JUDICIAL REMEDIES AGAINST REFUSALS OF INTERNATIONAL PROTECTION. ONCE AGAIN ON THE INTERPLAY BETWEEN EU LAW AND THE PROCEDURAL LAW OF THE MEMBER STATES

[Commentary on the judgment of the Court of Justice (Second Chamber) of 4 June 2026, Case C-198/25 [Quotal], *S and Minister van Asiel en Migratie*]

Dr Rafael Arenas García
Professor of Private International Law
Universitat Autònoma de Barcelona

SUMMARY:

The Quotal judgment of the Court of Justice of the European Union provides an opportunity to revisit the tension between national procedural autonomy and the effectiveness of EU law. The Court interprets Directive 2013/32/EU and concludes that national courts hearing appeals against administrative decisions concerning the recognition of international protection may depart, in their assessment of the facts, from the findings made by the administrative authority. Against this background, the article analyses the case law of the Court of Justice on the relationship between administrative decision-making and judicial review in matters of international protection, highlighting the difficulties it gives rise to in both Dutch and Spanish law. It also regrets that Regulation (EU) 2024/1348 did not incorporate the existing case law, which would have facilitated the task of national courts.

KEY-WORDS: International protection. Procedural autonomy. Effectiveness of EU law. Directive 2013/32/EU. Regulation (EU) 2024/1348

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I. Introduction

On an unspecified date, a Pakistani national (S.) applied for international protection in the Netherlands. By decision of 20 December 2023, the competent Minister refused the application on the ground that there were no reasons to believe that he would

be persecuted or would suffer serious harm if he returned to his country. The Minister also took the view that part of S.'s account was not credible.
S. brought an action against the refusal before the Court of First Instance of The Hague. That court held that the Minister's decision was insufficiently reasoned and allowed a period in which to remedy the defect. Availing himself of that possibility, the Minister issued a supplementary decision on 8 October 2024. The court took the view, however, that the reasons given for the refusal remained insufficient and that, contrary to the Minister's assessment, S.'s statements were credible, which would lead to international protection being granted.

However, according to Netherlands case-law, where the court disagrees with the Minister's reasoning or with his assessment of the credibility of the applicant's testimony, it may not grant international protection directly, but must confine itself to annulling the decision and referring the case back to the Minister. The national court had doubts, however, as to whether that case-law was compatible with Directive 2013/32/EU[1] and made a reference for a preliminary ruling to the Luxembourg Court, which was answered by the judgment commented on here[2]. The question which the Netherlands court seeks to have resolved is whether, at the appeal stage, it may, in accordance with EU law, rule on the granting of the asylum applied for, departing, where appropriate, from the assessments made by the administration and taking into account elements which the latter did not consider[3].

Framed in those terms, what the Luxembourg Court has to resolve is, once again, the delimitation between EU law and national procedural law. Indeed, the concept of 'procedural autonomy' is expressly present in the third of the questions referred. In what follows, I shall examine how the case is resolved in this particular instance, while connecting it with the more general problem of the relationship between EU instruments and the national law that operates alongside that of the Union. As regards the specific issue of international protection, attention will also be devoted to the amendment of the legislation, an amendment which has not, however, led the Court to interpret the law now in force, since it was not applicable to the situation on which the referring court had to rule. Finally, I shall also examine the changes introduced by the most recent regulation of this regime[4].

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[1] Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013, *OJ* L 180 of 29 June 2013.
[2] Judgment of the Court of Justice of 4 June 2026, Quotal, C-198/25, ECLI:EU:C:2026:447.
[3] See paragraph 16 of the Quotal judgment.
[4] Regulation (EU) 2024/1347 of 14 May 2024 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, amending Council Directive 2003/109/EC and repealing Directive 2011/95/EU of the European Parliament and of the Council, and Regulation (EU) 2024/1348 of the European Parliament and of the Council of 14 May 2024 establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU (*OJ* L of 22 May 2024).

II. The right to an effective judicial remedy in matters of international protection

The provision to be interpreted is Directive 2013/32/EU[5], which replaced Directive 2005/85/EC[6]. The latter gave concrete form to the agreement reached by the European Council at its meeting in Tampere on 15 and 16 October 1999 to create a Common European Asylum System, including both procedural and substantive rules; that is to say, rules concerning both the way in which asylum applications were to be processed and decided and the grounds for refusal and the guarantees afforded to applicants. The Directive also deals with the withdrawal of refugee status (Articles 37 et seq.).

Article 39 of the 2005 Directive laid down the requirement for Member States to ensure the right to an effective remedy before a court or tribunal against decisions on asylum applications, leaving it to the Member States to lay down the time limits and other rules designed to ensure an effective judicial remedy. In other words, the Directive referred back to national law, so that whichever option the Member States chose would be compatible with the Directive's provisions, provided that the remedy was, as Article 39 stresses, effective. Recital 27 of the Directive made this abundantly clear when it stated that 'the effectiveness of the remedy, also with regard to the examination of the relevant facts, depends on the administrative and judicial system of each Member State seen as a whole'.

The case-law of the Luxembourg Court directly interpreting Article 39 confirmed the relevance of national law in shaping the remedy provided for in that provision. Thus, in Samba Diouf[7] the Court held that the right to a judicial remedy does not preclude the absence of a separate remedy against the decision to examine an asylum application under an accelerated procedure, provided that that decision may be reviewed in the action brought against the final decision. In Tall[8], it rejected the proposition that the Directive required the lodging of a judicial appeal to have suspensory effect in relation to an administrative decision not to examine an asylum application. The non-mandatory nature of that suspensory effect was confirmed in Belastingdienst/Toeslagen[9], concerning a decision refusing international protection. The autonomy of the national procedural system in organising the available remedies was recognised in D. and A. in 2013[10].

