Reports of Cases

OPINION OF ADVOCATE GENERAL
BOBEK
delivered on 30 April 2019 [1]

Case C-556/17

Alekszij Torubarov
v
Bevándorlási és Menekültügyi Hivatal

(Request for a preliminary ruling from the Pécsi Közigazgatási és Munkaügyi Bíróság (Administrative and Labour Court, Pécs, Hungary))

(Reference for a preliminary ruling — Area of freedom, security and justice — Border control, asylum and immigration — Common procedures for granting and withdrawing international protection — Judicial review of administrative decisions on application for international protection — Right to an effective remedy — Jurisdiction of the national court limited to the power to annul)

I. Introduction

1. Table tennis (or, under a trade name, Ping-Pong) is a popular sport, the origins of which seem to stretch back to 19th or early 20th century England. 'The object [of the game] is to hit the ball so that it goes over the net and bounces on the opponent's half of the table in such a way that the opponent cannot reach it or return it correctly.' To this basic definition, Encyclopædia Britannica adds an intriguing historical fact: 'the first world championships were held in London in 1926, and from then until 1939 the game was dominated by players from central Europe, the men's team event being won nine times by Hungary and twice by Czechoslovakia'. [2]

2. There exists, unfortunately, another variety of the game, which is generally less enjoyable. In Czech judicial slang, but perhaps not just there, 'judicial' or 'procedural ping-pong' refers to the undesirable situation in which a case is repeatedly shuttled back and forth between courts within a judicial structure, or, in the context of administrative justice, between the courts and administrative authorities.

3. The present case and the issues it reveals could warrant the hypothesis that the popularity of the game in central Europe, unfortunately in its latter judicial variety, is not yet confined to history books and encyclopedias.

1 Original language: English.

2 Entry 'Table tennis', *Britannica Academic*, Encyclopædia Britannica, 21 August 2018, https://academic.eb.com/levels/collegiate/article/table-tennis/70842 (last accessed on 15 January 2019).

4. In 2015, the Hungarian legislature changed the competence that courts had when reviewing administrative asylum decisions from having the possibility to directly *alter* a decision, to the power to merely *annul* and remit. As a result, national courts cannot replace such decisions when they find them to be unlawful. They can merely annul the decision and refer the case back to the administrative authority for a new decision.

5. Mr A. Torubarov ('the Applicant') applied for international protection in Hungary in 2013. His application was rejected by the administrative authority twice. Both of those rejection decisions were annulled, for different reasons, by the referring court. The administrative authority then rejected that application for a third time, apparently in disregard of judicial guidance that had been issued by the referring court in the second judgment annulling the second administrative decision.

6. The referring court is now deciding on the matter for the third time. Faced with the problem of an administrative authority unwilling to abide by a judicial decision, that court wishes to ascertain whether it can derive the power to alter the administrative decision at issue from EU law, and more specifically from Directive 2013/32/EU on common procedures for granting and withdrawing international protection ('Directive 2013/32'),[3] read in the light of Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter').

7. Yes, it can.

II. Legal framework

A. EU law

8. Article 46(1)(a) and (3) of Directive 2013/32 provides:

'1. Member States shall ensure that applicants have the right to an effective remedy before a court or tribunal, against the following:

(a) a decision taken on their application for international protection, including a decision:

(i) considering an application to be unfounded in relation to refugee status and/or subsidiary protection status;

…

3. In order to comply with paragraph 1, Member States shall ensure that an effective remedy provides for a full and *ex nunc* examination of both facts and points of law, including, where applicable, an examination of the international protection needs pursuant to Directive 2011/95/EU[4], at least in appeals procedures before a court or tribunal of first instance.'

3 Directive of the European Parliament and of the Council of 26 June 2013 (OJ 2013 L 180, p. 60).

4 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).

9. Article 52 of Directive 2013/32 contains the following transitional provisions:

'Member States shall apply the laws, regulations and administrative provisions referred to in Article 51(1) to applications for international protection lodged and to procedures for the withdrawal of international protection started after 20 July 2015 or an earlier date. Applications lodged before 20 July 2015 and procedures for the withdrawal of refugee status started before that date shall be governed by the laws, regulations and administrative provisions adopted pursuant to Directive 2005/85/EC[5].

…'

10. The 'laws, regulations and administrative provisions referred to in Article 51(1)' of Directive 2013/32 include measures related to the implementation of Article 46 of the same directive.

B. Hungarian Law

11. Article 46(1)(a) of 2007. évi LXXX. törvény a menedékjogról (Law LXXX of 2007 on the right to asylum) (the 'Law on Asylum') provides:

'In asylum procedures conducted by the refugee authority:

(a) no appeal is permitted and reopening the case may not be requested;'

12. According to Article 68(5) and (6) of the Law on Asylum:

'(5) The court may not overturn the decision of the refugee authority. The court shall set aside any administrative decision it finds unlawful — with the exception of any violation of a procedural rule that does not affect the merits of the case — and, if necessary, shall order the asylum authority to conduct a new procedure.

(6) The court's decision adopted in conclusion of the proceedings is final, no appeal lies against it.'

13. Article 339(1) of 1952. évi III. törvény a polgári perrendtartásról (Law III of 1952 on the Civil Procedural Code) (the 'CPC') states:

'Unless otherwise provided for by the relevant legislation, the court shall quash any administrative decision it finds unlawful — with the exception of any violation of a procedural rule that does not affect the merits of the case — and, if necessary, shall order [the administrative body] to conduct a new procedure.'

14. Article 109(4) of 2004. évi CXL. törvény a közigazgatási hatósági eljárás és szolgáltatás általános szabályairól (Law CXL of 2004 on general rules of administrative procedures and services) (the 'Law on administrative procedures and services') provides:

'The authority shall be bound by the operative part and by the justification of the decision adopted by the court of jurisdiction for administrative actions, and shall proceed accordingly in the new proceedings and when adopting a new decision.'

5 Council Directive of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status (OJ 2005 L 326, p. 13).

15. Under Article 121(1)(f) of the Law on administrative procedures and services:

'In the proceedings governed under this Chapter, the decision shall be annulled if:

…

(f) the contents of the decision are contradictory to what is contained in Subsections (3) and (4) of Section 109.'

III. Facts, national proceedings and question referred

16. The Applicant is a Russian businessman. He was a member of the Russian opposition party 'Right Cause'. He was also a member of the civil society organisation 'Russian Business Association', which supports businessmen in Russia.

17. From 2008 onwards, several criminal actions were brought against him in Russia. He travelled to Austria and then to the Czech Republic. From there he was extradited to Russia on 2 May 2013 under an international arrest warrant. Once he was back in Russia, the Applicant was charged, but then released.

18. On 9 December 2013, the Applicant crossed the Hungarian border. On the very same day, he was arrested by the Hungarian border police and applied for international protection.

19. By decision of 15 August 2014 the Hungarian asylum authority the Bevándorlási és Menekültügyi Hivatal (Immigration and Asylum Office) ('the Defendant') rejected the application (*the first administrative decision*). In the Defendant's view, neither the Applicant's statements nor the country of origin information supported the allegation that he faced a real risk of persecution or serious harm.

20. The Applicant sought judicial review of the first administrative decision before the referring court, which, by judgment of 6 May 2015 set aside the Defendant's decision and ordered it to conduct a new procedure (*the first judicial decision*). That court noted that the first administrative decision contained inconsistencies, that the Defendant had failed to investigate a number of facts, and had conducted a haphazard assessment of the facts it had ascertained. The court ordered the Defendant to supplement its country of origin information research and carry out a comprehensive assessment of the facts and evidence in a new procedure.

