Please, Disregard Us: When a Minority of the European Court of Human Rights Declares its own Court to be Ultra Vires

by

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Please, Disregard Us: When a Minority of the European Court of Human Rights Declares its own Court to be Ultra Vires

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Abstract

Even in the tumultuous European judicial landscape of today, it is somewhat unusual to see a minority of a court to declare its own court to be ultra vires and to instruct the losing respondent state to disregard the judgment of the majority. That is nonetheless exactly what happened, in such a sharp and explicit manner for the first time, before the European Court of Human Rights in Grosam v Czech Republic*. This contribution captures the story of that extraordinary case. It starts by explaining national law and practice and mapping out the procedure that led to the judgment. It then critically examines the implications of the judgment, making three broader arguments. First, the majority in* Grosam *violated the principles of subsidiarity and acted indeed ultra vires. Second, it extended the understanding of judicial independence beyond any reasonable limits. In doing so, the judgment fosters an extreme vision of judicial insulation in the name of judicial independence, both at the stages of judicial appointments, but also by excluding any and all lay persons from participation in judicial decision-making. Third,* Grosam *exposes structural shortcomings of the internal functioning of the European Court of Human Rights. This article therefore closes with thoughts on potential institutional changes that could be contemplated in order to prevent judgments with so many substantive and procedural failures from being reached.*

Introduction

At first glance, there is nothing special about the judgment of the European Court of Human Rights (the Court) of 23 June 2022 in *Grosam v Czech Republic*.[1] If one were just to review the headnote of the

[*] Judge. Before joining the Supreme Administrative Court as a judge in 2022, the first author was legal secretary to the Chief Justice at the same court between 2005 and 2009. It could thus be suggested that the author is somewhat biased with regard to the subject matter and the institutions involved. However, in the majority opinion discussed in this article, it is somewhat unclear who exactly was the complainant and who the Court. In view of such blurred roles and cross-casting, a little bias on the part of the author, fully disclosed at the outset, may perhaps be forgiven. All opinions expressed remain strictly personal to the author.

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[1] *Grosam v Czech Republic* (19750/13) 23 June 2022.

judgment and skim through the content without paying much attention to detail, one might be tempted to put the case to one side and consider it to be just another of "those Eastern European rule of law cases" (yet again), which does not attract much attention except for that of true connoisseurs of the Strasbourg jurisprudence and rule of law specialists.

That would be a mistake. *Grosam* is, by all accounts, an extraordinary case. That is perhaps not because of the subject matter: disciplinary proceedings against an enforcement officer in the Czech Republic is not a topic that is likely to stir strong international passions. The reason the case merits attention is its systemic implications regarding the role and function of the Court and the entire Strasbourg system of fundamental rights protection. May the Court construe a case for one of the parties, ignoring any conventionally perceived confines of the proper judicial function? Should the Court be allowed to address issues that were never raised at the national level? Can the Court carry out an "abstract review of compatibility" of national law, entirely detached from the individual case brought before it, where the seemingly problematic issues identified were not even raised in that specific case? The fact that the reasoning itself is built on an incorrect understanding of national law, which finds no reflection in valid law or its actual application in practice at the domestic level, is perhaps indeed just the proverbial cherry on the cake.

Those issues were not unnoticed. A three-judge minority formulated a forceful dissenting opinion to the four-judge majority view. The minority did not mince its words. The dissenting opinion is full of expressions such as "wholly unable to agree", "fundamental disagreement", "grave departure from normal practice", "the instrumentalisation of an individual application by the Court for purposes other than the adjudication of grievances actually presented".[2] The minority then concludes that "In our view, the judgment amounts to an ultra vires act with the consequence that the respondent State can hardly be bound by the indications set out in reliance on art.46 of the Convention."[3]

The Czech Republic picked up on this criticism and appealed the chamber judgment. The case was referred to the Grand Chamber. However, no matter how the Grand Chamber decides the *Grosam* case, it may be suggested that the damage is already done. Moreover, even in this new European judicial era, where declaring another court to be "ultra vires" or its judgment "inexistent" has sadly lost a lot of its previous uniqueness, it is still extraordinary to see a minority opinion of a court openly asking the parties to ignore that Court. What could prompt the minority to declare the judgment of its own court ultra vires and to instruct the respondent State to disregard it?

The argument presented in this article is threefold. First, the Court in *Grosam* invented a case that did not exist before the domestic courts and grossly misinterpreted domestic law. Second, the Court is extending its understanding of judicial independence beyond any reasonable limits. This case shows how a cocktail of exacerbated worst-case scenario arguments, the doctrine of appearances, and abstract review in judicial independence cases can be used to reach any conclusion one wants. If the Court continues in this trend, it may lead, amongst other things, to the exclusion of lay judges from any judicial decision-making and prevent virtually any selection of judges by political actors. Third, the article concludes with thoughts on structural changes that could be contemplated in order to prevent judgments with so many substantive and procedural failures from happening again.

This article is structured as follows. It first sets the stage and details the progress of the *Grosam* case from the domestic courts to the Strasbourg level. Then it shows that the Court built its entire case on a dubious or outright wrong interpretation of the relevant domestic law. Subsequently, it identifies the flaws in the Court's conceptualisation of judicial independence and its repercussions for rule of law cases in general. Finally, it discusses the structural implications of the *Grosam* case. More specifically, it argues

[2] Joint Dissention Opinion of Judges Eicke, Koskelo and Wennerström in *Grosam* (hereinafter the "*Grosam* Dissenting Opinion") at [1], [2], [4] and [21].

[3] *Grosam* (19750/13) 23 June 2022 (Dissenting Opinion) at [25].

that the Court dropped the Convention's key principle of subsidiarity on its head and identifies possible reforms to the internal functioning of the Court.

The curious case of Mr Grosam

Proceedings at the domestic level

Jan Grosam was an enforcement officer in Prague. On 11 November 2008, acting in that official capacity, he drew up an enforcement officer act[4] whereby the debtor (a major internet provider at that period) consented to the enforcement of its debt amounting to CZK 67,762,535 (approximately EUR 2,700,000 at that time). It was stated in the enforcement act that the officer had verified that the person acting on behalf of the debtor (the finance director of the company) was authorised to act on the company's behalf in this matter. [5] It later transpired that the finance director, who signed the enforcement deed on the company's behalf, was not so authorised. Mr Grosam later claimed that he had seen a written authorisation for the given finance director to act on behalf of the company when drawing up the enforcement act. He had simply not made a copy of it for the file.

The Minister of Justice launched a disciplinary action against Mr Grosam before the Disciplinary Chamber for enforcement officers at the Supreme Administrative Court following a complaint made by the debtor company to the Ministry of Justice. Before the Disciplinary Chamber Mr Grosam was unable to establish on the basis of what documentation he had drawn up the enforcement act. The entitlement of the individual finance director to act for the company and to incur debts to such an extent did not follow either from the company's statutes entered in the Commercial Register or from any personal authorisation of the finance director in question. Quite the contrary: the Disciplinary Chamber emphasised that, had Mr Grosam checked the Commercial Register, it would have been immediately apparent to him that the finance director in question was not entitled to act for the company in that way. If an enforcement officer is drawing up a public deed with a person who is not entitled to act for that company according to the Commercial Register, he must be extra vigilant and verify with care any special authorisation. Within such a context, merely to state that he had seen "an authorisation" but did not make a copy for the file amounts to gross professional negligence.

The Disciplinary Chamber therefore concluded that by his grossly negligent conduct Mr Grosam had seriously breached his professional duties when, in the case in question, he had failed to proceed conscientiously and carefully within the meaning of the Rules of Professional Ethics of Enforcement Officers. With regard to the nature and severity of the disciplinary misconduct, the fact that this was neither the first nor an isolated instance of professional misconduct by Mr Grosam[6] and given the immediate severe impact on the company's assets, which suffered considerable financial damage as a result, the Disciplinary Chamber imposed on the applicant a disciplinary measure in the form of a fine amounting to CZK 350,000 (approximately EUR 13,561).

[4] Under Czech law, an enforcement officer act (*exekutorský zápis*) is a public deed. It means that the debtor has accepted the sum owed and the creditor may immediately proceed to enforcement of the sum acknowledged. The enforcement officer act is essentially the equivalent of an enforceable judicial decision on the merits: once it is drawn up, the debtor can no longer challenge the substance or authenticity of the claimed receivable.