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[5] *Supra* n. 1.
[6] Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, *OJ* L 326 of 13 December 2005.
[7] Judgment of the Court of Justice of 28 July 2011, Samba Diouf, C-69/10, ECLI:EU:C:2011:524.
[8] Judgment of the Court of Justice of 17 December 2015, Tall, C-239/14, ECLI:EU:C:2015:824.
[9] Judgment of the Court of Justice of 26 September 2018, Belastingdienst/Toeslagen, C-175/17, ECLI:EU:C:2018:776.
[10] Judgment of the Court of Justice of 31 January 2013, D. and A., C-175/11, ECLI:EU:C:2013:45.

Directive 2013/32/EU[11], the directive interpreted by the Luxembourg Court in the judgment under discussion, introduces a significant change to the rules governing judicial remedies against decisions relating to international protection. In the first place, in the recital equivalent to recital 27 of the 2005 Directive — recital 50 — the final part, which stated that the effectiveness of the judicial remedy depended on the administrative and judicial system of each Member State, is deleted. In addition, Article 46 of the Directive — the equivalent of Article 39 of the 2005 Directive — includes a third paragraph requiring that an effective remedy provide for a full and *ex nunc* examination of both facts and points of law[12].

The change from 2005 is significant. The broad reference to national law gives way to specific requirements as to the shape of the judicial remedy which, combined with the case-law of the Luxembourg Court, may clash with the traditions of some Member States. It must be borne in mind that judicial review of administrative action is organised, and has evolved, in quite different ways across the European States. The political context of each country and its legal culture, together with particular circumstances, lead to a variable combination of three elements: which administrative acts may be reviewed, what relief may be obtained (annulment, protection of the right, substitution of the administrative decision, an order addressed to the administration), and which facts may be reviewed by the courts and in respect of which of them the assessment made by the administration must be relied upon. Of course, each legal system will have its own nuances and particularities, so that the general principles will admit of exceptions which make simple labels difficult to apply.

Moreover, this configuration of judicial review of administrative action is not static, but evolves; and that evolution, broadly speaking and since the end of the Second World War, has essentially involved increasing judicial control over the administration by extending the situations in which such review may take place, widening the reviewing powers of the court (which may revisit facts already assessed by the administration) and equipping it with tools to compel the administration effectively.

Of course, this is an evolution that does not operate in the same way or at the same pace in every country. The broad reference made by the 2005 Directive therefore entailed differences in its application from one country to another which could be significant[13]. Those divergences were noted by the Commission in its 2010 report on the application of

[11] *Supra* n. 1.

[12] "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, at least in appeals procedures before a court or tribunal of first instance".

[13] See A.M. Reneman, *EU asylum procedures and the right to an effective remedy*, doctoral thesis, University of Leiden, 2013, https://hdl.handle.net/1887/20403, p. 257. See also *Improving asylum procedures. Comparative Analysis and recommendations for law and practice*, UNHCR, 2010, https://www.unhcr.org/media/improving-asylum-procedures-comparative-analysis-and-recommendations-law-and-practice-key, pp. 83-92.

the Directive[14] and explain the introduction, in the Commission's 2009 Proposal[15], both of the provision on the retention of the rights and benefits attaching to subsidiary protection while appeals are pending[16] and of the provision requiring that an effective remedy entail an examination of both facts and points of law, including an *ex nunc* examination of international protection needs[17]. According to the explanatory memorandum to the Proposal, those innovations are justified by the evolution of the case-law of the Court of Justice and of the European Court of Human Rights. As regards what is of greatest interest here — the reviewing powers of the courts — the most relevant decision of the Strasbourg Court is Salah Sheekh v the Netherlands of 11 January 2007[18], in which it is expressly stated that the reviewing court must carry out a full and *ex nunc* assessment[19]. It seems clear that the wording of Article 46 of Directive 2013/32/EU is to be explained by reference to that 2007 decision of the ECtHR. The result is a provision which does not merely refer to national procedural law with the effectiveness of the remedy as its only limit; it already lays down a substantive rule on the scope of that remedy. In what follows, I shall examine how the Luxembourg Court has interpreted that provision up to the judgment commented on here.

III. Judicial remedies in matters of international protection and the Luxembourg Court

1. The interplay between the administrative and the judicial stage in the recognition of international protection

The Luxembourg Court's interpretation of the matter at hand rests on a twofold distinction: on the one hand, in the granting of international protection there is a decision taken by a quasi-judicial or administrative body which may be reviewed by a court[20]. On

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[14] Report from the Commission to the European Parliament and the Council on the application of Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, of 8 September 2010, COM(2010) 465 final.
[15] Proposal for a Directive of the European Parliament and of the Council on minimum standards on procedures in Member States for granting and withdrawing international protection (recast), of 21 October 2009, COM(2009) 554 final.
[16] See point 135 of the Proposal.
[17] See point 136 of the Proposal.
[18] Application no. 1948/04, https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-78986%22]}.
[19] See paragraph 136: "This further implies that, in assessing an alleged risk of treatment contrary to Article 3 in respect of aliens facing expulsion or extradition, a full and ex nunc assessment is called for as the situations in a country of destination may change in the course of time". That same decision criticises the reviewing court for confining itself to the material provided by the authorities of its own State: "In its supervisory task under Article 19 of the Convention, it would be too narrow an approach under Article 3 in cases concerning aliens facing expulsion or extradition if the Court, as an international human rights court, were only to take into account materials made available by domestic authorities of the Contracting State concerned, without comparing these with materials from other reliable and objective sources" (*ibidem*).
[20] See paragraph 25 of the Quotal judgment.

the other hand, the decision on the granting of international protection entails, first, the determination of the relevant factual circumstances and, second, a legal assessment of those circumstances[21].

As regards the distinction between the taking of the decision and the review of that decision, the Directive distinguishes between procedures at first instance, governed by Chapter III, which are to be decided by the quasi-judicial or administrative bodies defined in Article 2(f) of the Directive, and the judicial review of those decisions, dealt with in Chapter V. Judicial review is also available against decisions withdrawing international protection (Chapter IV). Compliance with the requirements of the Directive and the safeguarding of applicants' rights are achieved through a proper articulation of the two stages, so that the existence of judicial review does not relieve the first-instance stage of its rigorous and protective character. That follows from the Directive's provisions on that first stage, including its recitals; it is that articulation which ensures that the procedure as a whole (first instance and judicial review) leads to a rigorous examination of applications for international protection (recital 34 of the Directive). This is the perspective adopted by the Luxembourg Court in the decision under discussion[22] and it is consistent with the requirement that the rights of applicants for international protection, or of those from whom that status is withdrawn, be effectively guaranteed at first instance as well[23], something the Court had already emphasised in earlier decisions[24].

