



The Luxembourg Showdown: Access to Justice in light of the Grand Chamber's rulings in *Hamoudi* and *WS and Others v. Frontex*

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On 18 December, the Frontex judicial saga to establish the agency's liability for its involvement in the human rights violations occurring in joint operations came to a long-awaited end with the two judgments *Hamoudi* ([Case C-136/24 P](#)) and *WS and Others* ([Case C-679/23 P](#)). The previous episodes (see [here](#), [here](#) and [here](#)) had offered little hope for meaningful access to justice for migrants seeking redress against the agency. Finally, the CJEU discarded the hackneyed image of Frontex as a mere executor and clearly stated that Frontex is legally responsible for the activities it oversees and coordinates and that its founding Regulation obliges the agency to guarantee respect for fundamental rights and the principle of non-refoulement in all its activities.

The cases stem from two emblematic situations. In 2020, Alaa Hamoudi, a Syrian national, arrived on the Greek island of Samos to seek asylum but was instead pushed back to sea after his phone was confiscated; the operation was carried out under Frontex surveillance. He was later intercepted by Turkish authorities and detained. Similarly, the WS Syrian family, who arrived in Greece in 2016 to seek asylum, were unlawfully placed on a Frontex-operated flight to Turkey, despite believing they were being transferred to Athens to apply for international protection.

By setting aside the judgments of the General Court (GC) and referring both cases back for further examination, the CJEU marked a clear shift in its approach to Frontex's liability. The Court required the agency to clarify the circumstances of the Syrian family's return, which occurred without a return decision, and to disclose all information in its possession concerning the location and circumstances of Hamoudi's alleged pushback.

While the final remedies remain to be determined by the GC, these rulings represent a significant advance for access to justice in the [executive governance of migration](#). This post focuses on three aspects of that development: access to evidence, access to standing, and access to redress, each essential to determining whether migrants can effectively challenge violations and obtain meaningful justice.



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Access to evidence: a realistic approach to evidentiary requirements

Access to justice presupposes the practical ability to prove one's case. The ability to prove facts is inherently challenging in the context of border operations, as violations often occur in remote areas, operations unfold under emergency conditions, and the regulatory framework surrounding border-control actors is frequently opaque. The matter has been at the center of *Hamoudi*'s case: the pushback in which *Hamoudi* was involved occurred at sea after the applicant's phone had been confiscated by the Greek authorities. To substantiate his claims regarding his presence at and involvement in the pushback, *Hamoudi* submitted to the GC his own witness statement, an [investigative article by Bellingcat](#) about the event, including two YouTube videos and four photographs consisting of colour screenshots taken from those videos. These elements were not considered enough by the GC, which deemed it as 'manifestly insufficient to demonstrate conclusively' that the appellant was present at and involved in the pushback, [without explaining how someone adrift at sea would be able to record these events.](#)

The CJEU, instead, adopted a markedly more grounded assessment of evidentiary requirements. The Court stated that, as a matter of principle, it is for the party seeking to establish non-contractual liability to prove, by conclusive evidence and by reliance on any form of evidence, that the conditions required for the EU non-contractual liability are met (para 71, *Hamoudi*). However, the CJEU immediately added (para 72, *Hamoudi*) that this general rule on the allocation of the burden of proof is not absolute, because the EU judiciary must, in all circumstances, ensure the effective judicial protection of individuals, [as required by Article 47 of the Charter](#). This emphasis on Article 47 also informs the CJEU's stance on the role of the GC: the GC must consider the specific circumstances of each case and adapt evidentiary rules when ordinary procedures impose a burden of proof that is excessively difficult or impossible to meet (para 78, *Hamoudi*).

Accordingly, while it is up to the GC to decide whether to use its investigative and procedural tools, that discretion must be exercised in full compliance with Article 47 and



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therefore, in exceptional cases, the Court may actively seek evidence to support applicants who face genuine obstacles or refusals in accessing necessary evidence, thereby safeguarding effective judicial protection and preventing procedural formalism from undermining substantive rights (paras 78 and 80, *Hamoudi*).

Notably, the CJEU's approach diverged from the [opinion of Advocate General](#) (AG) Norkus, who questioned whether the adaptation of the burden of proof should apply when the alleged wrongdoer is not a Member State, but an EU agency like Frontex. The AG argued that Frontex's 'more limited powers' cast doubt on how much its actions could affect the claimant's evidentiary burden (para 62, [Opinion](#), criticised [here](#) and [here](#)). The CJEU, instead, highlighted that Frontex is likely to hold relevant information given its tasks of monitoring, collecting operational data, and assisting Member States. In light of [these extended tasks and powers](#), the GC was required to adopt procedural measures to obtain all relevant information Frontex held in order to clarify the facts of the alleged pushback of the case (para 133, *Hamoudi*).