[5] The information reproduced in this sub-section relating to the disciplinary proceedings against Mr Grosam originates from the Decision of the Disciplinary Chamber of the Supreme Administrative Court in case (15 Kse 11/2011-60) 25 June 2012. All decisions of the Supreme Administrative Court are accessible online, *https://vyhledavac.nssoud.cz /*.

[6] As appears from Decisions of the Disciplinary Chamber of the Supreme Administrative Court in case (11 Kse 23/2009-100) 12 September 2010; (11 Kseo 4/2009-111) 23 March 2012; (11 Kseo 5/2009-99) 26 January 2012, the case at issue was in fact Mr Grosam's fourth disciplinary conviction within a few years.

Mr Grosam filed a constitutional complaint against the disciplinary court's decision. He claimed that in the course of his disciplinary proceedings the fundamental principles of criminal procedure had been violated. These included the presumption of innocence and the principle of *in dubio pro reo* arising therefrom. He further disagreed with the Disciplinary Chamber's factual findings. Finally, he stated that he had been denied the right of appeal in violation of art.2 seventh Protocol to the Convention. In his view, disciplinary proceedings are criminal proceedings within the meaning of art.6 of the Convention. Thus, the right of appeal in criminal matters guaranteed by art.2(1) of the Protocol was applicable. The exception under art.2(2) of the same provision was not applicable, since disciplinary chambers are only attached to the Supreme Administrative Court, but composed not of judges of that court alone, but equally of lay assessors.

By a decision of 11 September 2012,[7] the Constitutional Court dismissed Mr Grosam's constitutional complaint as manifestly ill-founded. First, as far as the individual case was concerned, the Constitutional Court stated that while it was not for it to review the factual findings or the application of statutory law, the Disciplinary Chamber had assembled and reviewed sufficient evidence. The Disciplinary Chamber's decision was cogently reasoned, dealing with the arguments put forward by Mr Grosam and in substance repeated again in the constitutional complaint. Second, as for the structural arguments relating to the absence of the possibility of an appeal in disciplinary proceedings, the Constitutional Court referred to its previous decision in which it had already approved the new system as constitutional.[8]

The proceedings before the Court

As the dissenting opinion stressed, the procedure before the Court in the *Grosam* case was somewhat unusual.[9] The dissenting opinion stated that the majority had dealt with issues and arguments that were not raised before the domestic courts. It suggested that those complaints and arguments were not even made in the proceedings before the Court itself.

In view of such statements, the authors felt compelled to request, in their personal capacity, access to the application submitted by the applicant and the ensuing parties' written submissions in the *Grosam* case. In application of art.40(2) of the Convention, the Court kindly granted access to those documents from the file.[10] The (in total) four sets of pleadings of the parties, exchanged between 2013 and 2019, in response to various questions put to the parties by the Court, may be summarised as follows:

By his initial application, lodged on 15 March 2013, Mr Grosam (the applicant) brought a complaint under arts 6(1), 6(2) and 6(3)(d) of the Convention and art.2 of seventh Protocol to the Convention. He maintained that the disciplinary proceedings at the national level:

1. Amounted to both a civil obligation and a criminal charge, under art.6(1);
2. Violated the principle of the presumption of innocence under art.6(2) since the Disciplinary Chamber had failed to search for evidence that could allegedly exonerate him;
3. Did not allow the applicant to provide further evidence, such as a witness statement, that could be used in his favour, thereby violating his right to fair trial under art.6(1) and (3)(d) of the Convention;

[7] Decision (I. ÚS 3257/12) 11 September 2012, all decisions of the Constitutional Court, *https://nalus.usoud.cz /Search/Search.aspx*.

[8] Plenary Decision of the Constitutional Court in case (Pl. ÚS 33/09, 332/2010 Coll.) 29 September 2010.

[9] *Grosam* (19750/13) 23 June 2022 (Dissenting Opinion) at [2]–[4] and [10]–[13].

[10] The request was submitted by a letter of 23 June 2022. By a Decision of 4 July 2022, the Court granted the access pursuant to art.40(2) of the Convention. The documents obtained are on file with the authors.

4. The Constitutional Court did not properly deal with the constitutional complaint made by the applicant. The Constitutional Court's reasoning was said to be too short and full of general statements which had no direct connection with the case being dealt with;
5. There was no (full) appeal under national law against a decision of the Disciplinary Chamber, a fact which amounted to a violation of art.2 seventh Protocol to the Convention. Since the disciplinary court's decision was criminal in nature, the applicability of that provision and the guarantee under art.2(1) was triggered. Disciplinary proceedings are not "an offence of minor character" to which the exception of art.2(2) could be applicable. Equally, the Disciplinary Chamber of the Supreme Administrative Court is not a "highest tribunal" within the meaning of that provision. It is composed not only of judges of the Supreme Administrative Court, but equally of lay assessors, who do not meet the standards required of supreme court judges.

By letter of 23 September 2013 the Court notified the Government of the Czech Republic (the Government) of the application. The Court invited the Government to submit its observations on the admissibility and merits of the application, and in doing so to provide answers to the following questions:

"1. Was Article 6 § 1 of the Convention under its civil and/or criminal head applicable to the proceedings in the present case? Was Article 2 of Protocol no. 7 to the Convention also applicable?
2. Assuming that Article 6 § 1 of the Convention was applicable, did the applicant at all stages of the proceedings have access to a court satisfying all the requirements of this provision, including the right to a reasoned decision?
3. Assuming that Article 2 of Protocol no. 7 was applicable, was the applicant afforded the right to have his conviction or sentence reviewed, as envisaged by paragraph 1 of that article? If not, did the absence of an appeal in the present case fall within the exceptions laid down by paragraph 2?"

In its first written submissions the Government objected to the fact that the questions put to it by the Court went beyond the applicant's claims. The applicant did not make any claim in his application suggesting that his right of access to a "tribunal" had been denied at the domestic level. Nor did he in fact claim that the Disciplinary Chamber's decision in his case contained insufficient reasoning.[11]

The parties subsequently reacted to each other's submissions in the second set of pleadings (additional observations), in which the Government again submitted that the scope of the case following the questions posed by the Court was moving beyond the scope of the case as brought forward by the applicant.[12]

By a letter of 6 October 2015, the Court posed a further set of questions to the parties. They were worded as follows:

> "Assuming that Article 6 § 1 of the Convention is applicable in the present case, was the applicant's right to a hearing by 'a tribunal established by law' as provided for in Article 6 § 1 of the Convention respected in the present case? In particular:
> (i) Did the disciplinary chamber in the present case meet the requirements of 'a tribunal' within the meaning of Article 6 § 1 of the Convention taking into account its composition, and did it provide sufficient guarantees of professional judicial expertise; and

[11] Observations of the Government on the Admissibility and Merits of the Application of 9 January 2014 at [1] and [66]–[67].

[12] Additional Observations of the Government on the Admissibility and Merits of the Application and on the Applicant's Claims for Just Satisfaction of 12 March 2014 at [2].

(ii) Did the manner of selection of persons to be included in the list of lay assessors of the disciplinary chamber satisfy the requirements of transparency, clarity and protection against arbitrariness?"[13]

While providing an answer to those questions, the Government strongly objected to "the questions posed by the Court go[ing] far beyond the applicant's complaints in the proceedings before the Court", contesting the admissibility of those issues.[14] The same view was expressed in further observations submitted in reaction to the applicants' submissions.[15]

By a further letter of 26 September 2019, the Government was invited to submit the following information: "What were the comments raised and amendments requested by each of the stakeholders during the consultation procedure of a bill of law, which would change the composition of chambers (or appointment) in disciplinary proceedings against enforcement officers?"[16]

In its reply, the Government expressed strong bewilderment about the relevance of the discussion relating to possible future amendments to that law, at that moment (that is to say, in 2019) not yet enacted, would have for the settling of an individual case that took place years earlier. It again underlined that it is not the task of the Court to carry out an abstract review of national law or practice disconnected from the individual case.[17]

It is equally instructive to read the applicant's submissions and to see how his arguments shifted in reply to the questions put by the Court. While the initial statement in reaction to the Government's reply remained, at least largely, within the framework of the original submissions,[18] it is the second and third sets of replies,[19] submitted in reply to the Court's own additional questions, in which elements that were subsequently crucial to the majority decision first appear. It was then, in the applicant's latest, in fact, fourth submissions, made in 2019, that he finally raised the points that have been incited by the successive rounds of questions put by the Court: the issue of whether the Disciplinary Chamber was a tribunal established by law and the manner in which its members were selected.

