European Court of Human Rights

A.A.N. and Others v. Greece and 7 other cases (Applications no. 38203/20, 42830/20, 42840/20, 4201/22, 4203/22, 4205/22, 4207/22, 4208/22)

Third Party intervention by the Chair for Migration Law and Human Rights of the Friedrich-Alexander-Universität Erlangen-Nürnberg and the Human Rights Centre of Ghent University.[1]

Introduction

1. These observations are submitted pursuant to the decision of the Vice-President of the Section of 24 February 2025 allowing for the third-party intervention in *A.A.N. and Others v. Greece* and 7 other applications.
2. In *A.A.N. and Others v. Greece*, just as in numerous other pushback cases, the applicants and the State disagree as to the facts underlying the alleged violation of the European Convention of Human Rights (ECHR). Thus, the Court's assessment of submitted evidence is crucial for the outcome of the case.
3. The Interveners want to draw the Court's attention to six themes that we consider to be of particular salience when addressing evidentiary aspects in pushback cases, namely: (A) the fact that the Court has already established in its case law that pushbacks are practiced in Europe; (B) states' determination to keep these practices secret; (C) the impact of the state-created evidentiary holes on the evidence generally before the Court; (D) the possibility that nonetheless remains that in some cases a particular pushback is actually evidenced through evidence that meets the standard of proof 'beyond reasonable doubt'; (E) in cases where the occurrence of a particular pushback is uncertain but the applicant has submitted *prima facie* evidence for it, the importance for the Court to adopt the corrective evidentiary route of shifting the burden of proof onto the respondent state; (F) additional ways whereby the Court can alleviate the evidentiary inequality of arms

[1] Prof. Dr. Grażyna Baranowska (Friedrich-Alexander-Universität Erlangen-Nürnberg), Prof. Dr. Marie-Bénédicte Dembour (Ghent University) and Isabel Kienzle (Friedrich-Alexander-Universität Erlangen-Nürnberg) co-authored the intervention.

between the applicant and the state, including by requesting information from the state under Article 38 ECHR and Rule 44A of the Rules of Court.

(A) As the Court's case law itself indicates, pushbacks are a European reality

4. The Court's own case law confirms that various European states have a practice of operating pushbacks.[2]
5. A multitude of reports by authoritative sources also indicate the existence of a pushback practice by various European states.[3]
6. Concerning Greece in particular, basing itself on numerous, diverse and concordant sources, the Court has acknowledged in *A.R.E. v. Greece* (2025) and *G.R.J. v. Greece* (2024) Greece's long-standing systematic practice of pushing people back at its land[4] and sea borders.[5]
7. This is an important piece of information, which may give rise to the presumption that the respondent State known to be practicing pushbacks is likely to have operated the pushback complained of by an applicant in a case brought before the Court. The strength of this inference depends on the other evidentiary elements (possibly also of a presumptive nature) with which it is combined.

(B) Pushback practices are surrounded by secrecy that is deliberately instigated by the state

8. As apparent from cases decided by the Court, authorities do not always consistently record state practices at borders,[6] or submit relevant records in proceedings.[7] This has led the Court to acknowledge 'the by definition **secret and unofficial** nature of [pushback] actions'.[8]
9. The absence of state recording of their pushback actions can take many forms, including (in a non-exhaustive list): the non-registration of the arrival of a migrant person; the non-registration of their