The Court puts relevant emphasis on the stark imbalance of power between migrants in a position of 'significant vulnerability' (para 88, *Hamoudi*; para 156, *WS and Others*) and the position of Frontex, which is 'likely to possess information that is relevant for the purpose of proving the existence of pushbacks' (para 96, *Hamoudi*). In the Court's view, this imbalance is enough to justify adapting the burden of proof: for alleged victims of pushbacks, it is sufficient to present *prima facie* evidence that such an operation occurred and that they were present during it (para 106, *Hamoudi*). Furthermore, the Court made clear that the mere fact that a claimant may not recall the exact date of their journey, cannot identify other victims, or lacks witness testimony, is not sufficient grounds to dismiss the probative value of their witness statement when assessing whether it constitutes *prima facie evidence* (para 122, *Hamoudi*). What matters most is that the witness account is detailed, specific, consistent, and credible (para 123, *Hamoudi*).

Access to standing before the court: confirming the strict requirements?



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While *Hamoudi* and *WS and Others* mark important victories in that the Court acknowledged Frontex's violations of migrants' fundamental rights, it is essential to acknowledge that such victories were achieved through actions for damages under Article 340 (2) TFEU, [a legal avenue primarily designed for compensation, not to protect fundamental rights](#). Yet, the CJEU emphasised that such action must be considered within the broader framework established by the EU Treaties to ensure effective judicial protection for individuals (para 74, *Hamoudi*). The Court further recalled that, under Article 2 TEU, the EU is founded on values including equality and the rule of law, which are intrinsically linked to the availability of effective judicial remedies (para 75, *Hamoudi*). In spite of this emphasis, civil society has pursued the route of non-contractual liability precisely because [other judicial avenues have repeatedly failed](#) to hold Frontex accountable or even bring the agency before a court. In *Hamoudi* the CJEU explicitly acknowledges this reality, stating 'that an action for non-contractual liability may be the only legal remedy capable of ensuring, to the requisite standard, judicial protection before the EU judicature against Frontex' (para 103, *Hamoudi*).

Yet, the conditions for non-contractual liability were left unchanged by the CJEU (paras 60-62 *WS and Others*) and, therefore, success is far from guaranteed, should [other cases be brought before the CJEU](#). That said, in *WS and Others* the Court made a noteworthy effort to adapt this legal framework to situations involving violations of fundamental rights by underlining that the existence of a causal link between damage and an unlawful conduct must be examined in concreto (para 154, *WS and Others*).

Crucially, the CJEU held that the GC had erred in law by concluding without having assessed in concreto that the harm suffered by the family deported to Turkey could not be directly attributed to Frontex's conduct (para 161, *WS and Others*). The GC had reasoned that the causal link was broken by the appellants' subsequent decisions following the return operation — specifically, their decision to flee to Iraq out of fear of being returned to Syria — without properly examining whether those decisions were reasonable in light of the particular circumstances.



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In correcting this approach, the Court emphasised that the family's choices could not be regarded as interrupting the causal chain. While 'entirely rational decision-making may be expected of economic operators' (para. 153, *WS and Others*), the same standard cannot be applied to asylum seekers (para. 156, *WS and Others*), given their inherent vulnerability.

This situation raises difficult questions about whether access to justice in EU courts can go beyond compensation claims, which, by nature, address harm only after it has occurred.

Access to redress: any chance for ex ante solutions?

The monetary compensation that might be awarded by the GC to Mr. Hamoudi and the WS family for Frontex's misconduct offers some measure of consolation for the harm they endured. However, financial redress alone falls far short of the structural changes needed to achieve meaningful and lasting justice. In cases of fundamental rights violations, compensation is inherently a *post mortem* remedy, one that addresses the harm only after the damage has been done.

This underscores the urgent need to rethink access to justice from an ex ante perspective, where stronger administrative remedies and precautionary measures play a vital role in preventing violations before they occur. However, although the CJEU was silent on that, the experience of the WS family starkly illustrates the ineffectiveness of current administrative remedies in place for Frontex. After filing a complaint with the Frontex Fundamental Rights Officer (FRO) in January 2017 regarding their unlawful return, they were informed that their case was first forwarded to the Greek Ombudsman and subsequently to the Hellenic Police. Over a year passed with no response, prompting the family to submit a second complaint in July 2018 concerning Frontex's handling of the first.

For the next two years, the FRO repeatedly delayed action, awaiting the results of the Hellenic Police's internal investigation, which was eventually concluded in 2019 but kept confidential. By October 2020, the FRO closed the complaint without addressing Frontex's



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role or the subsequent complaint, concluding that the agency had fulfilled its obligations.

Concluding remarks

While the judgments represent a positive step for migrants' protection and the rule of law, from an access-to-justice perspective they also reveal the limits of a system that still relies primarily on ex post compensation. Meaningful access to justice requires procedural avenues capable of preventing violations before they occur, rather than merely addressing them after the fact. [The absence of effective and independent oversight mechanisms within powerful agencies like Frontex](#) (for the hypothesis of a board of appeals for Frontex, see [here](#)) remains a central concern.