The judgment of the Court

By a four to three majority, the Court 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. Therefore, in the view of the majority, the applicant was denied his right to an "independent and impartial tribunal" on the basis that his case, having been heard by the Disciplinary Chamber, did not satisfy those requirements. In addition, the applicant could not appeal the decision, since the Constitutional Court could not fully rehear his case.[20] As a result, the very essence of the right at issue was impaired. Accordingly, there had been a violation of art.6(1) of the Convention in this respect.[21]

[13] Response of the Government to Additional Questions of the Court of 13 November 2015 at [3].
[14] Response of the Government to Additional Questions of the Court of 13 November 2015 at [5]–[10].
[15] Observations of the Government to the Applicant's Complementary Observations to the Court's Additional Questions of 11 December 2015 at [3]–[4].
[16] Response of the Government to an Additional Question of the Court of 11 October 2019 at [3].
[17] Response of the Government to an Additional Question of the Court of 11 October 2019 at [4]–[8].
[18] Plaintiff's statement regarding the Government's Opinion of 9 January 2014.
[19] Statement of complainant pertaining to the summons of the court dated 16 October 2015 of 5 November 2015 and Statement of the complainant pertaining to the summons of the court dated 20 November 2015 of 10 December 2015 (Note by the authors—the translations of the titles of the procedural documents are those of the applicant).
[20] *Grosam* (19750/13) 23 June 2022 (Majority Opinion) at [147]–[149].
[21] *Grosam* (19750/13) (Majority Opinion) at [146] and [150]–[151].

The majority began its reasoning by asserting jurisdiction under the civil prong of art.6(1). Having set out the applicant's submissions, the Court framed the case as follows:

> "In the present case, the applicant has objected to the composition of the disciplinary chamber of the Supreme Administrative Court, namely how it was designated by law and the consequences for the case at hand. In particular, he complained that the professional judges were in a minority (comprising two out of six members) and that the procedure for selecting the other four members (lay assessors) lacked adequate safeguards to guarantee their independence and professional expertise, which in turn cast doubt on the independence and impartiality of the disciplinary chamber as a whole. Accordingly, there is no issue concerning the judges of the disciplinary chamber or their appointment process. In addition, the applicant did not allege any subjective bias on the part of the chamber; therefore, the Court is only concerned with objective impartiality."[22]

The Court thus accepted that the Disciplinary Chamber of the Supreme Administrative Court was "established by law"[23] and that no subjective bias of any members of the Disciplinary Chamber had been shown.[24] As a result, it focused primarily on the requirements of "independence" and "impartiality" of the disciplinary tribunal.[25]

Pursuant to the "independent tribunal" requirement, the Court examined: (1) the manner in which the members of the Disciplinary Chamber are appointed; (2) the duration of their appointment; (3) the guarantees against outside pressure; and (4) the appearance of independence.[26] It found the duration of the members' appointment to be compatible with the Convention.[27] However, it identified flaws under the remaining three criteria.

First, the Court stated that there were no predetermined selection criteria for the way in which the lists from which the lay assessors were selected by lot by the President of the Supreme Administrative Court in the presence of all judges of that court for an office period of five years were to be compiled.[28] In particular, the Court believed that "the list of lay assessors who were enforcement officers included ten enforcement officers nominated by the President of the Chamber of Enforcement Officers without any predetermined selection criteria or otherwise transparent process. The only objective condition was that the candidates had to have held office for three years and satisfied the subjective condition of good moral character. The President of the Chamber of Enforcement Officers was otherwise allowed full discretion in his selection."[29]

Second, the Court criticised the absence of guarantees for lay assessors in the disciplinary panels against outside pressure.[30] There, the Court seemed to be concerned with assessors' material, hierarchical, and administrative dependence on their primary employers, which were not the Disciplinary Chamber. With regard to assessors from the ranks of enforcement officers, the Court noted that the Minister of Justice was able to initiate disciplinary motions against enforcement officers.[31] Moreover, the enforcement officer assessors' remuneration for those days when sitting as members of the Disciplinary Chamber was set by

[22] *Grosam* (19750/13) (Majority Opinion) at [117].
[23] *Grosam* (19750/13) (Majority Opinion) at [116].
[24] *Grosam* (19750/13) (Majority Opinion) at [117] and [141].
[25] We leave aside the somewhat confusing discussion of the notion of "tribunal", where the Court mixes together the technical competence and moral integrity of judges, public confidence in the judiciary, personal independence, and impartiality of judges without a clear conclusion (*Grosam* (19750/13) (Majority Opinion) at [119]–[122]).
[26] *Grosam* (19750/13) (Majority Opinion) at [125].
[27] *Grosam* (19750/13) (Majority Opinion) at [133] (albeit with the reasoning that addresses neither the length of their term nor the threats of dismissal).
[28] *Grosam* (19750/13) (Majority Opinion) at [130]–[132].
[29] *Grosam* (19750/13) (Majority Opinion) at [130].
[30] *Grosam* (19750/13) (Majority Opinion) at [134]–[139].
[31] *Grosam* (19750/13) (Majority Opinion) at [136].

a regulation of the Ministry of Justice.[32] Regarding assessors from the ranks of public prosecutors, the Court criticised that that prosecutors are part of the executive. Moreover, the Minister of Justice may also (as well as against the assessors from the ranks of enforcement officers) launch disciplinary proceedings against them.[33] All in all, two or even three (if one counts the public prosecutor) members of the Disciplinary Chamber could be under the Minister's influence.[34]

Third, under the veil of judicial independence, the Court reiterated its concerns about the pre-selection process, which allegedly left the selection process "entirely in the hands of the nominating persons", the lack of guarantees against outside pressure, and the close proximity to the Minister of Justice of at least some of the lay assessors.[35] Without further reasoning, the Court also stated that "the manner of the appointment of lay assessors in the present case completely differed from the general arrangements for the appointment of lay assessors in the Czech legal system".[36]

Finally, under the requirement of "impartial tribunal" the Court shared "the applicant's concerns that the two enforcement officers who were sitting as lay assessors in the disciplinary chamber and hearing his case, that is to say, one-third of the chamber's members, were the applicant's direct competitors."[37] The Court did not elaborate on that point any further, although it had previously noted that there was no territorial jurisdiction for enforcement officers in the Czech Republic.[38] However, since it included that point under the heading of the (lack of) an impartial tribunal, it would appear that that element also contributed to the Court's conclusion as regards the lack of a guarantee of the independence and impartiality of assessors from the ranks of enforcement officers. In this respect, the Court appears to be insinuating that enforcement officers cannot sit in disciplinary chambers that adjudicate upon their own colleagues/competitors.[39] They would presumably pass harsher sentences in order to remove their competitors, thus seizing their business for themselves.

As a result, the majority found there to be a violation of the applicant's right to an "independent and impartial tribunal" because his case had been heard by the Disciplinary Chamber which did not satisfy the abovementioned requirements of independence and impartiality. However, the majority equally triggered the application of art.46 of the Convention and ordered the Czech Republic to adopt appropriate general measures in order to solve the problems that have led to the Court's findings and to prevent similar violations from taking place in the future.[40]

Nevertheless, the Court reached that conclusion only by the slimmest of margins of four to three. 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;[41] (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;[42] 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,

[32] *Grosam* (19750/13) (Majority Opinion) at [136].
[33] *Grosam* (19750/13) (Majority Opinion) at [137].
[34] *Grosam* (19750/13) (Majority Opinion) at [138].
[35] *Grosam* (19750/13) (Majority Opinion) at [140].
[36] *Grosam* (19750/13) (Majority Opinion) at [140].
[37] *Grosam* (19750/13) (Majority Opinion) at [145].
[38] *Grosam* (19750/13) (Majority Opinion) at [144].
[39] *Grosam* (19750/13) (Majority Opinion) at [145].
[40] *Grosam* (19750/13) (Majority Opinion) at [168].
[41] *Grosam* (19750/13) (Dissenting Opinion) at [3], [5(i)], [8]–[9], [18], [20].
[42] *Grosam* (19750/13) (Dissenting Opinion) at [3], [5(ii)], [10], [12], [18], [20].

according to the Court's established case law, is not its task.[43] 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,[44] that the judgment amounted to an ultra vires act,[45] that the majority had instrumentalised an individual application for purposes other than the adjudication of grievances actually presented to it by the applicant[46] and had ignored respect for the rule of law.[47] One can hardly find a more scathing dissent in the Strasbourg Court's history.