As regards the distinction between what might be called the evidentiary stage and the decision-making stage — that is, the stage concerned with the determination of the facts and the stage whose object is the legal assessment of those facts — the judgment under discussion cites the judgment in M[25], in which, interpreting the Directive on minimum standards for qualification for refugee status or subsidiary protection status[26], the Court distinguished between the evidentiary stage and that of legal assessment. In M, the distinction was relevant because, relying on the wording of Article 4(1) of that

[21] See paragraph 28 of the Quotal judgment.
[22] See paragraph 26 of the Quotal judgment.
[23] In this connection, the judgment in GM is of interest (Judgment of the Court of Justice of 22 September 2022, GM, C-159/21, ECLI:EU:C:2022:708), in which it was held, on the one hand, that the authority which is to decide on the withdrawal of international protection cannot be bound by a previous decision of another authority (in that case, one with specific national security functions) and, on the other, that the person concerned or his lawyer cannot be deprived of information on the grounds on which the decisions are based.
[24] Judgment of the Court of Justice of 25 July 2018, Alheto, C-585/16, ECLI:EU:C:2018:584, paragraph 116; Judgment of the Court of Justice of 16 July 2020, Addis, C-517/17, ECLI:EU:C:2020:579, paragraph 61.
[25] Judgment of the Court of Justice of 22 November 2012, M, C-277/11, ECLI:EU:C:2012:744.
[26] Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, *OJ* L 304 of 30-IX-2004.

Directive[27], the applicant sought to have the administration share with him, before taking a decision, the reasons it was considering, on the basis that the authority was under a duty to cooperate with the applicant for protection. In that context, the Luxembourg Court made clear that cooperation with the applicant relates to obtaining the necessary factual elements, not to the legal assessment which follows from those elements when measured against the relevant rules[28].

In Quotal, that distinction is taken up again, but this time in order to deny that the reviewing court's jurisdiction is confined to the second stage (legal assessment), so that it may also enter into the assessment of the facts[29]. That possibility of assessing the facts follows from the requirement that the remedy be full and *ex nunc*, as laid down in Article 46(3) of Directive 2013/32/EU and as the earlier case-law had interpreted it. In this regard, in Alheto[30] the Court held that the reviewing court had to be able to review the facts that had been considered at first instance[31]. It ruled to the same effect, more recently, in Alace and Canpelli[32], citing CV[33], which in turn refers to Torubarov[34], which, closing the circle, refers back to Alheto.

It is therefore clear that the reviewing court is not to confine itself to examining whether the decision taken at first instance by the administrative (or quasi-judicial, as provided for in the Directive) authority was correct, but may examine the relevant facts and take into account new facts that have come to light after the first-instance decision[35]. What remains open, however, is the question of what the court must do if it annuls the first-instance decision. Article 46(3) does not, in principle, impose an obligation on the court to rule on the application for protection. That is a matter to be resolved in the light of the procedural law of the Member States, and it is not contrary to the Directive for the case to be referred back to the administrative or quasi-judicial authority which is to decide at first instance[36]. That referral back is subject, however, to the limit that the effectiveness of the remedy must be ensured, so that Article 46(3) of the Directive, read together with Article 47 of the Charter of Fundamental Rights, precludes the referral of the case back to the body competent to take the first-instance decision from ending in an outcome that departs from the judicial decision or is unduly protracted. That was established in Alheto

[27] "Member States may consider it the duty of the applicant to submit as soon as possible all elements needed to substantiate the application for international protection. In cooperation with the applicant it is the duty of the Member State to assess the relevant elements of the application".
[28] See paragraph 70 of the judgment in M.
[29] See paragraph 29 of the Quotal judgment.
[30] *Supra* n. 24.
[31] See paragraph 106 of the Alheto judgment.
[32] Judgment of the Court of Justice of 1 August 2025, Alace and Canpelli, C-758/24 and C-759/24, ECLI:EU:C:2025:591, paragraphs 76 and 81.
[33] Judgment of the Court of Justice of 4 October 2024, CV, C-406/22, ECLI:EU:C:2024:841, paragraph 85.
[34] Judgment of the Court of Justice of 29 July 2019, Torubarov, C-556/17, ECLI:EU:C:2019:626, paragraph 51.
[35] See paragraph 52 of the Torubarov judgment.
[36] See paragraph 146 of the Alheto judgment and paragraph 49 of the Quotal judgment.

itself[37] and in Torubarov[38]. In principle, that obligation lies on the Member State and on the authority ruling at first instance; but it may end up having consequences for the court as well, as was held in Torubarov, where it was stated that if the administrative authority did not comply with the court's decision and a second refusal, contrary to the criteria laid down by the reviewing authority, were challenged before it, that court would indeed have to grant international protection in order to safeguard the applicant's right[39]. That case-law was reiterated in PG the following year[40].

Quotal is not a 'Torubarov' situation, because there is as yet no judicial decision that the administration could disobey; but there was a delay in the procedure capable of jeopardising the applicant's right. Specifically, as explained above, the court had found the reasons given for the refusal to be insufficient and allowed a period in which to remedy that defect. The administration's supplementary decision remained insufficient in the court's view, and it is for that reason that it asks (second question referred) whether it may make a substantive and definitive assessment of the application for international protection[41]. The Luxembourg Court, however, reformulates the question and, instead of answering whether the referring court may rule 'definitively' on the application for international protection, takes it that it is being asked whether it may rule in a manner that is 'binding'[42]. The issue is thus reduced to whether the court has the power to depart from the facts taken into account by the administration and, in particular, from its assessment of the plausibility of the applicant's statements.