[2] Recently and prominently for Greece in *A.R.E. v. Greece*, ECtHR, no. 15783/21 (7 January 2025), para. 226-229 and *G.R.J. v. Greece*, ECtHR (dec.), no. 15067/21 (3 December 2024), para. 187-190.
[3] Concerning Greece, such reports are listed non-exhaustively, in *A.R.E. v. Greece*, ECtHR, no. 15783/21 (7 January 2025), paras. 138-168 and *G.R.J. v. Greece*, ECtHR (dec.), no. 15067/21 (3 December 2024), paras. 123-168.
[4] *A.R.E. v. Greece*, ECtHR, no. 15783/21 (7 January 2025), paras. 226-229.
[5] *G.R.J. v. Greece*, ECtHR (dec.), no. 15067/21 (3 December 2024), paras. 187-190.
[6] See for example *Shahzad v. Hungary* (No. 2), ECtHR, no. 37967/18 (5 October 2023), paras. 9, 58, 63 (switching off cameras at the border at precisely those moments when alleged pushback actions were occurring).
[7] See for example *M.H. and Others v. Croatia*, ECtHR, no. 15670/18; 43115/18 (18 November 2021), para. 271, where footage of video-surveillance was not introduced despite being considered critical evidence. See also: Jill Maybritt Alpes and Grażyna Baranowska, 'The Politics of Legal Facts: The Erasure of Pushback Evidence from the European Court of Human Rights' *Law & Social Inquiry* (2024): 1-24.
[8] *A.R.E. v. Greece*, ECtHR, no. 15783/21 (7 January 2025), para. 230; *G.R.J. v. Greece*, ECtHR (dec.), no. 15067/21 (3 December 2024), para. 191. Unofficial translation by the interveners.

protection claims; their transportation in vehicles not registered by the authorities; their detention in non-official detention sites; the turning off during pushbacks of the cameras that normally constantly record what is happening in a given border zone.

10. During pushback operations, as documented in the Court's case law on pushbacks,[9] states routinely confiscate migrants' phones. This is in order to prevent migrants from keeping any photograph or video they would already have taken and/or to make it impossible for them to start doing this.[10]
11. Where applicants are pushed back from transit zones and from ships, they have 'very limited contact with the outside world' and no or little 'access to facilities to collect evidence', as acknowledged by the Court in its case law.[11] In such context, only the state has access to information that could serve as evidence, in other words the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities.[12]
12. The determination by states to conceal their pushback practices results in a total or near-total absence of direct evidence of these practices.

(C) State-created evidentiary holes inevitably impact the level of evidence that gets submitted to the Court

13. As the Court stated in *Ireland v the United Kingdom*, 'the Court [does] not rely on the concept that the burden of proof is borne by one or other [parties]. In the cases referred to it, the Court examines all the material before it, [whatever their origin].'[13]
14. In general, most evidence submitted to the Court will originate from either the applicant or the respondent state.
15. In pushback cases, little evidence can be expected to be submitted by the state, whose efforts are directed at concealing its practices.

[9] E.g. *A.R.E. v. Greece*, ECtHR, no. 15783/21 (7 January 2025); para. 31, 266; *G.R.J. v. Greece*, ECtHR (dec.), no. 15067/21 (3 December 2024), para. 18, 207; *D. v. Bulgaria*, para. 19; *J.A. and Others v. Italy*, para. 10.
[10] See, among other sources, European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, (COT) 'Report to the Greek Government on the visit to Greece carried out by CPT from 13 to 17 March 2020', 19.11.2020, https://rm.coe.int/1680a06a86, para. 56; CPT, '32nd General Report: 1 January – 31 December 2022', March 2023, https://rm.coe.int/1680aabe2b, para. 93.
[11] *O.M. and D.S. v. Ukraine*, ECtHR, no. 18603/12 (15 September 2022), para. 92; *M.A. and Z.R. v. Cyprus*, ECtHR, no. 39090/20 (8 October 2024), para. 83.
[12] *M.A. and Z.R. v. Cyprus*, ECtHR, no. 39090/20 (8 October 2024), para. 81, referencing, *inter alia*, Varnava and Others v. Turkey, ECtHR [GC], no. 16064/90 et al. (18 September 2009), para. 184.
[13] *Ireland v. The United Kingdom*, ECtHR (Plenary), no. 5310/71 (18 January 1978), para. 160.