Setting the record straight: "the assumptions" about the domestic law and facts

One last element needs to be addressed before a discussion of the core substantive and structural aspects raised by the *Grosam* case can be carried out: the actual law and application practice at the domestic level. Relying only on the information provided by the majority opinion, one would assume that something suspicious is happening in Czech law, where arbitrarily composed tribunals are dismissing enforcement officers at the whim of the Minister of Justice. This section therefore sets the record straight. It first explains the genesis and the purpose of the current institutional model of disciplinary chambers, and then it challenges the assumptions which the majority made about the national law and practice.

The inception: disciplinary proceedings in a transforming society

Where did the Disciplinary Chamber against enforcement officers come from? The narrative of the majority opinion, setting out the legal framework and practice, together with the subsequent evaluation of that practice, gives the impression that the Disciplinary Chamber at the Supreme Administrative Court simply emerged out of the blue, without any reasons or justification, and departed from domestic practice in selecting lay assessors. The subliminal message is clear: a strange model was created without any reflection or due deliberation.

That is incorrect. It all started with judges and judicial discipline or, more precisely, with the issue of the (ir)removability of court presidents. Following the judgment of the Constitutional Court in *Brožová v Klaus*,[48] it became clear that, while the President of Republic appoints the President of the Supreme Court, the former cannot remove the latter. By extension, the same logic became applicable to presidents of lower courts, appointed by the Minister of Justice. All court presidents became de facto irremovable. That fact, together with a very low level of trust in the (then) existing system of disciplinary proceedings against judges, led to the idea of overhauling the entire system of judicial discipline and subjecting both judges and judicial officials (court presidents, vice-presidents, and presidents of judicial divisions at supreme courts) to one and the same system of disciplinary proceedings.

There was, however, little appetite for continuing with the system of purely intra-judicial disciplinary proceedings. The problems of that model, whether perceived or in fact real, were threefold: social irresponsiveness, false professional solidarity, and the overall length of proceedings caused by what were de facto three instances. All that gave rise to the public image of judges as an unduly privileged elite, not accountable to anybody. Even if, exceptionally, a judge was subjected to disciplinary proceedings, "the colleagues" would make sure that within the five to seven years that the three instances of disciplinary proceedings would take (High Court—Supreme Court—Constitutional Court seized by the constitutional complaint of the judge concerned), the case would be dropped at some stage, or would drag on forever if

[43] *Grosam* (19750/13) (Dissenting Opinion) at [3], [5(iii)], [21]–[24].
[44] *Grosam* (19750/13) (Dissenting Opinion) at [25].
[45] *Grosam* (19750/13) (Dissenting Opinion) at [25].
[46] *Grosam* (19750/13) (Dissenting Opinion) at [21].
[47] *Grosam* (19750/13) (Dissenting Opinion) at [26].
[48] Plenary Decision of the Constitutional Court in case (Pl. ÚS 18/06, 397/2006 Coll.) 17 July 2006.

the judicial decisions concerning the disciplined judge were annulled and remitted for fresh assessment by any of the instances.

These problems were not abstract, but real. For instance, disciplinary proceedings against the then Vice-President of the Supreme Court for his alleged interference with a pending criminal case against a government minister took so long that the vice-president reached compulsory retirement age and the disciplinary proceedings were therefore discontinued. In another case, a judge who overslept, missed a scheduled hearing, and then faked the transcript of that hearing was subjected to a mere salary reduction. Such false professional solidarity, widely reported in the media, contributed to a significant reduction in public confidence in the Czech judiciary.

It was within that context that the 2008 overhaul of disciplinary proceedings against judges sought to try something new. First, it sought *inclusion*. Henceforth, judges against whom disciplinary motion was initiated were supposed to be judged not only by supreme judges, often detached for many years from day-to-day practice of rank-and-file judges at lower courts, but also by a judge from a lower court sitting as a member of the disciplinary panel. Second, members of *other legal professions* were invited to participate in passing ethical judgments on potential judicial misconduct: one prosecutor, one attorney, and one legal scholar. Thus, the disciplinary chamber for judges has six members: three professional judges (the presiding judge of the Supreme Administrative Court, her deputy from the Supreme Court, one lower court judge) and three assessors (a public prosecutor, an attorney and a legal scholar).[49] Third, the disciplinary chambers were created within the Supreme Administrative Court, i.e. *at the highest level* of the judicial structure. The guiding principle was that there would be one system for all judges, irrespective of "rank". Since these chambers operated at the highest level and were composed in such a special way, with constitutional complaint by the judge concerned against the disciplinary chamber's decision always being possible, no further appeal was provided for.[50]

The 2008 overhaul of the system of disciplinary proceedings against judges was criticised, most strongly by the judges themselves. The key points of contention were the fact that "non-judges" would be asked to co-decide on judicial misconduct and the absence of the possibility of (full) appeal. The overall impression was that the overhaul was adopted in order to get "tougher" on judges. That impression turned out to be false. Subsequent empirical studies clearly showed that since 2009 the new disciplinary chambers have become more lenient in terms of sanctioning matters of judicial discipline than when judges alone judged judges.[51]

What have nonetheless ceased, are accusations of false professional solidarity. In fact, the other legal professions, the Czech Bar Association, the Prosecutor General's Office, and the deans of the public Law Faculties in the Czech Republic, who were all asked to nominate people for the lists from which the members (assessors) of the disciplinary chamber(s) were selected for a five-year period of office, took their nomination power seriously. They nominated candidates with many years of experience in their respective professions who were considered to be an asset to the decision-making of the disciplinary chambers. Their input would not be limited to "mere representation" of their profession. They also provide valuable insights in terms of views, perceptions, and how another profession operates that a career judge is unlikely to possess.

[49] The disciplinary chamber for public prosecutors, established at the same time, also has six members, but a slightly different composition: two professional judges (the presiding judge of the Supreme Administrative Court and her deputy from the Supreme Court) and four assessors (two public prosecutors, an attorney, and a legal scholar).

[50] Cf. in particular the explanatory memorandum to the bill submitted by the Government to the Parliament, Parliament print No. 425 in the V. Election Period (2008), pp.23–30.

[51] See D. Kosař and T. Papoušková, "Přinesla "Pospíšilova" reforma kárného řízení skutečně zpřísnění kárného postihu českých soudů?" ["Has the Judicial Reform of Disciplinary Proceedings Prepared by Minister of Justice Pospíšil Led to Stricter Disciplining of Judges?"] (2017) 25 *Časopis pro právní vědu a praxi* 219.

The initial *exposé* was necessary in order to explain the context within which about a year later, in 2009, a similar procedural and institutional model, previously designed with regard to judges and public prosecutors, was introduced for enforcement officers as well.[52] There, the historical and social context is also of some importance.

Before 2001, civil enforcement in the Czech legal system was entrusted to the civil courts. In the 1990s, the enforcement departments within the civil courts were understaffed and, as a result, underperforming. In 2001, a new profession was thus established: that of enforcement official (civil enforcer). When exercising public power (the enforcement of debts), the enforcement official received remuneration commensurate with the debt being enforced.