21. By its second decision, issued on 22 June 2016, the Defendant again rejected the application at issue (*the second administrative decision*). It concluded that even if criminal charges had been brought against the Applicant in Russia for political reasons, the right to a fair trial by an independent tribunal would be guaranteed to him in that country. The Defendant also invoked a position statement obtained from the Alkotmányvédelmi Hivatal (Constitutional Protection Office, Hungary). The Defendant stated that the presence of the Applicant in Hungary was contrary to the interests of national security, because reasons had been established to show that the condition for his exclusion laid down in Article 1F(c) of the 1951 Geneva Convention relating to the Status of Refugees[6] had been fulfilled.

6 The Convention relating to the Status of Refugees signed in Geneva on 28 July 1951 (*United Nations Treaty Series*, Vol. 189, p. 137, No 2545 (1954)), as supplemented by the Protocol relating to the Status of Refugees, concluded in New York on 31 January 1967, which entered into force on 4 October 1967.

22. The Applicant challenged the second administrative decision before the referring court. By its second judgment of 25 February 2017, the referring court set aside that decision (*the second judicial decision*). It found that the Defendant's decision was unlawful for two reasons: first, due to the manifestly inconsistent assessment of information concerning the country of origin, and second, because it relied on the position statement issued by the Hungarian Constitutional Protection Office, which contained confidential data.

23. Concerning the first point, the referring court found that it had been clearly substantiated that the Applicant's fear of political persecution was well founded. Concerning the second point, the referring court declared that the assessment of the position statement had been manifestly inconsistent as it was not clear from that statement that the Applicant might have been involved in activities of foreign secret services which could undermine the independence or the political, economic, defence or other relevant interests of Hungary, nor could it be affirmed that the condition for exclusion established in Article 1F(c) of the 1951 Geneva Convention relating to the Status of Refugees had been met.

24. The referring court therefore instructed the Defendant to conduct a new procedure. In the statement of reasons for its judgment it stated that the Applicant's application for international protection should in principle be granted.

25. By its decision of 15 May 2017, the Defendant rejected the Applicant's application (*the third administrative decision*). The Defendant no longer relied on the position statement referred to above. It insisted, however, that it had not been substantiated that the Applicant's fear of political persecution was well founded.

26. In an action brought against the third administrative decision, the Applicant requests that the referring court alter that decision and grant him refugee status or at least subsidiary protection or the application of the *non-refoulement* principle. As a secondary request, he asks for the third administrative decision to be set aside. As regards the latter point, he claims that, according to the second judicial decision, he should have been granted refugee status, subject only to the existence of grounds for exclusion. The third administrative decision is in his view invalid because it does not comply with the court's previous judgment.

27. The Defendant restates the position that it took in the third administrative decision.

28. The referring court observes that the Defendant did not comply with the second judicial decision, which constitutes grounds for annulment under Article 109(3) and (4) of the Law on administrative procedures and services. That court also notes that under the relevant national provisions, it does not have the competence to alter an administrative decision and grant the Applicant's application for international protection directly. Nor does it have the power to force the asylum authority to follow a previous judgment, for example by sanctioning it for not having done so. That court can only annul the invalid administrative decision and order the asylum authority to conduct a new procedure and issue a new decision. That however can lead to an endless procedural cycle, leaving the asylum seeker mired in legal uncertainty.

29. In those circumstances, the Pécsi Közigazgatási és Munkaügyi Bíróság (Administrative and Labour Court, Pécs, Hungary) decided to stay the proceedings and refer the following question to the Court for a preliminary ruling:

'Is Article 46(3) of [Directive 2013/32], in conjunction with Article 47 of [the Charter], to be interpreted as meaning that the Hungarian courts have the power to amend administrative decisions of the competent asylum authority refusing international protection and also to grant such protection?'

30. Written submissions were made by the Applicant, by the Slovak and Hungarian Governments and by the European Commission. The Applicant, the Hungarian Government and the Commission presented oral argument at the hearing that took place on 8 January 2019.

IV. Assessment

31. This Opinion is structured as follows. I start with two initial remarks on the applicability of Directive 2013/32 *ratione temporis* to the present case and the terminology adopted in this Opinion (A). I will then set out the requirements flowing from the obligation to provide an effective judicial remedy, as enshrined both in Article 46(3) of the directive, as well as in Article 47 of the Charter and in EU law in general (B). I will then assess the operation of judicial review of administrative decisions in matters of international protection adopted in Hungary in the light of those requirements (C). Coming inevitably to the conclusion that such a system of judicial review is failing in particular in terms of effective judicial protection, I shall close with suggestions as to what remedy is to be applied in the circumstances of the main proceedings (D).

A. Preliminary remarks

1. Temporal application

32. The Applicant filed his application *before* 20 July 2015. That date in principle determines, pursuant to Article 52 of Directive 2013/32, the applicability of the laws, regulations and administrative provisions adopted pursuant to the latter directive. Under the same provision, that directive may nevertheless apply also (for what is relevant here) to applications for international protection lodged *prior to* 20 July 2015.

33. At the request of the Court, the referring court confirmed that in Hungary, Directive 2013/32 also applies to applications for international protection filed before 20 July 2015. The relevant event to determine the applicability of Directive 2013/32 under national law appears to be the date on which the relevant administrative or judicial decision was issued.

34. In the present case, the relevant (third) administrative decision was issued on 15 May 2017. Thus, I shall proceed on the assumption that Directive 2013/32 is applicable to the case in the main proceedings *ratione temporis*.

2. Terminology

35. Throughout this Opinion, I shall refer to two types of review of decisions of administrative authorities: alteration and cassation. The differentiating element in this regard is the power of the national courts in terms of (non)replacement of administrative decisions on the merits with their own.

36. By *alteration* (of the administrative decision by a court), I understand a situation in which a part of or the entire (operative part of a) decision of an administrative authority is set aside and immediately replaced (substituted) by a decision of the court. Thus, if the court reviewing the decision is of the view that it is able to decide the merits of the case, then it enters a (partial) decision on substance itself, without the need to remit the case back to the administrative authority. The judicial decision will then replace the (relevant part of or the entire) administrative decision.

37. By *cassation* (of the administrative decision by a court), I refer to an institutional set-up in which a national court cannot replace any part of the administrative decision directly with its own. It may only annul or set aside the (part of or the entire) administrative decision and send it back to the administrative authority for a fresh assessment.

B. Effective judicial protection

38. The Court already had the opportunity of clarifying, in its recent judgment in *Alheto*,[7] some aspects of the requirement of effective judicial remedy under Article 46(3) of Directive 2013/32, read in the light of Article 47 of the Charter (1). However, for the purpose of the present case, it is also the wider constitutional and fundamental rights considerations that are of significance (2).

1. Alheto

39. Article 46(3) of Directive 2013/32 'defines the scope of the right to an effective remedy which applicants for international protection must enjoy … against decisions concerning their application'. That provision expressly requires 'a full and *ex nunc* examination of both facts and points of law, including, where applicable, an examination of the international protection needs' by a court or a tribunal.[8] In a different judgment, the Court further observed that 'it follows that the characteristics of the remedy provided for in Article 46 of Directive 2013/32 must be determined in a manner that is consistent with Article 47 of the Charter, which constitutes a reaffirmation of the principle of effective judicial protection'.[9]

40. I recall that the first paragraph of Article 47 of the Charter[10] corresponds in principle to Article 13 of the Convention for the Protection of Human Rights and Fundamental Freedoms ('ECHR') while the second paragraph of Article 47 corresponds to Article 6(1) ECHR.[11] By virtue of the bridge in Article 52(3) of the Charter, the meaning and scope given to those provisions of the Charter should be the same as (or more extensive than) the meaning and scope of the abovementioned provisions of the ECHR.

41. *Alheto* underlined three crucial points.

