The Strasbourg Court Goes Astray

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On 1 June 2023, the Grand Chamber of the ECtHR concluded a saga that even experts of the Strasbourg Court might have overlooked. In the *Grosam* case, the alleged shortcomings in the disciplinary procedure involving a Czech enforcement officer (bailiff) have been addressed. Understandably, the case has not garnered much attention. The Czech Republic faces no democratic decay comparable to Poland and Hungary. No systematic attacks on judicial independence take place there. In fact, for better or worse, no major judicial reform has been adopted in the Czech Republic for more than a decade. Moreover, the *Grosam* case did not concern disciplining judges, a hot topic in the Luxembourg and Strasbourg Courts these days, but only enforcement officers (*soukromí exekuto#i* in Czech).

Yet the *Grosam* chamber judgment was certainly *not* a routine case. The chamber judgment went to the core of the role of the ECtHR and, if it would have been allowed to stand, it could have seriously undermined the legitimacy of the whole system of the Strasbourg protection. The majority in the chamber judgment examined not only issues that were not raised in any manner in the domestic proceedings, but even matters which the applicant did not raise before the ECtHR itself. The majority thus acted *proprio mutu*, de facto constructed the case for the applicant, then conducted an abstract review of Czech legislation, and ended up indicating general measures to be taken by the Czech Republic to correct the purported deficiencies. On top of that, the majority misrepresented the state of Czech law and stretched the existing ECtHR case law on judicial independence to develop standards unheard of in Europe so far.

All of this eventually forced the Grand Chamber to step in. In a nutshell, our argument is three-fold. First, we suggest that the majority in the *Grosam* chamber judgment violated the principle of subsidiarity and acted indeed, as the chamber minority stated, *ultra vires*. These grave failures were eventually remedied by the Grand Chamber. Second, the chamber judgment put forward an extreme vision of judicial insulation in the name of judicial independence, both at the stages of judicial appointments, but also by effectively excluding any lay persons from participating in judicial decision-making. This part of the judgment, although formally set aside by the GC judgment, remains in the air, as it has not been contradicted on its merits. Finally, the chamber judgment exposed several structural shortcomings of the internal functioning of the European Court of Human Rights. Elsewhere, we sought fo flag them up with a couple of suggestions as to how one might approach them.

Facts of the Case

The Minister of Justice launched a disciplinary action against Mr Grosam, an enforcement officer, before the Disciplinary Chamber for Enforcement Officers at the Supreme Administrative Court following a complaint made to the Ministry of Justice.

The Supreme Administrative Court concluded that the (in)action of the enforcement officer in question amounted to grossly negligent conduct, and that Mr. Grosam had seriously breached his professional duties. It imposed a disciplinary measure in the form of a fine amounting to CZK 350,000 (approximately EUR 13,561).

After his constitutional complaint to the Czech Constitutional Court was rejected, Mr Grosam lodged an application to the Strasbourg Court. In his application, he claimed that the disciplinary proceedings before the Disciplinary Chamber at the Supreme Administrative Court fall within the “criminal prong” of Article 6(1) ECHR, that he was denied the right to appeal in criminal matters under Article 2 of Protocol No. 7, and that the Disciplinary Chamber violated the principle of presumption of innocence under Article 6(2) and several procedural rights under Articles 6(1) and 6(3)(d) of the Convention.

A Summary of the Majority Opinion in the Chamber Judgment

However, following a repeated series of questions posed to the parties by the ECtHR, the chamber majority reframed the case’s focus, shifting towards the structural independence and impartiality of the Disciplinary Chamber. Importantly, Mr Grosam neither raised these concerns before the Czech Constitutional Court nor in his initial application to the ECtHR.

By a 4:3 majority, the Court eventually considered that the *legal regulation* concerning the establishment of the Disciplinary Chamber for enforcement officers, which had heard and decided the applicant’s case, did not offer sufficient safeguards guaranteeing the independence and impartiality of the lay assessors, and thus of the Disciplinary Chamber as a whole.

More specifically, the chamber majority found the “absence of sufficient safeguards” on four “grounds”: (1) the absence of criteria for selecting nominees to lay assessors; (2) insufficient guarantees for lay assessors in the disciplinary panels against outside pressure; (3) lack of appearance of independence; and (4) the fact that two enforcement officers who were sitting as lay assessors in the 6-member disciplinary chamber were the applicant’s direct competitors.

An Unusually Strong Dissenting Opinion

Judges Eicke, Koskelo, and Wennerström challenged the majority view with an unusually sharp joint dissenting opinion. In essence, the dissenting judges argued that the applicant’s complaints should not even have been declared admissible. More specifically, they stated that the majority had exceeded its competence as (1) it had examined issues which were not in any manner raised by the applicant in the domestic proceedings; (2) it had examined matters which were not as such raised by the applicant even before the Court, but which were, instead, raised by the majority *ex proprio motu*, contrary to the established limits of the Court’s judicial function; and (3) it had based its conclusions on an abstract review of the domestic

legal framework and addressed issues which clearly had no bearing on the case in question, which, according to the Court's established case law, is not its task.