That income-related economic motivation for carrying out a professional activity did indeed secure the desired aim: a considerable increase in the enforcement of civil claims in the Czech Republic. However, in the second half of the 2000s, it became apparent that the system of civil enforcement had perhaps gone too far, from "no enforcement" to "overenforcement". The practices of some larger enforcement offices became nefarious and notorious. The newspaper articles of the (not just tabloid) press became filled with horror stories of completely disproportionate debt enforcement practices, when the penalty of a few hundred crowns for unpaid tram tickets quickly turned into tens of thousands of crowns for debt enforcement businesses, run by select enforcement officers and attorneys, or other wholly inappropriate debt collecting and enforcement practices. At the same time, it was widely believed that the disciplinary committee of the Chamber of Enforcement Officers, which was originally tasked with discipline within that rather small profession, was unable or unwilling to rein in those practices.[53]

Within such context, in 2009 the Czech Parliament adopted a complex amendment to the organisation and work of enforcement officers, which quickly became nicknamed "the sanction amendment".[54] The imperative of the day became that "anybody but the Enforcement Chamber" had to be called to enforce minimal standards for the behaviour of enforcement officers. It was in such context that the new procedural design was swiftly passed in the Czech Parliament.[55] That design was indeed unusual when compared with the other two self-administering chambers of legal professionals, notably the Czech Bar Association and the Czech Chamber of Notaries. The latter carry out their own disciplinary review primarily within the respective chamber bodies, which may only thereafter be subject to judicial review.

This is how the special Disciplinary Chamber for Enforcement Officers at the Supreme Administrative Court came into being. It can thus hardly be maintained that it is unclear exactly why it came about. If one wishes to look, one will easily find the explanation. That is certainly not to say that the procedural or institutional blueprint adopted with regard to the disciplinary chambers for judges, public prosecutors, and later for enforcement officers at the Supreme Administrative Court are flawless. Indeed, the discussion and the doubts expressed over the years, in particular with regard to the disciplinary panels for judges and state prosecutors, have mostly focused on the absence of a full appeal to the second-instance court. The counter argument to that would normally point to the special nature of the proceedings, which may not

[52] Law No.183/2009 Coll., but then in particular by Law No.286/2009 Coll., which provided a complex amendment to the rules and operation of Law No.120/2001 Coll., on Enforcement Officers.

[53] Some 150 or so members of the profession of enforcement officers united in the Enforcement Chamber were supposed to select from amongst themselves the members of both the disciplinary chamber (first instance) and the disciplinary committee (second instance), with the overall procedure set out in arts 116–123 of Law No.120/2001 Coll., in the version adopted in 2001.

[54] K. Šimka, "Kárná řízení u Nejvyššího správního soudu a soudní exekutoři" ["Disciplining Enforcement Officers before the Supreme Administrative Court"] (2019) 1 Komorní listy 10; or Zdeněk Kühn, "Kárná provinění exekutorů" ["Disciplinary Offences of Enforcement Officers"] (2020) 10 *Soukromé právo* 20.

[55] As stated by the Constitutional Court in in its Plenary Decision in case (Pl. ÚS 38/09, 269/2011 Coll.) 3 August 2011 at [7]–[11], of the 160 Members of the Chamber of Deputies present, 151 were in favour, with none voting against. As stated by the Parliament, the aim was immediately to remove competence from the dysfunctional disciplinary bodies of the Chamber, and transfer it to another, independent (sic!) organ.

necessarily be complex in terms of the law, but are sensitive in terms of moral judgement.[56] Moreover, in order to preserve one system that would be the same for all judges irrespective of hierarchy, where else could the Disciplinary Chamber be put? Finally, in any event, there is a possible "asymmetrical appeal" in the form of a constitutional complaint to the Constitutional Court. It is true that that review is limited only to instances of obvious excess and instances of arbitrariness, but in reality it covers whether the judgement reached by the Disciplinary Chamber is supported by the evidence and properly reasoned.[57]

In sum, the new design has been a social experiment, opening up the disciplinary decision-making regarding judges, state prosecutors, and later also enforcement officials, to the participation of other professions. While, for the reasons explained in this section, that model has been contested, no serious argument has ever been raised in the domestic forum that disciplinary chambers created in this way would lack independence or impartiality on account of their improper composition in individual cases. Moreover, both the systems of disciplinary chambers, relating to enforcement officers as well as those relating to judges, have passed repeated scrutiny before the Constitutional Court, both on their abstract review of constitutionality,[58] and in dozens of specific cases brought by way of constitutional complaints from the sanctioned judge, prosecutor, or enforcement officer concerned, as was also the case with Mr Grosam.[59]

The "absence of sufficient safeguards"

The model that was put in place by the amendment to the 2002 Disciplinary Code in order to implement those ideas established a dedicated Disciplinary Chamber for Enforcement Officers at the Supreme Administrative Court. All six members of that Disciplinary Chamber (and their possible substitutes) are chosen by lot at the plenary meeting of all judges of the Supreme Administrative Court. The president of the chamber (a judge of the Supreme Administrative Court) is chosen by lot from the members of that court. The same procedure is followed for the vice-president of the chamber, who is chosen by lot from among the judges of the Supreme Court. There are four further members of that chamber: two enforcement officers, one attorney, and one person nominated by the Ombudsperson. The two enforcement officer members are also chosen by lot from a list of 10 people nominated by the President of the Chamber of Enforcement Officers. The one attorney is selected in the same way from a list of 10 people nominated by the President of the Czech Bar Association. The one member nominated by the Ombudsperson is chosen by lot from a list of five nominees submitted by the Ombudsperson.[60]

The members of the chamber selected in this manner are sworn in at the subsequent plenary meeting of the Supreme Administrative Court for a term of office of five years. The chamber decides by a simple majority vote. In order to convict someone of a disciplinary offence a 4:2 majority is needed,[61] which in practice means that there must be broad consensus across the various legal professions represented that a disciplinary offence has been committed. No legal profession can effectively be outvoted.

This model was challenged by the Court because of the absence of sufficient safeguards on four grounds: (1) the absence of criteria for selecting nominees as lay assessors; (2) insufficient guarantees for lay

[56] In reality, the majority of cases of judicial discipline in a career Continental judiciary involve undue judicial delays caused by various factors from personal burnouts and issues to structural issues in the management of a court.

[57] For both judges and state attorneys, as well as enforcement officers. That was also the case for the complainant in the present case, whose constitutional complaint was rejected by a Decision in case (I. ÚS 3257/12) 11 September 2012.

[58] Plenary Decision of the Constitutional Court in case (Pl. ÚS 33/09, 332/2010 Coll.) 29 September 2010. The case concerned the disciplinary chamber in matters of judges and public prosecutors, but its findings have also been extended to the disciplinary chamber in matters of enforcement officers by Plenary Decision of the Constitutional Court case (Pl. ÚS 38/09, 269/2011 Coll.) 3 August 2011.

[59] Decision of the Constitutional Court in case (I. ÚS 3257/12) 11 September 2012.

[60] Article 4b Law No.7/2002 Coll., the Code of Disciplinary Procedure with Judges and Prosecutors.

[61] Article 4b(7) Law No.7/2002 Coll.

assessors sitting on the disciplinary panels against outside pressure; (3) a lack of appearance of independence; and (4) the fact that the two enforcement officers sitting as lay assessors in the six-member disciplinary chamber were the applicant's direct competitors.

First, as regards the allegedly unclear selection criteria, the Court, when carrying out its substantive assessment, apparently overlooked art.5(2) of the Disciplinary Code.[62] The numerous requirements contained in that provision, which are in fact the same as those for appointment to judicial office in the Czech Republic, are then coupled with the requirement that all enforcement officers must have passed their respective professional examination, which is of the same standing as the judicial examination. Moreover, in practice, which again appears to be of no consequence to the Court, the presidents of the respective professional bodies, the Chamber of Enforcement Officers included, have always nominated rather senior members of their profession. In reality, therefore, the assessors must by law possess comparable professional qualification to those of higher court judges.

As far as "full discretion"[63] is concerned, that argument is difficult to grasp. Of course, the respective professional bodies (the Czech Bar Association, the Chamber of the Enforcement Officers, the Ombudsperson, and, for disciplinary chambers for judges and public prosecutors, the Prosecutor General or the deans of public law faculties) have discretion to choose which of their members who satisfy all the legal criteria they will nominate. Yet, they do not appoint the members of the Disciplinary Chamber themselves. Regarding the enforcement officers, the Chamber represented by its President establishes a list of 10 people. All of them must fulfil all the criteria. From that list, two members of the disciplinary chamber in matters of enforcement officers are chosen by the Supreme Administrative Court itself, for the entire period of office lasting five years, by lot in a public hearing, in the presence of all the judges of the Supreme Administrative Court.