16. In such cases, due to the measures deliberately taken by the state to prevent the emergence of evidence (as explained in section B), the applicant also has typically little to no direct evidence of having been pushed back to offer the Court.
17. The evidentiary holes deliberately created by the state in pushback operations aim to prevent state accountability for the human rights violations they entail. Such pushback practices are designed to circumvent the legal framework put in place to protect migrants' rights, including human rights.
18. In order not to leave this human rights situation unattended, it is of the utmost importance that the Court responds appropriately to the evidentiary challenges pushback complaints present. It is crucial for the Court to shift the burden of proof onto the respondent state when this is indicated, which will often be the case, as explained in section E.
19. It is equally crucial, however, that the Court recognises when such a shift is not needed due to the strength of the evidence before it, building on which the factual complaint can actually be established.

(D) Occasionally a pushback complaint will succeed in meeting the Strasbourg 'beyond reasonable doubt' standard of proof

20. In *Ireland v the United Kingdom*, the Court defined its regular standard of proof:

> To assess [the evidence in this case], the Court adopts the standard of proof 'beyond reasonable doubt' but adds that such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact. In this context, the conduct of the Parties when evidence is being obtained has to be taken into account.[14]

21. Since this judgment, the Court has stressed that 'beyond reasonable doubt' has a *sui generis*, autonomous meaning in its jurisprudence, distinct from the acceptance the expression receives in the Common Law, where it applies in criminal cases. In short, before the Court, 'beyond reasonable doubt' proof can be attained through strong, clear and concordant inferences or presumptions of fact.
22. This is of high relevance to the pushback case law.
23. As seen above, the secrecy which surrounds pushbacks and the state-instigated evidentiary holes which characterise these operations have for effect that they generally cannot be *directly* evidenced. However, there will be the occasional case where a particular pushback operation lends itself to be found established beyond reasonable doubt due to the array of presumptive evidence before the Court.

[14] *Ireland v. The United Kingdom*, ECtHR (Plenary), no. 5310/71 (18 January 1978), para. 161.

24. Such an array may include some of the following evidentiary elements:

- report(s) documenting that pushbacks have been operated by the respondent State;
- unsubstantiated denial(s) by the State, when the State should be in possession of evidence substantiating the said denial(s) through for example its fingerprinting of migrants, camera recordings of the site where the contested events are said to have taken place, logging details as to where its patrols were operating on the said day, etc;
- absence of effective investigation of the contested events, when such an investigation would have been expected to take place;
- a detailed account from the applicant of what happened to them;
- in rare cases, pictures or videos of the pushback operation taken by a person who, despite the risks to themselves, successfully managed to keep their phone instead of having it confiscated by the authorities;
- in rare cases, a witness statement emanating from a fellow migrant who was caught in the same pushback operation;
- a social media message (for example a What'sApp message sent to a loved one or a lawyer) recounting the event immediately after its occurrence;
- social media messages that include a GPS location, and thus confirm the account of the applicant as to where they were;
- other elements proving where the applicant was at the material time.

25. When the array of submitted evidence is such that it no longer becomes possible to believe that the claimed pushback did not happen, then the right evidentiary course is for the Court to find the said pushback established beyond reasonable doubt.

26. The more evidence the Court will have before it, the more likely it will be able to reach such a conclusion.

27. This is what the Court for example did in *A.R.E. v Greece*. To quote the judgment (emphasis added):

> 266. The Court notes that there is before it **no direct evidence** of the applicant's refoulement as such. However, it considers that it would have been impossible for the applicant to provide such evidence in the particular circumstances of the case, since she was no longer in possession of her mobile phone at the time of her refoulement, which, moreover, took place during the night. In this regard, the Court attaches particular importance to the fact that it has been sufficiently demonstrated that the applicant was present in Greece and, above all, that she was last seen in the custody of Greek officials at the Nea Vyssa Square in the late afternoon/early evening of 4 May 2019, before reappearing in the early hours of the following morning on the Turkish side of the Evros River, where she was arrested. Further referring to the decision of the Izmir Court, the Court considers that it is **possible to infer** from these two indisputable facts that she was returned in the meantime. For its part, the Government has not provided any convincing

alternative explanation of what might have happened to her in the time that elapsed between the two events in question.