2. The construction developed by the Luxembourg Court

With Quotal, therefore, the Luxembourg Court completes the construction of the procedure for granting international protection that it has been developing through its interpretation of the 2013 Directive. As is usual with the Court of Justice, what we have before us is the work of a legislature rather than of a court, since it involves the formulation of rules that are not to be found in the legislation interpreted.

What that legislation does contain is the requirement that judicial review of the first-instance decision be full and *ex nunc* (deriving, as we saw, from the case-law of the Strasbourg Court). What the Luxembourg Court adds, however, is that such review may conclude with a binding decision on international protection of a substantive nature. That is to say, irrespective of what the procedural law of the Member State provides, the court's decision will not be confined to annulling — where appropriate — the first-instance

[37] See paragraph 149 thereof.
[38] See *supra* n. 34. Paragraph 59 of the judgment.
[39] See paragraph 78 of the Torubarov judgment.
[40] Judgment of the Court of Justice of 19 March 2020, PG, C-406/18, ECLI:EU:C:2020:216, paragraph 23.
[41] Paragraph 16 of the judgment.
[42] Paragraph 24 of the judgment.

decision, but will include (or may include) a ruling on the substance of the application which will be binding on the administration.

The Luxembourg Court does not, however, preclude a decision by the administration from being required — under national law — after that of the court. But if that administrative decision does not comply with what the court has laid down, then, in the event of a challenge to it, the court may indeed adopt a final and enforceable decision (Torubarov). What is not clear, however, is what would happen where we are faced not with a first-instance decision departing from what the court has laid down, but with a delay in taking a decision. The case-law of the Luxembourg Court has established that Member States must guarantee the rights of asylum seekers[43]; but if they fail to comply with that obligation and there is no decision that can be challenged before a court, the way in which that delay may be attacked will depend on what national procedural law provides, since the Directive provides for a remedy against the first-instance decision, not against the absence of a decision. Bearing in mind, however, the creative capacity of the Court of Justice, it should not be ruled out that, faced with a case of delay, if the person concerned complains of that delay before the competent court and the latter makes a reference for a preliminary ruling to the Luxembourg Court, the latter may end up concluding that the effectiveness of the Directive requires the remedies available against first-instance decisions to be capable of being used against delay in taking a decision as well, at least where there is already a binding judicial decision to be implemented by the administrative or quasi-judicial authority.

It should also be made clear that a subsequent decision of the administration could depart from the binding decision of the court if there were new elements which the latter had been unable to consider[44]. The first-instance authority is bound by the findings made by the court, but the decision taken by the court as regards the granting of international protection may be revisited, albeit only on the basis of elements not considered by the reviewing court. From a procedural standpoint, a further question might arise as to whether those new elements must post-date the judicial decision or may pre-date it, provided that they were not known to the court. In my view, following the logic developed by the Court of Justice, even where the elements pre-date the judicial decision, if there are objective reasons justifying the fact that the reviewing authority was unable to take them into account, it would indeed be possible for the first-instance administrative or quasi-judicial body to consider them.

As can be seen, the Court of Justice, starting from the need to safeguard the effectiveness of the Directive, alters the result that would follow from the ordinary application of national procedural law. There is nothing new in this, however, since on

[43] See paragraph 148 of the Alheto judgment, paragraph 59 of the Torubarov judgment and paragraph 19 of the PG judgment

[44] See paragraph 20 of the PG judgment and paragraph 50 of the Quotal judgment

other occasions the Court of Justice had already made it clear that procedural autonomy is subordinate to the attainment of that effectiveness of EU law. The classic example is Océano[45], where it was held that the national court had to interpret national law — so far as possible — in such a way as to allow it to determine of its own motion whether terms included in consumer contracts were unfair. The caveat 'so far as possible' does not, however, remove the need to introduce changes to the procedure which will inevitably raise doubts for national judges and litigants alike[46]. Moreover, where such consistent interpretation proves impossible, the national court must disapply the provisions of its domestic law that are incompatible with the EU rules having direct effect[47]; but that disapplication may open a gap that would need to be filled by some kind of rule which, if it does not exist, the national court will have to construct. It may, admittedly, resort to institutions designed for other purposes (*analogia juris*); but in any event we are faced with a necessary judicial activism which, ideally, ought to give way to procedural legislation that meets the requirements of EU law, if only for the sake of legal certainty and predictability. The review of unfair terms in consumer contracts illustrates the point. Following the Océano judgment already mentioned, the Spanish courts had to piece together a system of review that required further references to the Luxembourg Court and that at times involved reaching solutions liable to clash with the nature of certain procedures[48]. The Court orders a particular outcome, but it is the national court that has to find a procedural route to it, one that will necessarily demand a degree of creativity greater than would be possible in a classic scenario of relations between the legislature and the courts.

In the next section I shall examine how the relationship between the requirements laid down by the Luxembourg Court and national procedural rules arises in the field of interest here, applications for international protection, and then consider how those problems have been addressed by the legislation that replaces Directive 2013/32/EU, namely Regulation (EU) 2024/1348.

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[45] Judgment of the Court of Justice of 27 June 2000, Océano, Joined Cases C-240/98 to C-244/98, ECLI:EU:C:2000:346.

[46] In this regard, the distinction drawn by W. van Gerven ("Of Rights, Remedies and Procedures", *CMLR*, 2000, vol. 37, no. 3, pp. 501-536, p. 524) between "procedural rules" and "remedial rules" is relevant. While the latter may be determined by the Court's case-law (the requirement of a particular measure in order to safeguard a right), the former, because of their technical character, call for action by the legislature.

[47] See paragraph 55 of the Quotal judgment.

[48] See, for example, M. Gómez de Liaño Fonseca-Herrero, "El control de oficio de las cláusulas abusivas. El Juez nacional como garante de la protección del consumidor", *Revista de Derecho de la Unión Europea*, 2014, no. 26, pp. 313-328, p. 322, where she notes that the requirement of review in order-for-payment proceedings entails a "clear danger of distorting the nature of the procedure". The author does not present this as a criticism of the Luxembourg Court, but as a consequence of the establishment of a mechanism which she considers necessary for the protection of consumers. It serves us, however, as an example of the tension created between the requirements flowing from the case-law of the Court of Justice and the architecture of the procedures governed by the domestic law of the Member States.