In view of the existence of such a process having regard to professional criteria and selection, one cannot but be puzzled about what exactly the Court appeared to imply: that the President of the Enforcement Officers would intentionally nominate a list of 10 biased or outright corrupt people in order to secure influence on the decision-making of the Disciplinary Chamber, irrespective of which two people were chosen by lot?[64] Is it credible to suggest that those "biased members" might then do that President's bidding for the next five years and that those two—who are in a disciplinary chamber of six members—might be able to do that without anybody else in that chamber noticing and raising concerns? Or that such clearly biased people might be able to influence the other members of the disciplinary chamber, including two supreme court judges, given that a four-person majority is required in order to convict other enforcement officers?

Second, regarding the alleged lack of guarantees against outside pressure, the Court's reasoning is baffling. First, the Court does not appear to have even correctly identified the members of the Disciplinary Chamber in Mr Grosam's case. Most of its reasoning regarding potential outside pressure concerned the public prosecutor, but in Mr Grosam's case, as in all disciplinary cases against enforcement officers, *there was no public prosecutor sitting in the disciplinary chamber*. Presumably, however, such a "technical detail" does not matter in the world of hypothetical "abstract review".

For the rest, the reasoning of the majority is even less persuasive. Does the fact that the Minister of Justice (among other actors) may initiate disciplinary proceedings against enforcement officers for their professional misconduct mean that those officers are no longer independent? If that is true, then there are presumably no independent judges in the Czech Republic (and in most of the other States in Europe), since it is typically one of the competences of a Minister of Justice in Continental legal systems to bring disciplinary proceedings against judges? Even if one were to ignore those speculations of the majority,

[62] While it has reproduced it at [32] of the judgment.
[63] *Grosam* (19750/13) 23 June 2022 (Majority Opinion) at [130].
[64] *Grosam* (19750/13) 23 June 2022 (Majority Opinion) at [130].

the Grand Chamber emphasised that the fact that judges are subject to the law in general, and to the rules of professional discipline and ethics in particular, cannot cast doubt on their impartiality.[65] The majority also overlooked the fact that Czech law affords the same guarantees of independence and impartiality to lay assessors as it does to judges, including the criminalisation of any attempts to affect their decision-making. Hence, there clearly are, in contrast to what the majority is implying,[66] guarantees against outside pressure.

The same applies to the concerns about the Minister of Justice influencing the two enforcement officers sitting on the disciplinary chamber by setting the general tariffs for the remuneration and compensation of all enforcement officers, i.e. for the entire profession. In that parallel reality, it appears that the Minister would be misusing his general power to set the compensation for individual acts performed by all enforcement officers in order to put targeted pressure on two particular enforcement officers and influence their contribution to decision-making in the Disciplinary Chamber. In a similar vein, in the Czech Republic, the Minister of Justice also sets the general tariffs of attorney fees, on which the default costs in judicial proceedings are set. Does that then mean that all the attorneys in the Czech Republic are not independent?

Third, the majority also relied on the doctrine of appearances. This doctrine, while arguably undertheorised, is deeply embedded in the case law of the Court,[67] domestic courts,[68] and, more recently, also the Court of Justice.[69] It is based on the maxim that "justice must not only be done, it must also be seen to be done".[70] In a nutshell, not only being independent, it is of vital importance that judges are seen to be both independent and impartial.[71] According to the Court, the standpoint of a party is important but not decisive: what is decisive is whether the fear of the party concerned can be held to be "objectively justified".[72] Therefore, no problem arises as regards independence when the Court is of the view that an "objective observer" would see no cause for concern about it in the circumstances of the case at hand.[73] The Court has pointed out that the public's increased sensitivity to the fair administration of justice justified the growing importance attached to appearances. The recent judgments discuss this aspect of judicial independence and impartiality at length.[74]

However, the majority just restated, in a single paragraph, several claims addressed earlier and held that the pre-selection process of lay members of the disciplinary panels was not transparent and clear, that

[65] *Ramos Nunes de Carvalho e Sá v Portugal* (55391/13) and two others, 6 November 2018 at [163].

[66] *Grosam* (19750/13) 23 June 2022 (Majority Opinion) at [134]–[139].

[67] See the early case law, for instance, *Sramek v Austria* (8790/79) 22 October 1984 at [42]; and *Findlay v United Kingdom* (22107/93) 25 February 1997 at [73].

[68] For instance, it was for this reason that the UK House of Lords in the *Pinochet* case in 1999 held that a decision it had given had to be set aside and the appeal before it would be heard again by a panel of different Law Lords. It had come to light after the original decision that one of the Law Lords might have given an appearance that he was not independent and impartial because of a connection with a campaigning organisation which was involved in the case. In those circumstances, and even though there was no suggestion that the Law Lord was not in fact independent or impartial, the decision could not stand. Justice demanded that the appeal be heard again before a panel of Law Lords who appeared to be independent and impartial to reasonable well-informed observers.

[69] See, in particular, *AK v Krajowa Rada Sadownictwa* (C-585/18, C-624/18 and C-625/18) EU:C:2019:982; [2020] 2 C.M.L.R. 10 at [135]–[154].

[70] See *Micallef v Malta* (17056/06) 15 October 2009 at [98]; and *Denisov v Ukraine* (6639/11) 25 September 2018 at [63].

[71] *Oleksandr Volkov v Ukraine* (21722/11) 9 January 2013 at [103]; *Ramos Nunes* (55391/13) 6 November 2018 at [144] and [149]; and *Grace Gatt v Malta* (46466/16) 8 October 2019 at [85]–[86].

[72] *Sacilor-Lormines v France* (65411/01) 9 November 2006 at [63]; and *Grace Gatt v Malta* (46466/16) 8 October 2019 at [85].

[73] *Clarke v United Kingdom* (23695/02) 28 May 2005.

[74] See e.g. *Ramos Nunes* (55391/13) 6 November 2018 at [157]–[163]. See also the detailed analysis of the relevant criteria in the ECJ's "test of appearances" in *AK v Krajowa Rada Sadownictwa* (C-585/18, C-624/18 and C-625/18) EU:C:2019:982 at [135]–[154].

the selection process was entirely in the hands of the nominating persons, and that the appearance of independence was also affected by the lack of guarantees against outside pressure and the close proximity to the Minister of Justice of at least some of the lay assessors.[75] Such propositions remain unexplained.[76] Again, lay members of the disciplinary panels are selected by lot[77] in a highly objective process which makes it impossible to predict which of the 10 nominees from each profession will eventually be chosen. Yet, perhaps above all, the disciplinary chamber is randomly chosen from *five different lists of people*. It is hard to conceive of a structurally more robust system of separation of powers and checks and balances. It is impossible to imagine how one mastermind would be able to influence all such nominees, all coming from very different professional backgrounds.

In addition, the majority equally stated, without further analysis, that the manner in which the lay assessors of the disciplinary panel were appointed in the present case differed from the general arrangements for the appointment of lay assessors in the Czech legal system.[78] That proposition is again puzzling. First, there is not one, but several, types of lay assessors in the Czech judicial system. In selected criminal proceedings, lay assessors are elected by municipal (for district courts) and by regional (for regional courts) councils. Candidates are nominated by members of the relevant council. In employment disputes, which the majority altogether failed to mention in the judgment, there are two lay assessors in the first instance court, one nominated by the employers and the other by the trade unions. Thus, contrary to the Court's claim, there is *no general arrangement* for the appointment of lay assessors in the Czech legal system as there are several different arrangements reflecting the different roles of lay assessors in different types of judicial proceedings.

What is more important is that in both criminal and employment disputes the pre-selection process for lay members is much less transparent than in disciplinary proceedings before the Supreme Administrative Court. Hence, if the lay assessors of the disciplinary panels are appointed differently than other lay assessors in the Czech legal system, it is in a positive way, not vice versa. To put it bluntly, the selection of lay assessors in disciplinary chambers is the most bulletproof there is, certainly within the Czech legal system. However, even leaving that to one side, the very fact that the lay members of the disciplinary panels are chosen in a different way from lay people in other proceedings does not, in itself, reduce the appearance of independence.[79]

Fourth, as regards the Court's argument that the lay assessors of the Disciplinary Chamber drawn from the list of enforcement officers were the applicant's direct competitors, the Court is again mistaken, at least given the data that exist. First, one could not but admire the sly skills of one or even two enforcement officers, sitting in a chamber composed of other highly esteemed members of their respective legal professions, who were able to convince the other members of the Disciplinary Chamber, including two supreme court judges, to simply "remove a competitor" they did not like or whose business they wished to seize. Second, even if successful in removing that "competitor" from her office, the sly manipulators would not be able to obtain her business under Czech law, since the network of enforcement officers is firmly set in advance by the Ministry of Justice. All that would happen would be that the Minister of

[75] *Grosam* (19750/13) 23 June 2022 (Majority Opinion) at [140].