267. Consequently, the Court considers it sufficiently established that the applicant entered Greece on 4 May 2019 and was arrested and detained there before being returned to Türkiye, where she was arrested the following day. It concludes that **the applicant's allegations are sufficiently convincing and established beyond reasonable doubt**.[15]

28. In *A.R.E. v Greece*, shifting the burden of proof was not needed since the applicant had established her case beyond reasonable doubt. There was therefore no purpose here and even no sense in shifting the burden of proof onto the respondent State. The case was substantially established.

(E). When the applicant brings only *prima facie* evidence of having been personally pushed back, the burden of proof should be shifted onto the respondent state

29. In *A.R.E. v Greece*, the Court, faced with the strength of the presumptions before it, rightly concluded that the applicant's allegations were established beyond reasonable doubt. The Court is well aware, however, that not all meritorious applicants are in a position to bring sufficient evidence for their complaint to be considered proven beyond reasonable doubt. This is why it has established a route for shifting the burden of proof.[16]
30. Such a route can only be followed when two conditions are met. These could be called the context condition and the linkage condition. When they are met, the burden of proof is to be shifted onto the state, with the effect that it is now for the state to rebut the presumption of veracity of the applicant's account. If the state does not convincingly rebut this presumption, the Court is to hold the facts underlying the complaint established.
31. It is important to distinguish and understand precisely how the two conditions work.
32. As to the **first condition (context condition)**, there must exist a context which indicates that it appears plausible that the respondent State could have acted in the way claimed by the applicant. This is the case in a number of different situations, two of which are particularly relevant to pushback complaints. The first is when the respondent state is **known to already have been acting in the way described** by the complainant. The second is when the state **refrains from sharing evidence** it has or should have in its possession about the contested events. This could be

[15] *A.R.E. v. Greece*, ECtHR, no. 15783/21 (7 January 2025); para 266-267, unofficial translation by the interveners.
[16] According to established case-law, the distribution of the burden of proof and the required level of persuasion for reaching a particular conclusion are intrinsically linked to the specific facts, the nature of the allegation, and the Convention right involved, *El-Masri v. the Former Yugoslav Republic of Macedonia*, ECtHR (GC), no. 39630/09 (13 December 2012), para. 152.

either because the state should have recorded (part of) these events as a matter of course as they took place or should have investigated them promptly afterwards.

33. When the State not only refrains from sharing evidence which it could be expected to have in its possession, but in addition is also either known or suspected to have **deliberately prevented the production of evidence**, then the context condition for shifting the burden of proof is even more unassailable.
34. In pushback complaints, only in a case directed against a state which has never been reported to practice pushbacks in the past, might it be possible to think that the context condition for shifting the burden of proof may possibly not be met. In the great majority of all pushback cases, the first condition (context condition) for shifting the burden of proof will be met.
35. The shifting of the burden of proof depends on a second condition to be met as well: the **linkage condition.** This condition requires the applicant to show the plausibility that their particular complaint relates to the context which contributes to give rise to the presumption.
36. The standard of proof to be applied to the linkage condition is the one known as ***prima facie*** (Latin for 'at first appearance' or 'on the face of it').[17]
37. As a commentator has observed,

    > In line with its colloquial meaning, *prima facie* is most commonly understood [including in international human rights law] as a low standard of proof – a requirement to present an initial claim that is cognizable [colorable], but that need not … be [wholly] convincing nor more persuasive than the other party's submission.[18]

38. For the linkage condition to be met, the applicant only needs to bring *prima facie* evidence that they were pushed back.
39. Accordingly, in pushback cases, **just one** of the following pieces of evidence next to the applicant's statement, should be enough for the Court to consider the linkage condition fulfilled:
    - a detailed account from the applicant of what happened to them;[19]
    - a picture of the pushback operation taken against the odds, where the applicant appears;
    - a witness statement emanating from a fellow migrant who testifies having seen the applicant being pushed back;

[17] Prima Facie, J. Law and E. A. Martin (eds.), *A Dictionary of Law* (Oxford: Oxford University Press, 2009); Prima Facie, *Black's Law Dictionary* (2nd Ed.), https://thelawdictionary.org/.