IV. The questions still open and Regulation (EU) 2024/1348

1. Judicial review in the procedure for the recognition of international protection

The previous section concluded with the requirements which, according to the Luxembourg Court, the procedure for judicial review of a decision on the recognition or withdrawal of international protection must satisfy. There I noted that, as in other areas, tensions may arise between the principle of the Member States' procedural autonomy and the attainment of the effectiveness (as interpreted by the Court of Justice) of EU law. I shall now examine those potential tensions both in Netherlands law, in the application of which the reference for a preliminary ruling giving rise to the judgment under discussion originated, and in our own law (Spanish law). I shall consider the requirement that judicial review be full and *ex nunc*, the power of the court to examine the facts and to depart, where appropriate, from any assessment made by the first-instance authority and, finally, the power to give a final or binding decision capable of securing the recognition of international protection against the administration's assessment or its inaction.

In the case of the Netherlands, the legislation on judicial review of decisions concerning the recognition of international protection allows for a full and *ex nunc* examination by the court. Indeed, in the case at hand it is made explicit, in the wording of the question referred, that the problem is not the legislation but the case-law interpreting it[49]. The Netherlands legislature adapted the Aliens Act (*Vreemdelingenwet*) to the requirements of the Directive at the time, providing for a full and *ex nunc* review at the judicial review stage[50]. The case-law, however, as we have seen, maintained a 'deference' towards the assessment of the facts made by the administration. That case-law was not, however, built on nothing. The explanatory memorandum accompanying the bill transposing the Directive[51] insisted that the court could carry out a full examination, but only after the administration's assessment, which remained indispensable. In other words, what was sought was a court that reviews the administration's decision and not a court that makes its own assessment independently of it[52]. Earlier administrative-law case-law had followed that approach in the Netherlands, and it was in that sense that the Council of State (*Raad van State*) advised the Government in connection with the transposition of the 2013 Directive[53]. That is to say, the pre-existing Netherlands

[49] See paragraph 13 of the Quotal judgment.

[50] The Directive was transposed in the Netherlands by the Act of 8 July 2015 (https://zoek.officielebekendmakingen.nl/stb-2015-292.pdf). Article I.X of that Act inserted an Article 83a into the Aliens Act providing for a full and *ex nunc* examination of the application by the court.

[51] It may be consulted at the following internet address: https://zoek.officielebekendmakingen.nl/kst-34088-3.pdf.

[52] See page 21 of the explanatory memorandum.

[53] The relevant part of the memorandum reads as follows: *De Afdeling bestuursrechtspraak heeft in de consultatiereactie naar mijn oordeel een heldere schets gegeven van de huidige systematiek en de ratio*

procedural approach (a court that reviews the administration, but does not make an assessment independent of the administration's own) ended up being carried over into the interpretation of a rule which, on its face, reproduced the wording of the Directive. Quotal corrects that interpretation and frees the court from that deference towards the administration.

That 'liberation' has, moreover, a further consequence: the court will be able to give a decision on the application without having to await a fresh decision from the administration. Before Quotal, a decision by the court on the substance was possible — in principle — where there were no elements requiring assessment by the administration and only questions of law remained to be resolved. If an assessment of the facts was required, referral back to the administration appeared unavoidable because — it will be recalled — we are dealing with a court that reviews[54]. Following the judgment under discussion, there should be no obstacle to a decision on the application. That decision on the application — as we saw in the previous section — might require an administrative decision confirming the grant of protection; but in any event it would be binding on the administration on the terms set out in section III.

We thus see how, in the case of the Netherlands, the national procedural conception (a court that reviews as opposed to a court that assesses) leads to a reading not only of the Directive but of the national legislation transposing it in a sense different from that which follows from the case-law of the Luxembourg Court. The judgment under discussion should correct the two departures described: on the one hand, the court must have full jurisdiction in the assessment of the facts and, on the other, it must be able to rule on the application for protection without having to refer the case back to the first-instance authority.

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hiervan. De Afdeling bestuursrechtspraak geeft aan dat sprake zou moeten zijn van een toetsende rechter en niet van een beoordelende rechter. Een beoordelende rechter zal, geheel los van het besluit, een eigen beoordeling geven over de geloofwaardigheid van de door de vreemdeling gestelde feiten. Een toetsende rechter toetst of de beslissing van het bestuursorgaan rechtmatig is. Terecht heeft de Afdeling uit de toelichting afgeleid dat in dit wetsvoorstel een toetsende rechter wordt beoogd. Het volledig en ex nunc onderzoek en de wijze waarop hieraan binnen de grenzen van de scheiding der machten en de wettelijke taak van de bestuursrechter vorm kan worden gegeven moeten in dit licht worden begrepen. Een volle toetsing van het geloofwaardigheidsoordeel van het bestuursorgaan op basis van het dossier is naar het oordeel van de regering een goede invulling hiervan. This may be translated as: "The *Afdeling bestuursrechtspraak* has, in my view, given a clear outline in its consultation response of the present system and of its rationale. The *Afdeling bestuursrechtspraak* indicates that there should be a court that reviews and not a court that assesses. A court that assesses will give, entirely independently of the decision, its own appraisal of the credibility of the facts alleged by the foreign national. A court that reviews examines whether the decision of the administrative body is lawful. The *Afdeling* has rightly inferred from the explanatory memorandum that this bill is intended to provide for a court that reviews. The full and ex nunc examination, and the manner in which it may be given shape within the limits of the separation of powers and of the statutory task of the administrative court, must be understood in that light. A full review of the administrative body's credibility assessment on the basis of the file is, in the Government's view, a proper way of giving effect to this" (translation by Claude Opus 5).

[54] See paragraph 51 of the Quotal judgment.