[76] Note that the majority refers in its analysis of the appearances (*Grosam* (19750/13) 23 June 2022 (Majority Opinion) at [140]) only to the 35-year old judgment concerning the Council of the Ordre des avocats (*H v Belgium* (8950/80) 30 November 1987 at [51], Series A No. 127 B) and to a somewhat specific inadmissible claim concerning the appearance of international judges on the Court of Bosnia and Herzegovina (*Maktouf and Damjanovic v Bosnia and Herzegovina* (2312/08 and 34179/08) 18 July 2013 at [51]).

[77] In contrast to *Posokhov v Russia* (63486/00) 4 March 2003; *Zakharkin v Russia* (1555/04) 10 June 2010; *Fedotova v Russia* (73225/01) 13 April 2006; *Ilatovskiy v Russia* (6945/04) 9 July 2009.

[78] *Grosam* (19750/13) 23 June 2022 (Majority Opinion) at [140] (referring to [38]).

[79] See also *Ali Riza v Turkey* (30226/10 and 5506/16) 28 January 2020 at [209]; *Zolotas v Greece* (38240/02) 2 June 2005 at [24].

Justice would announce an open tender for the freshly vacant enforcement officer's business, which could not be taken by any existing executor, but only by a new candidate. Getting rid of a "competitor" would simply lead to nothing but the entry of another one, freshly appointed to the pre-determined seat of the enforcement officer's office. Third, the limited experience there is in this regard indicates that, if judged by their peers, members of a profession tend to be rather more lenient than strict, in particular because all of them know, at least on a subliminal level, that they could easily find themselves in a similar position. After all, it was the blatant inability of the Chamber of the Enforcement Officers "to put their house in order" internally, including intra-professional leniency in the disciplinary proceedings within the Chamber, that originally led the Czech legislature to re-assign the disciplinary powers from the Chamber of the Enforcement Officers to the Disciplinary Chamber at the Supreme Administrative Court.

In sum, it is fascinating to see how much was "overlooked" in one particular case. To paraphrase Oscar Wilde, to overlook one factual point might be regarded as misfortune, to overlook so many of them looks like carelessness. That, however, opens up the more general reflections of this article. The section that follows analyses the key substantive yardstick of the case: judicial independence and its assessment by a (international) jurisdiction. Subsequently, this article zeroes in on the institutions, procedures, and safeguards within the Strasbourg system.

Judicial independence unbound?

The *Grosam* case is a prime example of the notion of "judicial independence" being pushed to the extreme, or even rather beyond. It reveals all the vices that may often be laid at the doorstep of an international jurisdiction that wishes to pass a judgment on certain practices at the national level, but due to a lack of information or understanding ends up conjuring up and castigating something that does not exist, either in law or in fact. In this section, we will first look at the structurally problematic elements of the Court's reasoning in this regard, and we provide a few suggestions for a more reasonable approach.

It cannot be ruled out that something might be misused…

The rule of law backsliding or outright crisis in some European States has indeed put international jurisdictions, be it in Strasbourg or in Luxembourg, in a rather difficult position. Out of necessity, they have been tasked with a job that they are not best equipped to do. Being a court normally means that one is supposed to look at one individual case. Being an international court implies looking at an individual case from a certain distance, by definition detached from national application reality and the intricate real life of legal and social institutions. However, assessing real independence often means understanding precisely the context and social reality beyond individual cases.

The answer from the Court to this institutional conundrum has further bolstered the "doctrine of appearances",[80] together with its overall robust case law on the various facets of judicial independence, external as well as internal, and reacting to diverse types of threats or influence. The application of these doctrines in specific cases has led to fierce discussions within the Court.[81] The Court views the notion of "judicial independence" as a living concept that nowadays protects individual judges, not only from improper external interference in their core adjudicative tasks, but also from improper interference by

[80] See *Kleyn v Netherlands* (39343/98) 6 May 2003 at [191]; *Ramos Nunes* (55391/13) 6 November 2018 at [144]–[145], [147] and [149]; *Fruni v Slovakia* (8014/07) 21 June 2011 at [141].

[81] See the joint dissenting opinion of judges Zupančič, Bîrsan and Long in *Sacilor-Lormines v France* (65411/01) 9 November 2006.

their peers (internal judicial independence[82]) and in their non-adjudicatory tasks such as membership of judicial councils.[83] Moreover, it provides safeguards against structural interferences in judicial governance via judicial councils,[84] rigged appointment,[85] and the transfer[86] and disciplining of judges, and stipulates the right to a lawful judge,[87] and protects court presidents.[88] More recently, the Court extended its reach to the structural issues by creative interpretation of the "established by law" criterion laid down in art.6(1) of the Convention[89] and by emphasising the jurisdictional guarantee of a status of judicial independence.[90]

In most instances, the doctrine of appearances, if used sensibly, is a useful and necessary tool that helps to bridge the actual lack of detailed evidence concerning influence or abuse. It effectively allows for an argumentative switch from "it has been established that" towards a much lighter threshold of "to some (us included), this might appear problematic". The question remains how far such logic may be pushed. The *Grosam* judgment provides three lessons in this regard. First, we argue that the combination of an expansive interpretation of the doctrine of appearances, coupled with "abstract review" detached from the specific case, and the worst-case scenario hypotheticals ("what if" or extreme prophylactic logic), is a deadly one, which means that anything and everything that one wants to challenge can be declared as violating judicial independence. Second, that approach will inevitably translate into extremist 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 violated the Convention, a view which is supported neither in the practice of the contracting parties nor in the Court's case law, and leaves no room for, at least some, democratic legitimacy of the judiciary.

First, in *Grosam*, neither the applicant nor the majority was actually able plausibly to explain how the rules concerning the disciplining of enforcement officers had been or could be misused. There was no violation whatsoever *in the individual case*, as the majority in fact itself acknowledged. There was also no hint of a structural abuse or misconception of the applicable rules which would be used to bring about certain results. Thus, there was *neither an individual nor a structural failure*.

The only reasoning there is that the Court is suggesting, *in abstracto* and completely detached from the individual case, that such mechanisms could potentially be abused.[91] However, anything is capable of potentially being abused. Following that mindset, the mere possession of a knife or a car would also be

[82] See D. Kosař, *Perils of Judicial Self-Government in Transitional Societies* (Cambridge: Cambridge University Press, 2016), pp.407, 419–420; and J. Sillen, "The Concept of 'Internal Judicial Independence' in the Case Law of the European Court of Human Rights" (2019) 15 *European Constitutional Law Review* 104.

[83] E.g. *Grzęda v Poland* (43572/18) 15 March 2022.

[84] E.g. *Grzęda v Poland* (43572/18) 15 March 2022; *Ramos Nunes* (55391/13) 6 November 2018; and *Loquifer v Belgium* (79089/13) 20 July 2021.

[85] E.g. *Astradsson v Iceland* (4907/18) 7 May 2021; *Xero Flor w Polsce sp. z o.o. v Poland* (18952/18) 7 April 2022; *Gloveli v Georgia* (19750/13) 23 June 2022.

[86] E.g. *Bilgen v Turkey* (1571/07) 9 March 2021.

[87] E.g. *Chim and Przywieczerski v Poland* (36661/07 and 38433/07) 12 April 2018, *Pasquini v San Marino* (50956/16) 2 May 2019.

[88] E.g. *Baka v Hungary* (20261/12) 23 June 2016; *Erményi v Hungary* (22254/14) 22 November 2016; *Denisov v Ukraine* (6639/11) 25 September 2018.

[89] See H. Logi Karlsson, "The Emergence of the Established 'By Law' Criterion for Reviewing European Judicial Appointments" (2022) 23 *German Law Journal* 1051.