42. First, as stated by the Court in that judgment in response to question 6, Article 46(3) of Directive 2013/32, read in conjunction with Article 47 of the Charter, are *ex ante* 'blind' as to the type of judicial review that a Member State instituted in implementing that article. The Court noted that Article 46(3) of Directive 2013/32 concerns 'the "examination" of the appeal and does not therefore govern what happens after any annulment of the decision under appeal'.[12] It follows that in the absence of any harmonising measures, the Member States are thus free to provide for a review based on the logic of alteration or cassation.

7 Judgment of 25 July 2018 (C-585/16, EU:C:2018:584).

8 Judgment of 25 July 2018, *Alheto* (C-585/16, EU:C:2018:584, paragraphs 105 to 106).

9 Judgment of 18 October 2018, *E. G.* (C-662/17, EU:C:2018:847, paragraph 47 and the case-law cited).

10 The first paragraph of Article 47 of the Charter provides: 'Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.'

11 At the same time, explanations relating to the Charter make clear that the protection under the first paragraph of Article 47 of the Charter is more extensive than that provided by Article 13 ECHR, since it guarantees the right to an effective remedy before a court. Also, compared to Article 6(1) ECHR, the right to a fair hearing under the second paragraph of Article 47 of the Charter is not confined to disputes relating to civil law rights and obligations or to criminal charges. See Explanations relating to the Charter of Fundamental Rights (OJ 2007 C 303, p. 17).

12 Judgment of 25 July 2018, *Alheto* (C-585/16, EU:C:2018:584, paragraph 145).

43. Second, important strings were nonetheless attached to that statement. The Court also added that it 'follows from its purpose of ensuring the fastest possible processing of applications …, from the obligation to ensure that Article 46(3) [of Directive 2013/32] is effective, and from the need, arising from Article 47 of the Charter, to ensure an effective remedy, that each Member State bound by that directive must order its national law in such a way that, following annulment of the initial decision and in the event of the file being referred back to the quasi-judicial or administrative body referred to in Article 2(f) of that directive, a new decision is adopted within a short period of time and complies with the assessment contained in the judgment annulling the initial decision'. [13]

44. The Court's response thus implies the following: while there is no duty flowing from Article 46(3) of Directive 2013/32 which obliges the Member States to transpose that provision by way of granting national courts the power to decide on the merits of an application themselves, the preservation of any practical effect of that provision requires that a court has the power to formulate mandatory guidance that must be respected and implemented by the administrative authority. [14]

45. Third, the latter requirement must be read in conjunction with the answer that the Court provided to question 3 posed in the same case, setting out what full and *ex nunc* judicial examination under Article 46(3) of Directive 2013/32 means. [15] In this respect, the Court stated that the term '*ex nunc*' refers to the obligation for the court to make 'an assessment that takes into account … new evidence which has come to light after the adoption of the decision under appeal'. [16]

46. The adjective 'full' makes clear that the role of the court is not only to verify 'the observance of applicable law but includes the establishment and appraisal of the facts'. [17] In this latter respect, the full examination requires the court to assess 'both the evidence which the determining authority took into account or could have taken into account and that which has arisen following the adoption of the decision' under review. [18]

47. Thus, in sum, *first*, Directive 2013/32 does not determine a particular way in which Article 46(3) of that directive should be implemented. That is for the Member States to choose, in the light of their judicial and administrative traditions and practice. They could choose that decisions may be altered, they can opt for cassation, or even of course various hybrids between the two. *Second*, the bottom line for both is that such a review must be a full review, where both issues of law as well as fact can be assessed. *Third*, should the Member States opt for cassation, they have to guarantee that the result of judicial review carried out in that form is complied with in a speedy manner by the administrative authority when that authority makes a new decision after a judgment annulling its decision.

2. The broader (constitutional) picture

48. The clarifications given by the Court in *Alheto* constitute an expression, in the specific field of international protection, of more general principles related to the requirement of effective judicial remedy now enshrined in Article 47 of the Charter and referred to in the second subparagraph of Article 19(1) TEU. [19]

13 Judgment of 25 July 2018, *Alheto* (C-585/16, EU:C:2018:584, paragraph 148).

14 See, in this respect, Opinion of Advocate General Mengozzi in *Alheto* (C-585/16, EU:C:2018:327, point 71).

15 Judgment of 25 July 2018, *Alheto* (C-585/16, EU:C:2018:584, paragraphs 102 to 118).

16 Judgment of 25 July 2018, *Alheto* (C-585/16, EU:C:2018:584, paragraph 111). In the same context and, more specifically, on the necessity for the reviewing court to hold a hearing, see judgment of 26 July 2017, *Sacko* (C-348/16, EU:C:2017:591, paragraphs 42 to 48).

17 Opinion of Advocate General Mengozzi in *Alheto* (C-585/16, EU:C:2018:327, point 68).

18 Judgment of 25 July 2018, *Alheto* (C-585/16, EU:C:2018:584, paragraph 113).

19 Judgments of 28 March 2017, *Rosneft* (C-72/15, EU:C:2017:236, paragraph 73 and the case-law cited), and of 27 February 2018, *Associação Sindical dos Juízes Portugueses* (C-64/16, EU:C:2018:117, paragraph 35 and the case-law cited).

49. Effective judicial review constitutes the bedrock of the rule of law on which, as the Court has often recalled since its judgment in *Les Verts*, the European Union is based.[20] The latter is one of the European Union's founding values, expressed in Article 2 TEU, and it is 'common to the Member States in a society in which, inter alia, justice prevails'.[21]

50. The quintessential and unalterable role of the (national) court is to ensure that the law is observed and individual rights are protected. That role is, inter alia, assumed by judicial control of the public administration. It is of course not only possible, but also desirable, that that protection is already granted at the level of the public administration. But that possibility certainly does not negate either the right of individuals to have access to judicial review of the public administration's actions or the role of administrative courts.[22]

51. That role must also be respected when it comes to the national application of EU law. When national judges act as EU law judges within the scope of EU law,[23] they naturally have the same inherent duty to ensure that the law is observed and the rights of individuals which are derived from EU law are protected at national level. The role of the judiciary is, within the constitutional division of powers in any Member State, crucial to the effective application of EU law.[24]

52. Certainly, in the division of competence within the Union, any such pronouncements are to be limited to the instances in which the Member States are implementing EU law (within the meaning of Article 51(1) of the Charter) and/or act 'in the fields covered by Union law' (referred to in the second subparagraph of Article 19(1) TEU).

53. While that is naturally true, I think it useful to distinguish two types of situations in this regard: remedy- or procedure-specific issues (with the arguments and considerations relating to a discrete element of judicial operation or set-up), on the one hand, and horizontal or transversal issues (permeating any and every element of the national judicial function), on the other. While for the purposes of the discussion of the first type, such as a potential interpretation of the exact shape and extent of judicial remedies in matters of international protection laid down in Article 46 of Directive 2013/32, it must be established that a case is firmly within the scope of EU law, any such discussion is of limited importance in the second type of case, in which measures taken at national level by definition structurally concern the entire judicial function, irrespective of whether or not an individual case will or will not be adjudicated within the scope of EU law.

54. For these reasons, I entirely understand why the Court was not overly concerned, in *Associação Sindical dos Juízes Portugueses*, with making a surgical distinction between the scope of Article 19(1) TEU and/or Article 51(1) of the Charter.[25] To my mind, the logic as to why EU law clearly reaches into the issues of *transversal, structural changes* to the national judicial function is a different one: any such changes will by definition be indiscriminately applicable to *any and all functions* exercised by national judges. Therefore, if the salaries of national judges are being lowered,[26] or they are forced

20 Judgments of 23 April 1986, *Les Verts* v *Parliament* (294/83, EU:C:1986:166, paragraph 23), and of 25 July 2002, *Unión de Pequeños Agricultores* v *Council* (C-50/00 P, EU:C:2002:462, paragraphs 38 and 39). See, more recently, judgment of 3 October 2013, *Inuit Tapiriit Kanatami and Others* v *Parliament and Council* (C-583/11 P, EU:C:2013:625, paragraph 91 and the case-law cited).

