link between those two facts in order to establish that the alleged refoulement was genuine. The ECtHR underscored that it does not lose sight of the fact that it is extremely difficult to adduce that evidence due to the inherently secret and unofficial nature of the conduct in question (the judgment in *A.R.E.*, § 230). See, however, the decision in *G.R.J.* (§§ 187 to 225), in which, despite the existence of a fairly uniform modus operandi of refoulement of foreign nationals seeking asylum from the Evros region and the Greek Islands by the Greek authorities at the relevant time, and the fact that the applicant's account largely corresponded to that modus operandi, the ECtHR had strong doubts as to the credibility of his account in the light of certain evidence adduced by him to corroborate it. The ECtHR considered that the applicant's allegations were at times contradictory and inconsistent. That court thus held that the applicant had not adduced prima facie evidence of his presence in Greece and refoulement to Türkiye from the island of Samos on the alleged dates and that he could not therefore claim to be a victim within the meaning of Article 34 ECHR (the decision in *G.R.J.*, §§ 199 to 225).

82 The ECtHR held that documentary evidence drawn up by another Member State of the Council of Europe – in that case, Türkiye – detailing Ms A.R.E.'s abscondment to Greece on 4 May 2019 and refoulement to Türkiye on 5 May 2019 constituted prima facie evidence substantiating her version of events, which the Greek Government did not succeed in rebutting (the judgment in *A.R.E.*, §§ 219 and 241). The ECtHR attached great importance to the decision of the Izmir Criminal Court delivered on 6 May 2019 detailing Ms A.R.E.'s refoulement in establishing the facts in that case (ibid., § 235).

83 While the authenticity of this form of evidence produced was disputed by the Greek Government, the ECtHR held that it corresponded to the overall account of the applicant (ibid., § 250). The ECtHR also took into account witness testimony which converged on crucial points with, and was supported by, the audiovisual material produced and thereby corroborated the applicant's account (ibid., § 264).

84 See, by analogy, Opinion of Advocate General Mengozzi in Meister (C-415/10, EU:C:2012:8, point 34).

85 Judgments of 24 March 1988, Commission v Italy (104/86, EU:C:1988:171, paragraph 11), and of 4 July 2024, EUIPO v KD (C-5/23 P, EU:C:2024:575, paragraph 47).

86 See, by analogy, judgment of 10 April 2014, Areva and Others v Commission (C-247/11 P and C-253/11 P, EU:C:2014:257, paragraphs 80, 81, 92 and 98).

87 See Opinion of Advocate General Pitruzzella in Harman International Industries (C-175/21, EU:C:2022:481, point 91). See, also, Opinion of Advocate General Campos Sánchez-Bordona in Commission v Germany (C-482/14, EU:C:2016:368, point 96).

88 The Court should not intervene in such cases and the normal rules on the burden of proof should apply.

89 Indeed, intervention may extend beyond the question of distribution of the burden of proof. See ECtHR, 9 October 1979, *Airey v. Ireland* (CE:ECHR:1979:1009JUD000628973), on the right to legal aid in civil cases. See, also, Article 9(4) of the Convention on access to information, public participation in decision-making and access to justice in environmental matters, signed at Aarhus on 25 June 1998 and approved on behalf of the European Community by Council Decision 2005/370/EC of 17 February 2005 (OJ 2005 L 124, p. 1), Article 11(4) of Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment (OJ 2012 L 26, p. 1) and judgment of 15 March

2018, North East Pylon Pressure Campaign and Sheehy (C-470/16, EU:C:2018:185), on the requirement that certain judicial proceedings in the field of the environment not be prohibitively expensive. The rules of procedure of courts may also be adapted to protect vulnerable parties such as minors and in order to obtain their testimony.

90 See points 30 to 34 of the present Opinion on the case-law of the Court and EU legislation on anti-discrimination and the burden of proof. See, also, points 40 to 50 of the present Opinion on the case-law of the ECtHR on secret detention and collective expulsions.

91 Thereby demonstrating that he or she is a victim of the collective expulsion in question. Strong evidence that there was a systematic practice of refoulement at the relevant time and place is insufficient in itself. See the decision in *G.R.J.* (§§ 225 and 226).

92 See, by analogy, the decision in *G.R.J*.

93 These are two autonomous but logically linked subconditions.

94 There is admittedly a certain degree of overlap between the second and third conditions. However, both should be met in full in order to reverse the burden of proof 'normally' on a claimant.

95 And the case-law thereon.

96 If the present proceedings related to the actions of a Member State, I believe the line of reasoning outlined by the ECtHR, inter alia, in its judgment in *A.R.E.*, would, in principle, be applicable. Where a claimant adduces prima facie evidence that he or she was the victim of a collective expulsion by a Member State, the burden of proof would be reversed and placed on the latter. The Member State would be presumed to be in a position to refute the claimant's allegations and it would be incumbent on the Member State to provide a satisfactory and convincing explanation of events that lie wholly or largely within its exclusive knowledge.

97 See, *a contrario*, the judgment in *J.K. and Others v. Sweden* (§ 98), in which the ECtHR stated, in the context of the expulsion of an asylum applicant, that national authorities may be considered to have 'full access to information' relating to the objective situation in the country of origin concerned.

98 In particular, when compared to the alleged role of the Greek authorities in the events.

99 See the order under appeal, paragraphs 39 and 62.