[18] Lisa Reinsberg, 'UN Treaty Bodies' 'Sufficiently Substantiated' Admissibility Requirement: Endorsement or Distortion of the Prima Facie Threshold?' in Deborah Casalin, Marie-Bénédicte Dembour and Cornelia Klocker (eds.) *Questions of Evidence in the Individual Communications Procedure of the UN Human Rights Treaty Bodies* (Cambridge: Cambridge University Press, forthcoming).

[19] Such a detailed account by the applicant will not always be available. Due to the negative impact on their memory function of the trauma of the pushback, some persons do not remember the details of their pushback.

- a social media message recounting the event and the presence of the applicant in it, sent shortly after the pushback in question occurred;
- confirmation by whatever means of the applicant's location during, immediately before or immediately after the pushback.

40. That no more than just one piece of *prima facie* evidence is needed for the linkage condition to be considered met, was confirmed by the Court in *A.R.E*, where the Court stated (emphasis added):

> [T]he applicant provided a number of elements which, **even taken separately**, could constitute *prima facie* evidence in favour of her version of the events.[20]

In other words, it is not the combination of the evidentiary elements that would have allowed the Court to conclude that the applicant had proven her case *prima facie*.[21] Just one element would have sufficed for this.

41. It is crucial that the Court keeps to the proper meaning of *prima facie* when it considers whether to shift the burden of proof.[22] This is for two distinct but confluent reasons.

42. First, if the evidence submitted by the applicant of its involvement in a particular pushback is more than *prima facie*, the evidentiary route of shifting the burden of proof should deliberately and expressly not be followed by the Court – if the case lends itself to be found proven beyond reasonable doubt through presumptions and inferences.

43. Second, if the Court misqualifies as *prima facie* a piece or bundle of evidence which is actually stronger than just plausible – thus being probable, compelling or even beyond reasonable doubt – this may wrongly be taken in future cases to indicate that *prima facie* evidence requires more probative value than it normatively does. In other words, the risk is that *prima facie* comes to be interpreted as denoting a higher standard of proof than it does. In addition to possibly affecting the resolution of the case in question, this would undermine the whole evidentiary system put in place by the Court. Clarity and consistency is of the essence of law, including in its evidentiary aspects.

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[20] *A.R.E. v. Greece*, ECtHR, no. 15783/21 (7 January 2025): para 265, unofficial translation by the interveners.

[21] A reminder that this had not been needed in this case, since the Court found the pushback proven beyond reasonable doubt.

[22] Unfortunately the Court has sometimes used the expression *prima facie* in situations where the evidence was stronger than just plausible. See Marie-Bénédicte Dembour 'The Evidentiary System of the European Court of Human Rights in Critical Perspective', *European Convention on Human Rights Law Review* 4, no. 4 (2023): 368-374; Marie-Bénédicte Dembour, 'Beyond Reasonable Doubt at its Worst – But Also at its Potential Best: Dissecting Ireland v the United Kingdom's No-Torture Finding', *European Convention on Human Rights Law Review* 4, no. 4 (2023): 375-425; Grażyna Baranowska, 'Exposing Covert Border Enforcement: Why Failing to Shift the Burden of Proof in Pushback Cases is Wrong', *European Convention on Human Rights Law Review* 4 (2023): 473–94; Kristin Henrard, 'The European Court of Human Rights and the 'Special' Distribution of the Burden of Proof in Racial Discrimination Cases: The Search for Fairness Continues', *European Convention on Human Rights Law Review* 4, no. 4 (2023): 426-446; Joseph Finnerty, 'When is a State's 'Hidden Agenda' Proven? The Role of the Merabishvili's Three-Legged Evidentiary Test in the Article 18 Strasbourg Case Law', *European Convention on Human Rights Law Review* 4 (2023): 447-472.