21 Judgment of 27 February 2018, *Associação Sindical dos Juízes Portugueses* (C-64/16, EU:C:2018:117, paragraph 30). See also judgment of 28 March 2017, *Rosneft* (C-72/15, EU:C:2017:236, paragraph 72 and the case-law cited).

22 As I suggested elsewhere, the power and the responsibility to ensure compliance with the law ultimately rests with the (national) court. Thus, the fact that certain elements of decision-making at national level are matters for administrative discretion cannot deprive the courts of the inherent role to protect individual rights — see my Opinions in *Klohn* (C-167/17, EU:C:2018:387, points 127 to 129), and in *Link Logistik N&N* (C-384/17, EU:C:2018:494, point 112).

23 Judgment of 26 February 2013, *Åkerberg Fransson* (C-617/10, EU:C:2013:105).

24 See especially, order of 17 December 2018, *Commission* v *Poland* (C-619/18 R, EU:C:2018:1021, paragraphs 41, 42 and 65 to 67 and the case-law cited); judgments of 27 February 2018, *Associação Sindical dos Juízes Portugueses* (C-64/16, EU:C:2018:117, paragraph 42 et seq.); of 6 March 2018, *Achmea* (C-284/16, EU:C:2018:158, paragraphs 35 to 37); and of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)* (C-216/18 PPU, EU:C:2018:586, paragraph 60 et seq.).

25 Judgment of 27 February 2018 (C-64/16, EU:C:2018:117, paragraph 29).

26 As in the matter which led to the judgment of 27 February 2018, *Associação Sindical dos Juízes Portugueses* (C-64/16, EU:C:2018:117).

into early retirement,[27] or, purely hypothetically, they were abusively put into disciplinary proceedings, or pressurised by politically appointed presidents of their courts, or by other hijacked national judicial institutions, as well as any other transversal conditions of their work and function being affected, any suggestion that all of that only matters for their work as 'national' judges while, as far as their operation as 'EU judges' is concerned, they will remain spotlessly independent, is not even an argument to be seriously discussed.

55. Thus, any such transversal, horizontal measures that will by definition affect each and every operation of the national judiciaries are a matter of EU law. And this, in my personal view, largely irrespective of whether the specific procedural point that gave rise to that litigation is or is not within the scope of EU law in the traditional sense. In that context, detailed discussion about the exact scope of Article 51(1) of the Charter when contrasted with Article 19(1) TEU looks a bit like a debate on what colour to choose for the tea cosy and the dining set to be selected for one's house, coupled with a passionate exchange about whether that tone exactly matches the colour of curtains already selected for the dining room, while disregarding the fact that the roof leaks, the doors and windows of the house are being removed, and cracks are appearing in the walls. However, the fact that there is rain coming into the house and the walls are crumbling will always be structurally relevant to any discussion about the state of the judicial house, irrespective of whether the issue of the colour of the tea cosy will eventually be declared to be within or outside the scope of EU law under whatever provision of EU law.

56. Finally, it might be useful to recall that all those institutional and constitutional guarantees are not an end in themselves. Nor are they put in place for the benefit of judges. They are the means to another end: to ensure effective judicial protection of EU-law rights for individuals at national level, and thus, again, the essence of the rule of law.[28]

57. Born at the cross-section of these constitutional principles and a necessary element of effective and proper operation of a system of judicial protection, as well as the right to an effective remedy under the first paragraph of Article 47 of the Charter, is the issue of execution of judicial decisions. Potential disregard for the outcome of judicial review may pose issues in two respects. They are mutually non-exclusive. They just come at the same problem from different vantage points.

58. First, there are the *systemic, structural* rule of law concerns. Although the actual operation of judicial review in a given area is subject to specific rules (such as, in the present case, the EU law requirement of *ex nunc* and full jurisdiction[29]), once a court has taken a position in a final decision, that decision must be followed and implemented by all parties to whom it is addressed, including of course the public administration. If, however, a final judicial decision is not complied with by the public administration, and if such non-compliance is not a single mishap, then that undermines the proper functioning of any society built upon the premiss of the rule of law and the separation of the legislative, executive and judicial powers.

59. Second, from the perspective of an individual litigant and the protection of his *fundamental rights*, compliance by the public administration with the judicial decision constitutes an important element of the right of access to a court, as enshrined in the first paragraph of Article 47 of the Charter. That right cannot be reduced to the 'input' stage leading to a court's decision, namely the mere possibility to 'access the court building', institute proceedings, and be allowed to plead one's case. It naturally also includes certain requirements as to the 'output' of the entire endeavour, that is, the stage of execution of the final decision.

27 At issue in the matter which led to the order of 17 December 2018, *Commission v Poland* (C-619/18 R, EU:C:2018:1021).

28 Judgments of 28 March 2017, *Rosneft* (C-72/15, EU:C:2017:236, paragraph 73 and the case-law cited), and of 27 February 2018, *Associação Sindical dos Juízes Portugueses* (C-64/16, EU:C:2018:117, paragraph 36).

29 Set out in Article 46(3) of Directive 2013/32.

60. As stated by the European Court of Human Rights ('the ECtHR') when interpreting Article 6(1) ECHR, '"the right to a court", of which the right of access, that is the right to institute proceedings before courts in civil matters, constitutes one aspect … would be illusory if a Contracting State's domestic legal system allowed a final, binding judicial decision to remain inoperative to the detriment of one party'.[30] The ECtHR continued that 'it would be inconceivable that Article [6(1) ECHR] should describe in detail procedural guarantees afforded to litigants … without protecting the implementation of judicial decisions; to construe Article [6(1) ECHR] as being concerned exclusively with access to a court and the conduct of proceedings would be likely to lead to situations incompatible with the principle of the rule of law which the Contracting States undertook to respect when they ratified the Convention'.

61. The ECtHR thus concluded that 'execution of a judgment given by any court must therefore be regarded as an integral part of the "trial" for the purposes of Article 6'.[31] Furthermore, 'this principle is of even greater importance in the context of administrative proceedings concerning a dispute whose outcome is decisive for a litigant's civil rights'. Importantly, 'a person who has obtained a judgment against the State at the end of legal proceedings should not be expected to bring separate enforcement proceedings'.[32]

62. It is against that general framework that the question posed by the referring court in the present case should be assessed.

C. The present case: effective judicial protection?

63. The assessment carried out by the Court in *Alheto* was general and prospective in nature. The question posed was whether Article 46(3) of Directive 2013/32 presupposes a certain method of its implementation. The answer to that question, already outlined above in points 39 to 47 of this Opinion, was a negative one. It is for the Member States to decide, provided that the procedures instituted meet certain minimal requirements as to their effective operation.

64. By contrast, the present case is specific and by its nature retrospective. It essentially starts and continues where the matter was left in *Alheto*. In the present case, a Member State has already exercised its choice as to the structure and the procedural set-up of the national model in question. The question posed by the referring court is whether that specific national procedural choice is, in practice, as demonstrated by the case in the main proceedings, compatible with the requirements set out in the previous section of this Opinion.

65. The traditional analytical grid for examining such procedural or institutional choices carried out by the Member States is the dual requirement of equivalence and effectiveness, which serves, in the absence of harmonisation at EU level, as the limit to the default national (procedural) autonomy.