In the case of Spain, no problems have arisen — so far as I am aware — in relation to the application of the Luxembourg Court's case-law concerning judicial review of the recognition of international protection. The Asylum Act (*Ley de Asilo*)[55] does not regulate judicial appeals against administrative decisions on the recognition of international protection, confining itself to introducing, in that connection, a provision on interim measures which, as we shall see, is of interest, but which affects neither the court's powers to establish the facts nor its power to give a decision on the application going beyond the annulment of the administrative decision.

As to the latter point, the Contentious-Administrative Jurisdiction Act (*Ley de la Jurisdicción Contencioso-Administrativa*, LJCA)[56] already provides that an applicant may seek the recognition of an individualised legal situation[57], so that the judgment is not confined to annulling the measure or act challenged, but will also recognise that legal situation and adopt the measures necessary for its restoration[58]. That is to say, applied to our case, the court may rule on the recognition of international protection without having to refer the case back to the administrative authority[59].

Nor, moreover, is there any doubt as to the power of the court or tribunal to assess the facts taken into account by the administration, and to depart from its assessment. The judgment of the Supreme Court of 16 March 2016, already cited[60], is an example of this[61]. The full power of the courts to assess the facts relevant to the determination of contentious-administrative appeals follows from the provisions on the taking of evidence in the Contentious-Administrative Jurisdiction Act (Articles 60 and 61), supplemented by

[55] Act 12/2009 of 30 October regulating the right of asylum and subsidiary protection, *BOE*, 31-X-2009.
[56] Act 29/1998 of 13 July regulating the Contentious-Administrative Jurisdiction, *BOE*, 14-VII-1998.
[57] Article 31(2).
[58] Article 71(1)(b).
[59] See, for example, in relation to temporary protection, and among many other recent decisions, the judgment of the Supreme Court (Contentious-Administrative Chamber, Section 5) of 6 May 2026, ECLI:ES:TS:2026:2015, the operative part of which declares that the applicants are entitled to the temporary protection regime deriving from the 2001 Directive (Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof, *OJ* L 212 of 7 August 2001). As regards refugee status, the judgment of the Supreme Court (Contentious-Administrative Chamber, Section 3) of 16 March 2016, ECLI:ES:TS:2016:1182, is significant: its operative part not only annuls the decision of the Ministry of the Interior refusing the application, but concludes by "recognising the status of refugees of the aforementioned citizens on the terms set out in the grounds of this judgment". The decision applies legislation predating the 2013 Directive; but it illustrates the absence of debate in Spanish law as to the power of the courts to recognise individualised legal situations when determining contentious-administrative appeals, as well as the projection of that power onto cases involving applications for international protection.
[60] See the preceding footnote.
[61] See, in the Second Ground of Law, the following reasoning: "the contentious-administrative courts must ascertain, for the purposes of determining whether decisions of the Ministry of the Interior in matters of asylum comply with the principle of legality, first, whether it follows from the material in the administrative file and from the evidence adduced before the court that the account given by the asylum seeker is credible and plausible, and whether it may also be regarded as established, even if only on a prima facie basis, as is required in this field, that he suffers persecution on political, ideological or religious grounds or on other grounds set out in the Convention relating to the Status of Refugees, done at Geneva on 28 July 1951".

those of the Civil Procedure Act (*Ley de Enjuiciamiento Civil*, LEC) by virtue of the express reference made to it in Article 60(4) LJCA. As regards evidence, there is likewise no difficulty in taking into account evidence post-dating the administrative procedure or even coming to light once the judicial proceedings have begun. That follows from Article 56(4) LJCA, which provides for the admission of documents after the application and the defence in the cases provided for in civil proceedings. Those cases are governed by Article 270 LEC, which allows the production not only of subsequent documents but also of earlier ones that were not known or could not have been obtained beforehand for reasons not attributable to the party producing them.

Spanish legislation, moreover, not only allows new documents to be produced but also allows evidence to be taken on new facts, as provided for in Article 286 LEC, which applies to contentious-administrative proceedings by virtue of the reference in Article 60(4) LJCA already mentioned. That provision would give effect to the requirement of *ex nunc* review demanded by EU law. Spanish courts may make a full assessment of the facts and, moreover, one that is not limited to those known or in existence at the time relevant for the administrative procedure or at the initial stage of the judicial appeal. On this basis, therefore, the requirements of the Luxembourg Court's case-law appear to be satisfied. As we shall see, there is a problem in relation to Article 46(5) of the Directive (the applicant's right to remain in the territory pending the outcome of the appeal), which I shall address shortly; but before doing so it is worth considering whether the application of those rules also meets the requirements flowing from the Luxembourg Court's case-law.

A reading of Spanish case-law confirms, moreover, that the courts do assess the evidence. An examination of the decisions of the National High Court (*Audiencia Nacional*) on the recognition of refugee status bears this out[62], and shows, in addition, that the debate on the evidence carries over into the system of appeals[63].

It is worth drawing attention, however, to a line of reasoning that recurs in the National High Court in this type of proceedings. Many judgments conclude by stating that the applicant had not succeeded in rebutting the well-founded reasons given by the administration for refusing protection[64]. That formulation appears to give a preference to the assessment made by the administration which could entail a limitation on the 'full' analysis required by the Luxembourg Court; but it could also be read as a rhetorical device connected with the traditional deference of the contentious-administrative courts towards the administration, such that it entails no real limitation on the assessment of the evidence,

[62] See, for example, the judgments of the National High Court (Contentious Chamber, Section 2) of 11 June 2015, ECLI:ES:AN:2015:2584 and ECLI:ES:AN:2015:2156, among many others.
[63] See, for example, the judgment of the Supreme Court of 16 March 2016 already cited (*supra* n. 59), which set aside the second of the decisions of the National High Court cited in the preceding footnote.
[64] See, for example, recently, the judgment of the National High Court (Contentious Chamber, Section 6) of 15 July 2026, ECLI:ES:AN:2026:3465.

but merely the consideration of the elements already present in the administrative file. A broad examination of the case-law in this area, which is beyond the scope of this note, could confirm as much.