(F) The role of the Court in alleviating the evidentiary inequality of arms between the applicant and the state

44. The state-instigated secrecy that surrounds pushbacks creates a stark inequality of evidentiary arms between the applicant and the state. In short, the state does all it can to suppress evidence, putting the applicant in a very challenging if not impossible position to prove their case.
45. Most pushback survivors do not have access to any legal representation, let alone access to counsels who have developed a specialist expertise in finding ways to seeking to prove pushback complaints.
46. This makes it particularly important for the Court to be very clear on the evidentiary principles it applies, including the evidentiary route it follows.
47. In this regard, the evidentiary system the Court has developed since *Ireland v the United* Kingdom suggests that evidentiary-wise, the **most logical way for the Court to proceed** in a pushback case is **first** to assess whether the evidentiary material before it allows it to assess the occurrence of the pushback operation in question to be **established beyond reasonable doubt through presumptions and inferences**. **Failing this**, the Court's **second step** should consist in verifying – as will most often be the case - that the context condition and the linkage condition are met for **shifting the burden of proof**.
48. In addition, given the concealing practices adopted by states in regard to pushbacks, the Court should consider alleviating the inequality of arms before the parties by **requesting information from states, under Article 38 ECHR and Rule 44A of the Rules of Court**. The Court can do this not only when communicating an application to a respondent state,[23] but at any stage during the proceedings.[24] Information requests have binding effect on respondent states.[25] In pushback cases, it may be particularly useful for the Court (and the applicant) to have the following information from the state:
    - a list of registrations of migrants at the relevant time and place,
    - the log books of military ships deployed in the area at the relevant time;
    - administrative documents listing the coast guards and police officers in duty at the relevant time and place, their location and tasks.

[23] Rule 54(2)(a),(b).
[24] Rule 54(2)(a),(c) for the stage of admissibility and Rule 59 (1) for the stage of merits.
[25] Established case law, see e.g. *Janowiec and Others v. Russia* [GC], no. 55508/07, 29520/09 (21 October 2013), para. 203; Kreyndlin and Others v. Russia, no. 33470/18 (31 January 2023), para. 66.

On the basis of the state's submissions (and reply to them from the applicant), the Court can then establish the facts in a more informed manner, if necessary drawing presumptions as appropriate.

49. In the event of incomplete or inaccurate submissions by the state, the Court may consider the state's version of the facts less credible, attribute more importance to a withheld piece of evidence or assume the veracity the applicant's allegation. The Court may thus consider the evidence provided by applicants as sufficient to reach the threshold of beyond reasonable doubt.

Summary of the main arguments:

50. It is evident from the Court's case law that European states conduct pushbacks and that pushbacks are secret and unofficial in nature. Due to the deliberate actions by states, pushback survivors have little to no direct evidence to offer the Court.
51. Occasionally a pushback complaint will nonetheless succeed in meeting the Strasbourg 'beyond reasonable doubt' standard of proof. In the total or near-total absence of direct evidence, this standard will generally be reached through strong, clear and concordant inferences and presumptions of fact.
52. It is crucial in such a cases for the Court to acknowledge that the findings of fact were reached on the application of a high standard of proof – thus without the mechanism of shifting the burden of proof having been activated or a *prima facie* standard of proof having been applied.
53. In most cases, however, pushback survivors are not in a position to bring sufficient evidence for their complaint to be considered proven beyond reasonable doubt. In such cases, after the applicant provides *prima facie* evidence of their involvement in the pushback in question, the burden of proof is to be shifted to the respondent state.
54. When examining whether the linkage condition for shifting the burden of proof is met, it is crucial for the Court to keep to the proper meaning of *prima facie* (without blurring the distinction between *prima facie* and the regular standard of proof).
55. To alleviate the stark inequality of evidentiary arms between the applicant and the state, the Court should more systematically request information from states and draw adverse inferences when the state refrains from submitting crucial evidence.