30 ECtHR, 19 March 1997, *Hornsby v. Greece* (CE:ECHR:1997:0319JUD001835791, § 40), concluding that there had been a violation of Article 6(1) due to the absence of execution by the executive authority of a judicial decision. Those considerations have since been confirmed many times. See, for example, ECtHR, 7 May 2002, *Burdov v. Russia* (CE:ECHR:2002:0507JUD005949800, §§ 34 to 37); ECtHR, 6 March 2003, *Jasiūnienė v. Lithuania* (CE:ECHR:2003:0306JUD004151098, §§ 27 to 31); ECtHR, 7 April 2005, *Užkurėlienė v. Lithuania* (CE:ECHR:2005:0407JUD006298800, § 36), finding however no violation of Article 6 ECHR due to the alleged delays in execution of a judicial decision; ECtHR, 7 July 2005, *Malinovskiy v. Russia* (CE:ECHR:2005:0707JUD004130202, §§ 34 to 39); ECtHR, 31 October 2006, *Jeličić v. Bosnia and Herzegovina* (CE:ECHR:2006:1031JUD004118302, §§ 38 to 45); ECtHR, 15 October 2009, *Yuriy Nikolayevich Ivanov v. Ukraine* (CE:ECHR:2009:1015JUD004045004, §§ 51 to 57); and ECtHR, 19 June 2012, *Murtić and Čerimović v. Bosnia and Herzegovina* (CE:ECHR:2012:0619JUD000649509, §§ 27 to 30).

31 ECtHR, 19 March 1997, *Hornsby v. Greece* (CE:ECHR:1997:0319JUD001835791, § 40).

32 ECtHR, 11 January 2018, *Sharxhi and Others v. Albania* (CE:ECHR:2018:0111JUD001061316, §§ 92 to 93), citing ECtHR, 12 July 2005, *Okyay and Others v. Turkey* (CE:ECHR:2005:0712JUD003622097, § 72). See also ECtHR, 15 January 2009, *Burdov v. Russia (No. 2)* (CE:ECHR:2009:0115JUD003350904, § 68).

66. Although I agree that in the present case, the crux of the matter is the (in)effective nature of the system of national judicial review when tested against the requirement of effectiveness and the first paragraph of Article 47 of the Charter (2), I still find it very instructive to start the analysis by a discussion of the requirement of equivalence (1). That is also because, by the scope of the discretion left to the Member States in *Alheto* in terms of how precisely they wish to structure their procedures under Article 46(3) of Directive 2013/32, the consideration of equivalence was in fact (re)inserted into a picture which could otherwise be seen to relate purely to the effectiveness of an EU-law harmonising measure.

1. Equivalence

67. The requirement of equivalence prohibits, in essence, a Member State from laying down less favourable procedural rules for actions to safeguard rights that individuals derive from EU law than those applicable to similar domestic actions. [33]

68. In order to proceed with the examination of that requirement, it ought to be clarified precisely what rule should be reviewed and what other rules it should be compared with.

69. As regards the first point, it appears from the order for reference and from the discussion that unfolded at the hearing that the national rules defining the scope of judicial review in matters of international protection evolved over three distinct periods.

70. First, *before 15 September 2015*, the judicial review of administrative decisions seemed to be governed in general by the cassational principle, while the power to alter was an exception. [34] The power to alter a decision was given to the administrative courts in selected matters, such as issues concerning personal status (adoption, or registry entries concerning personal data in vital statistics); in matters requiring a speedy decision (parental custody or the placement of a minor in a suitable institution for the care of children); in some matters of an economic nature (family welfare and social security benefits, the registration of rights and facts relating to immovable property, tax, duty liabilities and other payment obligations, transfer of property and the use of residential properties); and in matters of specific historic relevance (placement of materials in general archives, or the question of the length of time spent in detention, in custody for the protection of public security, or in prison camps in the Soviet Union). Matters of international protection (asylum) were also included on the list of exceptions under Section 339(2)(j) of the CPC. The judicial power to alter was recognised in Section 68(5) of the Law on Asylum. [35] Thus, before 15 September 2015, national judges had the power to alter administrative decisions in matters of international protection.

71. Second, *between 15 September 2015 and 1 January 2018*, the default principle of cassation in matters of administrative justice remained the same, [36] but Section 339(2)(j) of the CPC containing the exception related to asylum matters was repealed. [37] Asylum matters thus became excluded from the list of exceptions, with the result that the default cassational principle applied again. Section 68(5) of the Law on Asylum was amended to read that 'the court may not overturn the decision of the refugee authority. The court shall set aside any administrative decision it finds unlawful … and, if necessary, shall order the competent authority to conduct a new procedure'.

33 See recently, for example, judgment of 24 October 2018, *XC and Others* (C-234/17, EU:C:2018:853, paragraph 25), or of 7 November 2018, *K and B* (C-380/17, EU:C:2018:877, paragraph 56 and the case-law cited).

34 See Section 339(1) of the CPC then in force. For the (open) list of those exceptions see Section 339(2) of the CPC.

35 'The court may alter the decision of the refugee authority. The court's decision is final, and it may not be appealed.'

36 See Section 109(4) of the Law on administrative procedures and services and Section 339(1) of the CPC. The same legislation was also in force prior to 1 September 2015.

37 See egyes törvényeknek a tömeges bevándorlás kezelésével összefüggő módosításáról szóló 2015. évi CXL. törvény (Law CXL of 2015 on the amendment of certain laws in relation to the management of mass immigration).

72. The order for reference explains that, according to the reasons for that amendment given by the legislature, its purpose was to provide uniformity in court decisions. However, that reasoning was given by the legislature with respect to the original proposition. The latter was initially concerned only with the judicial review of applications introduced in 'transit zones'. Conversely, no reasoning seems to have been provided regarding the resulting and more generally conceived reform that concerns judicial review of all applications for international protection (no matter where that application was introduced).

73. Third, *as of 1 January 2018*, the general and default rule applicable to judicial review of administrative decisions changed from cassation to the power to alter decisions, with the new rule providing that 'the court shall change the administrative act if the nature of the case allows it, the facts are properly clarified and on the basis of the information available the legal dispute can be definitively decided'.[38] However, the field of international protection remained excluded from that new rule, since Section 68(5) of the Law on Asylum remained in principle unchanged.[39] Thus, since 1 January 2018, the overall default rule is the power to alter, but decisions on international protection are among the matters that remain subject to an exception, thus remaining subject to the cassational principle.

74. The procedure in the main proceedings appears to fall under the second period, in which matters relating to international protection were excluded from the list of exceptions and thus were governed by the default cassational principle. It is that regime that should thus be the object of the present assessment.

75. Turning now to the comparator against which the relevant (second) regime could be tested, it should be noted that the harmonised rules in Directive 2013/32 do not seem to have an 'internal' (national) equivalent and thus a comparator. Indeed, the procedure at issue pertains to a harmonised area of law lacking any direct national comparator. In those circumstances, 'similar domestic actions' the 'purpose, the cause of action and the essential characteristics'[40] of which could be compared with the procedure at issue must be looked for at a higher level of abstraction, while also looking for the closest possible analogy to the pertinent EU law action or rule in the national legal system.[41] However, that closest possible analogy cannot be so abstract as to cover an entire field of law, which would make the exercise of comparison impossible.

76. While that assessment is ultimately for the national court to undertake, based on its knowledge of the detailed national procedural rules, I note that in the second period referred to above (15 September 2015 to 1 January 2018), matters concerning personal status and those whose nature call, in principle, for a rather quick determination (adoption, parental custody or the placement of a minor in an institution for the care of children)[42] remained excluded, in contrast to the matters of international protection, from the default cassational principle.

38 Section 90(1) of a közigazgatási perrendtartásról szóló 2017. évi I. törvény (the new Code on Administrative Litigation, Act I of 2017) ('CAL') that replaced, as of 1 January 2018, the old CPC as regards administrative judicial proceedings.

39 Section 68(5) of the Law on Asylum provides that: 'The decision of the refugee authority may not be overturned by the court.'