Finally, as anticipated, we encounter a particular problem in the application of Article 46(5) of the Directive, which provides that applicants for international protection are to be allowed to remain in the territory pending the outcome of the appeal before the court[65]. In Spain that right to remain is not guaranteed, since what is provided for is the possibility of applying for the suspension of the administrative decision entailing removal from the territory as an especially urgent interim measure under Article 135 LJCA[66]; but such suspension is not mandatory. This raises a problem that goes beyond EU law, since in 2014 the ECtHR had already held, in relation to certain asylum applications, that the systematic refusal of suspensory effect to an appeal could infringe the right to an effective remedy[67]. Article 46(5) of the Directive goes further, because it confers on all asylum seekers the right to remain in the territory while the appeal is pending, which, as we can see, is not provided for in those terms by Spanish law.

The case-law, for its part, has not settled the problem definitively. It is true that there are several decisions of the Supreme Court which, applying the case-law of the Luxembourg Court and Article 46(5) of Directive 2013/32/EU, hold that the interim measure suspending removal must be granted[68]; but, as the Spanish Government itself acknowledges, not all sections of the National High Court have aligned themselves with

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[65] The Luxembourg Court had already established the need to guarantee that the applicant remain in the State in which asylum had been sought until the judicial appeal against the refusal had been determined, when interpreting Article 5 of Directive 2008/115 (Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, *OJ* L 348 of 24 December 2008) together with the Charter of Fundamental Rights, in its judgment in Gnandi (Judgment of the Court of Justice of 19 June 2018, Gnandi, C-181/16, ECLI:EU:C:2018:465). Although, for reasons relating to its temporal scope, the 2013 Directive was not applicable, Article 46(5) thereof is mentioned in the judgment (paragraph 12). In that decision, although that provision was not applicable, it was held that the solution which it lays down — non-removal of the foreign national while the appeal is pending — was required by the principle of non-refoulement and by the rights recognised in the Charter of Fundamental Rights. It must be noted, however, that the Directive itself provides for an exception to that right to remain in respect of certain manifestly unfounded decisions, certain inadmissibility decisions, cases of reopening and situations in which the applicant has entered from a safe country (*see* Article 46(6) of the Directive).

[66] See Article 29(2) of the Asylum Act.

[67] *Cf.* P. Jiménez Blanco, "La regularización por motivos de protección internacional y razones humanitarias", in P. Rodríguez Mateos/P. Jiménez Blanco/A. Espiniella Menéndez, *Régimen jurídico de los extranjeros y de los ciudadanos de la UE*, Cizur Menor, Aranzadi, 2017, pp. 453-471, pp. 461-462. The decision in question is the ECtHR judgment of 22 April 2014, *A.C. and Others v Spain*, application no. 6528/11.

[68] Judgment of the Supreme Court (Contentious Chamber, Section 5) of 29 November 2022, ECLI:ES:TS:2022:4365; judgment of the Supreme Court (Contentious Chamber, Section 5) of 13 October 2023, ECLI:ES:TS:2023:4188; judgment of the Supreme Court (Contentious Chamber, Section 5) of 11 October 2024, ECLI:ES:TS:2024:5004. The first two were relied on by the Spanish Government, before the Committee of Ministers of the Council of Europe, to demonstrate compliance with the ECtHR judgment of 22 April 2014 (Communication from the Spanish authorities of 16 September 2024, DH-DD(2024)1051, submitted in the context of the supervision of the execution of the ECtHR judgment in *A.C. and Others v Spain* of 22 April 2024, https://www.refworld.org/sites/default/files/2024-10/dh-dd20241051.pdf)

that case-law, so that applications for the interim measure suspending the removal decision pending the judicial appeal against the administration's refusal to recognise international protection continue to be rejected[69]. That failure by the National High Court to apply Article 46(5) of Directive 2013/32/EU persists. The most recent example I have found is an order of 20 August 2026[70].

Thus, in the case of Spain, the legal system is aligned with the requirements of the Luxembourg Court's case-law as regards a full and *ex nunc* judicial review of the application for international protection, with the power to depart from the administration's assessment and to recognise the right applied for directly. It is true that expressions may be found in the courts' reasoning which display a certain deference towards the assessment of the evidence made by the first-instance authorities, but they appear to be a rhetorical device rather than a renunciation of an independent assessment of the facts on the file.

Where a problem does arise is in the need to postpone the removal of applicants whose request has been refused at the administrative stage until the judicial appeal has been determined. There is no express provision to that effect in Spanish law, and the case-law has not been consistent in applying the case-law of the Luxembourg Court (Gnandi) and Article 46(5) of Directive 2013/32/EU. In the next section we shall see what changes are introduced by Regulation (EU) 2024/1348.

2. Regulation (EU) 2024/1348

We have seen so far that the text of the 2013 Directive, as regards judicial appeals against the administration's decision on an application for international protection, had been substantially supplemented by the case-law of the Luxembourg Court. It might perhaps have been desirable for the Regulation replacing the Directive to have taken that case-law into account, but that does not appear to have been the case.

Regulation (EU) 2024/1348[71] replaces Directive 2013/32/EU as from 12 June 2026 (Articles 78(1) and 79(2) of the Regulation), which means that it will apply to applications lodged as from 12 June 2026 (Article 79(3)). As it is a regulation and not a directive, it does not have to be transposed; but, as has become usual, certain adaptations of domestic law will be necessary[72]. In the case of Spain, however, that adaptation has so

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[69] See p. 6 of the Communication from the Spanish authorities cited in the preceding footnote.

[70] Order of the National High Court (Contentious Chamber, Section 7) of 20 August 2026, ECLI:ES:AN:2026:3583A.

[71] See *supra* n. 4.