As a result, the dissenting judges concluded that the judgment entailed a deviation by the Court from the role imposed on it as an impartial adjudicator in cases brought before it, that the decision amounted to an *ultra vires* act, that the majority had instrumentalized an individual application for purposes other than the adjudication of grievances actually presented to it by the applicant. One can hardly find a more scathing dissent in the Strasbourg Court's history.

The Grand Chamber Cleans Up the Mess

The Grand Chamber reviewed the chamber judgment unusually quickly and eventually reversed it. In a short technical judgment, it sided with the chamber minority and found the application inadmissible since the arguments regarding the absence of an "independent and impartial" tribunal, which the applicant introduced following the questions put to him by the chamber itself, were brought out of time.

This reversal is laudable as the chamber majority put the principle of subsidiarity on its head. The chamber majority acted as a first instance court, as it decided on issues that were not raised before domestic courts at all and were not even made by the applicant before the ECtHR, until he was enticed to do so by the, on all accounts leading, questions by the ECtHR itself. Moreover, it did not focus on the circumstances of the individual case. Instead, it conducted an abstract review of domestic legislation. In doing so, it did not cite any domestic commentary nor the relevant domestic case law and practice. In fact, it offered a very peculiar view and interpretation of domestic law as well as its context, which had nothing to do with reality.

Does It?

It can thus be argued that, although the chamber judgment exceptionally exceeded its competence, a concern raised by the dissenting judges, which prompted the Government to appeal the decision, has ultimately led to its reversal by the Grand Chamber. The Strasbourg system could thus be said to be working properly, with a problematic issue flagged up and then resolved.

Yes and no. As the Grand Chamber did not reach the merits stage, it did not engage with the specific views of judicial independence qua judicial insulation advocated by the chamber majority. That vision has three features. First, the *Grosam* chamber judgment used an expansive interpretation of the doctrine of appearances, coupled with an "abstract review" detached from the specific case, and the worst-case scenario hypotheticals ("what if" or extreme prophylactic logic), which de facto means that anything and everything that one wants to challenge can be declared as violating judicial independence. Second, that approach will inevitably translate into extreme positions on substance, such as the idea that only judges can decide on matters concerning the discipline of the legal professions because members

of other legal professions and other lay judges are never able to meet the same exalted standard of independence. Third, extending judicial independence to the "pre-selection" stage and requiring transparent, clear, and objective criteria even at this stage would mean that virtually any selection of judges by political bodies violates the Convention

The Grand Chamber did not address any of these issues. Naturally, from the point of view of the Strasbourg system, it did not have to, since it declared the initial application inadmissible. But the arguments against the Disciplinary Chamber in the chamber judgment still hang in the air and can be exploited by domestic actors who do not want a delicate balancing between judicial independence and judicial accountability. In fact, in the Czech domestic forum, the model that was based on sharing responsibility for judicial discipline as well as those of other legal professions, including enforcement officers, is unlikely to survive that "reputational hit" since the only "legal opinion" there is on the substance of the matter is that this is incompatible with the European Convention, coupled with the narrative that the original chamber judgment was reversed only "on technicality". Needless to say that it is not only the Czech Republic, but also a number of other countries in Europe that foresee the inclusion of other legal professions into the decision-making on judicial discipline, typically before a tribunal with a mixed composition of judges and non-judges.

What is next?

The chamber treatment of the *Grosam* case raised many eyebrows. The majority acted ultra vires, misinterpreted domestic law, engaged in an abstract review of domestic legislation, and introduced an extreme vision of judicial independence. But the procedure before the ECtHR included further irregularities. It took more than nine years to deliver the chamber judgment, after long periods of inactivity and a series of guiding questions to the applicant. The final deliberation took only place when the term of two judges had expired, and the president of the chamber was a "hold-over" judge. In other words, the majority of the tiniest chamber majority was technically speaking "out of office" already.

Such a singular constellation might be used as an impetus for pondering on the internal functioning of the ECtHR to help prevent judgments such as *Grosam* from being reached. The measures might include increased individual accountability of judge rapporteurs; reconsidering the role of "lame-duck" judges; diffusing and thereby better controlling the role of national judges; a reflection on the practice of setting up the ECtHR's sections and constituting the chambers; and introducing an internal red flag system. Some of those proposals have already been made by others, especially by Judge Albuquerque. However, the *Grosam* saga, which brought a simple inadmissibility case to the Grand Chamber, shows that the ECtHR should take them more seriously than ever. Our piece in the European Law Review on the *Grosam* chamber judgment explores those suggestions in detail.

Conclusion

The Strasbourg Court has recently flexed its muscles in judicial governance issues. By creative interpretation of the notion of "tribunal established by law", it has set new standards for, among other things, the selection of judges, the role of court presidents, the relocation and reassignment of judges, and case assignment. The key takeaway from these judgments ranging from *Astradsson* and *Grz#da* to *Tuleya* and *Lorenzo Bragado* is simple – the member states of the Council of Europe are bound to uphold the rule of law. The *Grosam* saga showed that the Strasbourg Court could be rather easily accused of preaching water but drinking wine itself. That is unacceptable. The ECtHR should abide by its own standards. If it fails to do so, it might end up drinking alone.