40 See, for example, judgments of 27 June 2013, *Agrokonsulting-04* (C-93/12, EU:C:2013:432, paragraph 39 and the case-law cited), and of 12 February 2015, *Baczó and Vizsnyiczai* (C-567/13, EU:C:2015:88, paragraph 44 and the case-law cited). See also judgment of 16 May 2000, *Preston and Others* (C-78/98, EU:C:2000:247, paragraph 57).

41 See, in this regard, my Opinion in *Scialdone* (C-574/15, EU:C:2017:553, points 100 to 103).

42 See above, points 70 and 71.

77. Those areas of law, similar to a decision on international protection, touch upon important elements of one's personal status in respect of which obtaining a quick final determination of one's application appears of the essence. Subject to the referring court's assessment as to whether the conclusion concerning that comparability can be upheld considering the purpose, cause of action and essential characteristics of actions in those matters,[43] it appears difficult to identify the reasons and arguments explaining that systemic departure as regards matters of international protection.

78. I wish to clearly underline one point: the analysis just outlined is no argument for immutability. The fact that, up to a certain point in time, there has been a certain procedural set-up certainly does not mean that that procedural set-up cannot be changed in the future. However, the relevant question is why the sudden need for such a change, if a similar need was apparently not identified in other similar areas that remained subject to the same rules.

79. It is on this point that the arguments advanced by the Hungarian Government fail to convince. Two arguments have been put forward by that government as to why there was the need, in 2015, to take away the judicial power to alter decisions and replace it with just the power to annul and remit: first, the area of international protection is a particularly complex and difficult area requiring specific knowledge that is present only with a specialised administrative authority and, second, the need to ensure the uniformity of decision-making in this area.

80. First, while of course not denying the sensitive nature of asylum matters, I remain puzzled by the argument that that area of law would, in contrast to some of the other matters listed in Section 339(2) of the CPC,[44] such as those related to personal status or requiring a speedy decision, be so incommensurably more complex as to be singled out in this way.

81. Second, the Hungarian Government further explains the necessity to endow courts in this context only with the power to annul by the need to ensure the uniformity of decisions. That need comes, according to that government, from the fact that no appeal can be brought against the judicial decision.

82. That is, in my view, a curious argument, in which the cart is put before the horse, with an accusation made immediately thereafter that the horse is lame because it is not able to pull the cart properly. If one wishes to ensure the uniformity of judicial decision-making in a specific field, the natural way to do so is by putting in place a higher judicial court whose task would be to do precisely that. I fail to see how the objective of uniformity can be achieved by depriving the courts of the power to alter decisions while leaving the power to decide the merits of asylum applications to the administration. As long as there is any, even cassational, review possible, with the competence attributed to different courts or even different judges, there will by definition be the 'danger' of differentiated outcomes before different courts. Or rather, the latter consequence demonstrates the full logical reach of that argument, which could equally be used to suggest that in order to keep the decision-making practice uniform before one administrative authority, there can be no judicial review whatsoever.

83. In view of all the elements above, I consider the arguments advanced by the Hungarian Government as to why, by its nature, the subject matter of international protection had to be singled out for special treatment difficult to maintain.

43 Judgment of 24 October 2018, *XC and Others* (C-234/17, EU:C:2018:853, paragraph 27).

44 See above point 70.

84. That difficulty is even more striking if one were to consider, as a subsidiary argument, the time period after the reform of 1 January 2018 that changed the default rule (thus applicable to all areas of judicial review of administrative decisions) from the cassational to the alteration principle while leaving asylum outside of that new default rule. While that period is not directly relevant for the present assessment of equivalence, it should be noted that the competence to alter a decision has been introduced as a general rule in a number of areas that appear to be incomparably more complex than matters of international protection (with, of course, all due respect to the latter).

85. Thus considering the changes made to judicial review across the three different periods commented upon above, I must admit that what makes issues of international protection so structurally special and incompatible with the alteration principle escapes me. That in no way excludes the possibility that reasons for that differentiated treatment exist. The fact nevertheless remains that if they do, they have not been put forward in the present proceedings by the Hungarian Government.

2. Effectiveness

86. Pursuant to the requirement of effectiveness, the procedural rules governing actions for safeguarding an individual's rights under EU law must not render the exercise of those rights impossible in practice or excessively difficult.[45] Moreover, the question of 'whether a national procedural provision makes the application of EU law impossible or excessively difficult must be analysed by reference to the role of that provision in the procedure, its conduct and its special features, viewed as a whole, before the various national bodies. In that context, it is necessary, inter alia, to take into consideration, where relevant, the protection of the rights of the defence, the principle of legal certainty and the proper conduct of the procedure'.[46]

87. What effective remedy means in the specific context of Article 46(3) of Directive 2013/32, read in the light of the first paragraph of Article 47 of the Charter, has already been stated by the Court in *Alheto* and outlined above in points 39 to 47 of this Opinion.

88. While the yardstick for assessment is relatively clear, another type of doubt needs to be dispelled first. On preliminary rulings, the Court is competent to interpret EU law. While doing so, under the assessment of effectiveness or equivalence, it may provide guidance as to *general, normative* compatibility: national rules structured and/or applied in a certain way are or are not compatible with requirements stemming from EU law. Thus, the focus is on *normative* conflict, while assuming that national bodies or authorities effectively 'play by the (rule)book', and on the *general* operation of the rule, and not on its potential misapplication in the individual case.

89. That traditional picture becomes somewhat more blurred if those two layers start to shift: what if, in an *individual* case, 'law in action' deviates from the 'law in books'?

90. The potential dissociation between the two levels of analysis is also reflected in the different vantage points introduced above at points 58 and 59 of this Opinion: on the one hand, there is the *structural analysis* of a certain model or its application in practice that may hint at structural shortcomings. On the other hand, there is the *individual case analysis* that may, in the given case, amount to a violation of fundamental rights of the individual applicant, while not amounting to a structural problem. The latter may be discarded as a one-time failure (of an otherwise correct system).

45 See, recently, judgment of 24 October 2018, *XC and Others* (C-234/17, EU:C:2018:853, paragraph 22 and the case-law cited).

46 Recently, judgment of 24 October 2018, *XC and Others* (C-234/17, EU:C:2018:853, paragraph 49 and the case-law cited). See also judgments of 14 December 1995, *Peterbroeck* (C-312/93, EU:C:1995:437, paragraph 14), and of 14 December 1995, *van Schijndel and van Veen* (C-430/93 and C-431/93, EU:C:1995:441, paragraph 19).

91. I wish to make quite clear that, to my mind, this case remains an instance of the former type of analysis. An argument could be made that the present case is nothing more than an individual misapplication of law in a specific case of one single applicant that bears no evidence of broader structural flaws.

92. However, that suggestion is impossible to maintain.

93. First, as has been already outlined above in points 67 to 85 when discussing the requirement of equivalence, the present case is firmly embedded in a type or a model of judicial review whose parameters have been set by the legislature. Those parameters necessarily limit what a judge in a specific case, such as the present one, can do.

94. Second, the Hungarian Government claims that the operation of the system as evidenced in the present case is the operation that was sought by the legislature, especially considering that government's explanation concerning the interpretation of Section 109(4) of the Law on administrative procedures and services. Indeed, the Hungarian Government advanced a rather singular vision of the role and functions of administrative justice when reviewing administrative decisions under that provision. It stated in that respect that administrative courts can only issue instructions as to what facts should be examined, what new evidence shall be collected and to abstractly interpret the legislation and indicate the relevant factors to be taken into account by the administration in its decision-making. By contrast, the administrative court cannot bind the administration as to its specific appraisal in the individual case and cannot decide the case instead of the asylum authority, which is empowered to do so under Directive 2013/32.