[72] On this "curious" circumstance (regulations requiring a kind of "transposition") I refer to R. Arenas García, "Reglamentos Europeos y Derecho Procesal Nacional: Delimitación e interacción", in C. Parra (ed.), *Nuevos Reglamentos comunitarios y su impacto en el derecho catalán*, J.M. Bosch Editor, 2012, pp. 69-93. In the case at hand, it is significant that Article 67(7) of the Regulation imposes on the Member States the obligation to lay down certain time limits for appeals within the limits set by the Regulation itself.

far been limited to two instructions of the Under-Secretariat of the Ministry of the Interior of 11 June 2026[73] which, obviously, cannot affect the rules governing contentious-administrative appeals against administrative decisions on the recognition of international protection. Accordingly, the task which Article 67(7) of the Regulation entrusted to national legislatures[74] has not been undertaken in Spain. Nor has advantage been taken of the possibility offered by Article 67(1) of excluding judicial appeals in certain cases[75]. I shall not dwell on this, however, because the point here is to consider whether the Regulation has responded to the requirements flowing from the Luxembourg Court's case-law on judicial remedies. That is to say, as we saw, the case-law of the Court of Justice had added certain refinements to the rules on judicial remedies which were, at most, implicit in the text of the Directive, and which had given rise to a number of references for preliminary rulings examined briefly in section III. Regulation (EU) 2024/1348 was a good opportunity to incorporate the Luxembourg Court's clarifications into the legislation, but this, as we shall see, has not happened.

Thus, in the first place, Article 67(3) of the Regulation substantially reproduces Article 46(3) of the Directive, laying down the full and *ex nunc* character of the judicial remedy; but it addresses neither the possibility of the court giving a binding decision going beyond the annulment of the administrative decision nor the measures to be taken should the first-instance authority fail to follow the terms of the judicial decision or delay the adoption of a fresh decision in line with what the court has decided. In other words, the gaps left by the Directive remain, but with the difference that, since we are dealing with a regulation, the joint application of the regulation and of the relevant national rules on these matters arises differently than in the case of directives. From now on, the requirement of a 'full and *ex nunc*' judicial remedy will have to be applied in each Member State as an autonomous category, without the intermediation of national transposing rules and without the domestic rules governing the system of remedies being, in principle, particularly relevant, since the Regulation is ideally to be applied uniformly in all Member States. True, there is the principle of procedural autonomy; but the provision at issue is precisely procedural in nature.

Nor shall I dwell on this here, however, because what will probably happen, at least in the case of Spain, is that the rules of the Contentious-Administrative Jurisdiction

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That is to say, it is made explicit that the Regulation will require adaptation to national law, even though one of the advantages of a regulation over a directive is precisely its supposed uniform application. See, for example, recital 5 of the Regulation, which reflects the idea that applications for international protection should be examined in a procedure governed by the same rules in all Member States for the sake of clarity and legal certainty.

[73] *BOE*, 13-VI-2026.

[74] See *supra* n. 72.

[75] Specifically, the cases set out in Article 66(6) of the Regulation: where the applicant has renounced his recognition as a beneficiary of international protection, where he has become a national of a Member State, or where he has been granted international protection in another Member State.

Act will continue to apply and, as we have seen, they are in principle consistent with the requirements of the Luxembourg Court's case-law. I shall simply note that, now that Article 68 of the Regulation (the equivalent of Article 46(5) of the Directive) on the suspensory effect of the appeal and the applicant's right to remain in the territory of the Member State until the appeal is determined is a directly applicable rule, it should be more difficult for the Spanish courts to refuse the suspensory interim measures applied for. Indeed, such suspension should even be ordered of the court's own motion, given the categorical and direct character of Article 68 of the Regulation; although it would remain to be seen whether Spanish law provides a procedural avenue for doing so. In any event, however, the tension on this question between the Supreme Court and the National High Court should be resolved, with even greater reason than before, in favour of the Supreme Court's position.

All in all, as regards the matter at hand — the case-law of the Luxembourg Court on judicial remedies against administrative decisions in matters of international protection — the Regulation is a missed opportunity. The Court of Justice had been accumulating requirements to be complied with through the application of procedural law that might not have been designed for the outcome sought by the Luxembourg Court. The Regulation does not address this, and the change of instrument (from a directive to a regulation), far from facilitating a solution, as we have seen, aggravates the difficulty. By contrast, it does go into a certain amount of detail on the introduction of documents into the procedure and on translation requirements, as well as — as we have just seen — on the suspensory effect of the appeal, which supplements the provision on the right to remain while the appeal is pending that the Directive already contained.

V. Conclusion

Quotal confronts us, once again, with the tension between procedural autonomy and the effectiveness of EU law. This particular case has allowed us to examine how, in the field of international protection, the Luxembourg Court has built a system of requirements which are only implicit (at best) in the text of the legislation and which oblige national judges to make imaginative use of the resources available to them in order to achieve the result required by the Court of Justice's case-law.

If I may use an image, it reminds me of that film by Fernando Fernán Gómez, "El viaje a ninguna parte" ("The Journey to Nowhere"), in which a troupe of travelling actors arrives in a village where a local worthy, Zacarías, tells them that he has written a musical and would like them to perform it. The actors are taken aback and ask whether it is only the text or the music as well. The amateur author (played by Agustín González) says that his work has the music and the dancing too. Full of admiration, they ask him to show it to them, and he hands them a thin school exercise book. The actors leaf through it and ask him: “And the music and the dancing?”, to which Zacarías replies: “Here, here!” And he points to a page where the only stage direction reads: “And here they all come together, sing and dance”.

When I read certain decisions of the Luxembourg Court, that image comes to mind: the national court must establish a remedy, deliver a judgment on the substance going beyond annulment and — possibly — deal, where appropriate, with the administration’s inaction in failing to comply with the judicial decision; but the means for achieving this lie in a body of law that has no such thing in mind and, at times, references for preliminary rulings pile up on one another in such a way that the body of the Court of Justice’s decisions looks more like a code than pure case-law. The Spanish odyssey over unfair terms in consumer contracts, begun with the Océano judgment cited above and continuing for decades, especially in the field of mortgage contracts, is ample illustration of that situation.

In short, that is how things are; that is what EU law is like. Perhaps all that remains is to regret that in this case, as in others, the European legislature does not make greater use of the opportunities it has to turn that case-law into effective rules, which would enhance clarity and legal certainty.