95. Thus, apparently far from being a single instance, the present case should rather be deemed an individual demonstration of a broader intentional institutional design. In that regard, and assuming that it has the parameters as demonstrated by the present case and further explained by the Hungarian Government, the issue of structural effectiveness of the specific model of judicial review that Hungary chose to implement Article 46(3) of Directive 2013/32 can indeed be assessed.

96. Assessed on that level, a model of judicial review in matters of international protection in which the courts are endowed with a mere cassational power while the judicial guidance they issue in their annulment decisions is effectively being disregarded by the administrative bodies, clearly fails to meet the requirements of effective judicial review set out in Article 46(3) of Directive 2013/32 and interpreted in the light of the first paragraph of Article 47 of the Charter.

97. At the outset, I wish to stress that there is no doubt that the authority competent to examine applications for international protection at first instance [47] (that is, at the administrative level) plays a particularly important role within the system of asylum protection as designed by Directive 2013/32. [48]

98. That being said, it hardly follows from such confirmation of the key role played by administrative authorities that any ensuing judicial review should be partial or limited. In particular, I wish to pause at the abovementioned vision of the scope of judicial review presented by the Hungarian Government. The previously quoted Section 109(4) of the Law on administrative procedures and services provides that 'the authority shall be bound by the *operative part and by the justification* of the decision adopted by the court of jurisdiction for administrative actions, and shall proceed accordingly in the new proceedings and when adopting a decision'. [49]

47 'Determining authority', to use the language of Directive 2013/32, defined at Article 2(f) of that directive as 'any quasi-judicial or administrative body in a Member State responsible for examining applications for international protection competent to take decisions at first instance in such cases'.

48 The Court noted indeed that 'the examination of the application for international protection by an administrative or quasi-judicial body with specific resources and specialised staff in this area is a vital stage of the common procedures established by Directive 2013/32'. See judgments of 25 July 2018, *Alheto* (C-585/16, EU:C:2018:584, paragraph 116), and of 4 October 2018, *Ahmedbekova* (C-652/16, EU:C:2018:801, paragraph 96).

49 Emphasis added.

99. On its face, that provision is quite similar to a number of other provisions that may be found in systems of the cassational type of review of administrative decisions. What is, however, quite different is the (strikingly narrow) interpretation ascribed to that provision by the Hungarian Government.

100. It is of course true that the design and interpretation of Section 109(4) of the Law on administrative procedures and services is for the national legislature and national courts.

101. However, if that same provision is used as a tool for the enforcement of rights that an individual derives from EU law, such as in matters of international protection covered by EU law, the interpretation given to that provision by the Hungarian Government would obviously be untenable. As already stated by the Court, the requirements of Article 46(3) of Directive 2013/32, as interpreted in *Alheto*, include *ex nunc* review with full jurisdiction with regard to both law and facts, with binding effects upon the administrative authority to be implemented in a speedy manner by that authority. [50]

102. That means that a national court reviewing any such decision is entitled to issue binding guidance on both matters of law as well as assessments of facts related to the individual case, by which the administrative authority is strictly bound and must follow. That vision of judicial review is a very different one: a court of law is there to review and to control the public administration, not to act as a humble '*amicus administratoris*', issuing suggestions as to how the law might be interpreted or what facts the administration could perhaps collect in the next round.

103. On the other hand, it is naturally also true that such binding effects of a judicial decision will only arise with regard to the matter covered by that decision. Put differently, following a decision of the court on certain matters, the factual and legal space within which the administration may act becomes smaller. To the extent that the court has effectively 'closed' some legal space from further consideration by a final determination, the same question cannot be reassessed. To do otherwise would defy the sense and purpose of any judicial review, and would indeed turn administrative justice into an endless game of procedural ping-pong.

104. By contrast, the administration may make its own assessment within the legal space that has still been left 'open' by the judge and, in the specific context of international protection, where the assessment is to be carried out *ex nunc*, it is also obliged to take into account any new facts if such new facts arise between the judicial annulment decision and the adoption of a new administrative decision.

105. However, on both accounts, the administration must use the 'space' potentially left open by a previous judicial decision and/or the *ex nunc* nature of the assessment in good faith: while the administration must continuously assess the factual circumstances, it cannot (mis)use that obligation so as to rely on elements that are, formally speaking, new, but that have no impact on the factual assessment in order to circumvent the limits of the previous judicial assessment that was necessarily linked to the previous administrative decision containing specific factual elements.

106. I wish to add that, to my mind, the same conclusion also follows from the requirements of the first paragraph of Article 47 of the Charter, [51] with which the interpretation of Article 46(3) of Directive 2013/32 and the implementation thereof by the Member States [52] must comply.

50 Above, points 41 to 47.

51 On the relationship between the principle of effectiveness as one of the dual requirements arising under the concept of procedural autonomy of the Member States and the fundamental right to an effective judicial remedy under Article 47 of the Charter, see my Opinion in *Banger* (C-89/17, EU:C:2018:225, point 99 et seq.).

52 Judgment of 18 October 2018, *E. G.* (C-662/17, EU:C:2018:847, paragraph 47 and the case-law cited).

107. It ought to be noted in this context that Article 46(3) of Directive 2013/32 would be deprived of any practical effect if the administration were allowed to reopen questions adjudicated upon earlier in a final judgment by a court.[53] Such a situation would also run contrary to the principle of legal certainty, which must be considered part of the right to an effective remedy and is 'one of the fundamental aspects of the rule of law'.[54] Indeed, as the ECtHR recalled, the principle of legal certainty requires that 'where courts have finally determined an issue, their ruling should not be called into question'.[55] In addition, as already discussed in general above,[56] disrespect for the requirement for an effective judicial remedy runs counter to the very value of the rule of law within the European Union.

108. Turning to the case in the main proceedings, in the light of the elements presented in the order for reference, any residual decision-making space of the administrative authority appears to have been closed by the referring court following the annulment of the second administrative decision. Indeed, while in the first annulment judgment the referring court instructed the authority to examine specific evidence, in the second annulment judgment it stated that the Applicant's application for international protection had to be granted as the element of well-founded fear was established. It was thus not open to the administrative authority to reopen that evaluation.

109. Furthermore, it might be added that by disregarding the assessment carried out by the national court, stated in the reasons for the second annulment decision, the administration prolonged the overall length of the proceedings (which at present have lasted for five years and still counting). In this way, it hampered the attainment of the objective of prompt review that both the administrative and judicial stages of the assessment of an application for international protection must pursue.[57]

110. For these reasons, my interim conclusion is that a model of judicial review on matters of international protection in which the courts are endowed with a mere cassational power but in which the judicial guidance they issue in their annulment decisions is effectively being disregarded by the administrative bodies when deciding on the same case again, such as demonstrated in the case in the main proceedings, fails to meet the requirements of effective judicial review set out in Article 46(3) of Directive 2013/32 and interpreted in the light of the first paragraph of Article 47 of the Charter.

D. Remedy

111. The interim conclusion just reached gives rise to two further issues also addressed by the referring court: *what* remedy and *when* precisely it is to be applied in the circumstances of the present case?

1. What remedy?

112. That issue was the subject of some discussion at the hearing. The Court asked the Hungarian Government about the instruments and measures that are provided for by Hungarian law that could ensure the effective enforcement of a judicial decision against the administrative authority. It appears, from the reply provided, and subject to verification by the referring court, that no such measure exists.

53 See, by analogy, also ECtHR, 2 November 2004, *Tregubenko v. Ukraine* (CE:ECHR:2004:1102JUD006133300, §§ 34 to 38), and ECtHR, 6 October 2011 *Agrokompleks v. Ukraine* (CE:ECHR:2011:1006JUD002346503, §§ 150 to 151).

54 ECtHR, 6 October 2011 *Agrokompleks v. Ukraine* (CE:ECHR:2011:1006JUD002346503, § 144 and the case-law cited).

55 ECtHR, 6 October 2011 *Agrokompleks v. Ukraine* (CE:ECHR:2011:1006JUD002346503, § 144 and the case-law cited).

56 See above points 48 to 62 of this Opinion.

57 Concerning the pre-judicial stage see Article 31(2) as well as recital 18 of Directive 2013/32. As regards the courts' obligation to ensure 'the fastest possible processing of applications', see judgment of 25 July 2018, *Alheto* (C-585/16, EU:C:2018:584, paragraph 148).

113. In an ongoing procedure, it appears that the national court cannot force the administration to take any specific action as far as the *merits* of the case are concerned. Even if in the abstract, one could perhaps suggest the imposition of fines or issuing injunctions, (quite apart from the question of their efficacy) those measures seem to be unavailable.

114. Once the court issues a final decision on the merits, the case and the judicial procedure related thereto are closed. It then becomes logically impossible for the court to start enforcing its own decision upon the administration, since there is no pending case to start with. Indeed, the decision of the court should be imposed on the administration by simple operation of law, namely Section 109(4) of the Law on administrative procedures and services, provided that the interpretation of that provision and the national reality would indeed lead to that conclusion.

115. Thus, there would appear to be no viable alternatives in national law to voluntary compliance with a judicial decision that could give the courts the power to make the administration comply with their decision. The issue then indeed becomes, as the referring court identifies, whether EU law would provide the national court with any remedy in such a situation.

116. In my view, it does. As stated by this Court, 'by virtue of the principle of primacy of EU law, which is an essential feature of the EU legal order … , rules of national law, even of a constitutional order, cannot be allowed to undermine the effectiveness of EU law on the territory of that State'.[58] The principle of primacy (and direct effect[59]) thus obliges the national court to set aside any national rule that frames judicial review in matters of international protection in a way that is incompatible with Article 46(3) of Directive 2013/32, as well as with the first paragraph of Article 47 of the Charter, and prevents the national court from attaining the objective sought by those rules.[60]

117. I understand that in the present case, it is not possible to interpret the national law in conformity with EU law. The disapplication of the incompatible rule is thus, as a matter of EU law, the only remedy possible in the present case.[61] Nonetheless, the question that immediately arises is how such disapplication would operate in the context of the present case.

118. That would depend on what procedural rules ultimately apply to the case in the main proceedings at the moment when the referring court adjudicates upon it again.

119. Should the applicable procedural rules be those in force *as of 1 January 2018*, the primacy of EU law would mean the exclusion of the exception that removed the possibility to alter administrative decisions in matters of international protection from the administrative courts. I understand that that exception is contained in Article 68(5) of the Law on Asylum. A case dealt with at national level would then default back to the general power to alter administrative decisions that is currently exercised under Section 90(1) of the CAL.

58 See judgment of 26 February 2013, *Melloni* (C-399/11, EU:C:2013:107, paragraph 59 and the case-law cited).

59 Without wishing to enter into the (rather academic) discussion of whether or not the setting aside of any national conflicting rules in a case like the present one is the consequence only of the primacy of EU law or of primacy and direct effect, suffice it to note that the first paragraph of Article 47 of the Charter has already been declared by this Court to be endowed with direct effect in the judgment of 17 April 2018, *Egenberger* (C-414/16 EU:C:2018:257, paragraph 78).

60 See, by analogy also, judgment of 5 June 2014, *Mahdi* (C-146/14 PPU, EU:C:2014:1320, paragraph 62 to 64).

61 While of course, at least in theory, the remedy of damages for the potential breach of EU law attributable to a Member State could also be contemplated, it is rather clear that in the situation of applicants for international protection such a remedy would be illusionary and ineffective.

120. Should the applicable procedural law be that in force *between 15 September 2015 and 1 January 2018*, the power to alter administrative decisions in the matter at hand could be exercised by disapplying the law that repealed the letter (j) from the list contained in Section 339(2) of the CPC as in force prior to 15 September 2015 and that also amended Section 68(5) of the Law on Asylum. Thus, the procedural rules would effectively default back to the regime that existed with regard to matters of international protection before 15 September 2015.

121. In conclusion, the common theme is that the solution suggested would consist in effectively excluding the exclusion of the power to alter decisions in judicial review in matters of international protection. In both scenarios, after that exclusion, the national judges would not be tasked with doing anything that they were not accustomed to doing previously and that is not actually the default procedural position today.

2. Triggered when?

122. The final question concerns the moment when the primacy of EU law would trigger the abovementioned exclusionary effect. Considering the cumulative requirements of prompt review and compliance with a previous judicial decision contained in Article 46(3) of Directive 2013/32, read in the light of the first paragraph of Article 47 of the Charter, the moment at which the abovementioned power of the national judge would be triggered would correspond to the situation where (i) the clear assessment contained in a judicial decision annulling an administrative decision has been disregarded by the administrative authority, (ii) without the latter bringing any new elements that it should have reasonably and legitimately brought into consideration, thus depriving the judicial protection provided to the applicant of any practical effect.

123. Put simply, the triggering point is not about numbers, but about quality. In the logic of the closing of the space for administrative decision-making by a judicial assessment that has already been carried out, outlined above at points 103 to 105 of this Opinion, a national court acquires the competence to alter a decision on international protection as a matter of EU law the first time its decision has been disregarded. It does not matter whether this happens in the seventh, third, or even in the second round of judicial review.

124. In the light of the above, my second interim conclusion is that, in order to ensure compliance with Article 46(3) of Directive 2013/32 read in the light of the first paragraph of Article 47 of the Charter, a national court, deciding in circumstances such as those in the case in the main proceedings, has to set aside the national rule limiting its power to the mere annulment of the relevant administrative decision. That obligation arises when the clear assessment contained in a judicial decision annulling a previous administrative decision has been disregarded by the administrative authority deciding the same case anew, without the latter bringing any new elements that it could have reasonably and legitimately brought into consideration, thus depriving the judicial protection provided for under the invoked provisions of any practical effect.

125. By way of a final remark, it ought to be noted that the general considerations concerning the crucial role of effective judicial review in preserving the rule of law in any legal system apply to any area of EU law to be implemented at the national level. This is true in particular of the scope and degree of the binding effects of judicial decisions and the obligation incumbent upon public authorities to carry them out fully and in good faith. That being said, it should also be stressed that the present case concerns the specific requirements as to the speed and quality of judicial review set out in the context of detailed secondary legislation, namely Article 46(3) of Directive 2013/32, pertaining to a rather specific area of law.

V. Conclusion

126. In the light of my considerations above, I suggest that the Court reply to the Pécsi Közigazgatási és Munkaügyi Bíróság (Administrative and Labour Court, Pécs, Hungary) as follows:

– Article 46(3) of Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection, in conjunction with the first paragraph of Article 47 of the Charter of Fundamental Rights of the European Union, is to be interpreted as meaning that a model of judicial review in matters of international protection in which the courts are endowed with a mere cassational power but in which the judicial guidance they issue in their annulment decisions is effectively being disregarded by the administrative bodies when deciding on the same case again, such as demonstrated in the case in the main proceedings, fails to meet the requirements of effective judicial review set out in Article 46(3) of Directive 2013/32 and interpreted in the light of the first paragraph of Article 47 of the Charter.

– A national court, deciding in circumstances such as those in the case in the main proceedings, must set aside the national rule limiting its power to the mere annulment of the relevant administrative decision. That obligation arises when the clear assessment contained in a judicial decision annulling a previous administrative decision has been disregarded by the administrative authority deciding the same case anew, without the latter bringing any new elements that it could have reasonably and legitimately brought into consideration, thus depriving the judicial protection provided for under the invoked provisions of any practical effect.