[90] See R. Bustos Gisbert, "Judicial Independence in European Constitutional Law" (2022) 18 *European Constitutional Law Review* 591.

[91] See in particular *Grosam* (19750/13) 23 June 2022 (Majority Opinion) at [130], [136]–[140] and [144]–[145].

incompatible with art.2 of the Convention because, apart from cutting bread or driving to work, they could be misused to kill someone.

That is clearly untenable, but that is exactly the result to which abstract musings about worst-case scenarios concerning judicial independence and impartiality lead. Applying the same mindset, any and every court can be declared not to be impartial. One may take the hypothetical example of a seven-judge chamber of the Court, hearing a case. If looked at on the basis of the same approach, such a chamber might be seen to be offering very few guarantees of independence because: (1) two of its judges were already on their way out as their terms had ended and, since they were not retiring, were already looking for the next job, probably hoping to please a government(s) or private employers; (2) the presiding judge's term had also finished and he remained at the Court only because his successor had not yet been selected, which again put him in a rather precarious position; (3) another judge was previously (and still on part-time basis is) a national academic, whose salary is therefore set by the domestic parliament and/or a national Minister of Education, and, thus, in the logic of the majority, is not structurally independent of those bodies; (4) all seven judges were selected by a political institution (Parliamentary Assembly) by vote, i.e. not by any transparent procedure, but on the basis of a political choice; and (5) none of them is independent, because their salary is set by other bodies of the Council of Europe.

We do not agree with any of the points just made. They were merely used to demonstrate how untenable the majority reasoning is. "Assessing" issues of structural independence purely in abstract terms, detached from specific cases, with "what if" logic means that anything and everything is open to challenge. One merely has to conjure up a sufficiently unfortunate scenario whereby an otherwise decent model or framework can, under certain circumstances, be misused, so as to arrive at the conclusion that "a system does not provide sufficient guarantees against failures".

Second, this overall approach has radical repercussions on any of the substantive matters addressed. Following the *Grosam* logic means that only (full-time) judges may decide on matters concerning the discipline of any and all legal professions. The members of other legal professions and other types of lay judges will never meet the same exalted standard of independence simply due to the very fact that they do something other than judging. That logic would presumably also apply to other judicial proceedings since there is no reason why such "heightened" judicial independence standards should apply to disciplining enforcement officers alone.

That would, however, in turn, mean that lay participation in judicial activity, not only at first instance lay tribunals (be it magistrates, *giudice di pace*, or any other national first instance court not entirely composed of professional full-time judges), but potentially also the jury, would also be incompatible with the new tenets of the Convention. It is obvious that lay assessors are never full-time employees of the court. Their income, if any, from judicial activity is inherently marginal. The chamber's finding in *Grosam* thus equally challenges the traditional requirements for the people's participation in judicial decision-making. In fact, its criticism is directed against the institution of lay assessors or jurors as such. It is that aspect which makes the case of pan-European importance because, to follow the Chamber's logic, it would require structural changes to the laws of many countries within the Council of Europe, with the effect that the participation of non-professional judges in judicial decision-making would most likely be abandoned.

Even if we interpret *Grosam* narrowly so as to apply it to disciplinary proceedings only, it is clear that it is a common practice in many contracting parties to the Convention for various disciplinary bodies to be composed of lay assessors who may even form a majority. This is fully in line with the Court's established case law on lay assessors. There is no requirement under art.6 for a "tribunal" to be composed only of professional judges.[92] Moreover, even the participation in tribunals of members without legal

[92] See *Taxquet v Belgium* (926/05) 13 January 2009 at [72]; *Dauti v Albania* (19206/05) 3 February 2009 at [52]; *Luka v Romania* (34197/02) 21 July 2009 at [41].

qualifications is not, as such, contrary to that provision.[93] The mere fact that lay assessors constitute a majority also does not in itself violate art.6 of the Convention.[94] The *Grosam* judgment flatly contradicts this line of case law that has been developed over decades.

Another consequence of the Chamber's argument is the effective prohibition of lay assessors, including *expert* lay assessors,[95] despite the fact that they are again a common feature of a number of domestic European legal systems.[96] Such experts bring their unique knowledge to deliberations on specific and often technical matters. The presence of expert lay assessors helps the court to reach a just decision with the desirable level of knowledge of the aspects of the case which are not known to those outside the relevant profession.

Moreover, apart from valuable insights into the genuine function of the profession that lay judges provide, a crucial additional element is social and professional representativeness and inclusion, ultimately generating enhanced legitimacy for decision-making in specific matters. In the specific area of the discipline of "coercive" professions, such as those of judges, prosecutors, or even enforcement officers, it is crucial that what is seen by the public is not only the members of a profession being allowed to pass judgment on other members of their own "guild", but also instances of participation and some degree of public control. It is true that the current Court's case law prioritises judicial self-governance and insulation.[97] However, the "doctrine of appearances" naturally works both ways. It should thus also prevent instances in which the public may perceive the members of a certain profession as effectively being unaccountable because they are being judged only by their peers with an "enhanced level" of understanding of their shortcomings and failures.[98]

Third, in *Grosam*, the Court does not find the transparent selection of judges by lot to be sufficient, despite the fact that, in constitutional design, it is generally considered more resistant to capture than any other selection method, because wrong reasons are unable to affect random selection.[99] However, in the assessment of the Court, even that model might be misused if one were to think in the abstract. What is intriguing in structural terms, yet again, is that such exaggerated standards of "judicial independence" are in fact extended also to the "pre-selection" stage. In order to reach the required level of abstract

[93] See *Haarde v Iceland* (66847/12) 23 November 2017 at [103]–[108], where the criminal proceedings were conducted at first and only instance before a tribunal with a majority of lay judges; see also *Ibrahim Gürkan v Turkey* (10987/10) 3 July 2012 at [18]–[20].

[94] *Ettl v Austria 9273/81* 23 April 1987 at [38]; *Sramek v Austria* (8790/79) 22 October 1984 at [13] and [36]; *Argyrou v Greece* (10468/04) 15 January 2009 at [14] and [27]; *Rolf Gustafson v Sweden* (23196/94) 1 July 1997 at [27] and [48].

[95] I.e. people who are not professional (full-time) judges, but are called to sit on judicial panels in certain specific cases in order to bring their expert knowledge to the given field (as opposed to lay assessors as such, who are called to sit as representatives of the respective community without being required to be specialists in a given field).

[96] See e.g. M. Malsch, *Democracy in the Courts: Lay Participation in European Criminal Justice Systems* (Abingdon: Routledge, 2016); S. Corby, P. Burgess and A. Höland, "Employees as Judges in European Labour Courts: A Conflict of Interests?" (2020) 27 *European Journal of Industrial Relations* 231; and S. Magnússon, "The Use of Experts in Icelandic Law of Procedure" (2007) 51 *Scandinavian Studies in Law* 359.

[97] See in particular *Grzęda v Poland* (43572/18) 15 March 2022 and the criticism in M. Leloup and D. Kosař, "Sometimes Even Easy Rule of Law Cases Make Bad Law: ECtHR (GC) 15 March 2022, No. 43572/18, *Grzęda v Poland*" (2022) 18 European Constitutional Law Review 753.

[98] As explained in detail above (see fnn.54–56 above), it was exactly such false professional solidarity and the unwillingness of the Enforcement Chamber to address the wild enforcement practices in the 2000s that led to the overhaul of the disciplining of enforcement officers.

[99] See B.S. Frey and L. Steiner, "Random Selection in Politics, Science and Society: Applications and Institutional Embeddedness" (2014) CREMA 9-2014 Working Paper 1; P. Stone, "The Logic of Random Selection" (2009) 37 *Political Theory* 375. Some political scientists even propose the selection of constitutional judges randomly from a pool of certified properly qualified candidates: see e.g. P.-É. Vandamme and D. Bello Hutt, "Selecting Constitutional Judges Randomly" (2021) 27 *Swiss Political Science Review* 107.

independence, the (pre)selection itself must be completely insulated from interference by any other body that could cast doubts on subsequent judicial independence.

Leaving aside the apparently outdated visions of the separation of powers, which precisely foresee that State powers are supposed to influence and check each other *at the moment of their creation*, the more pressing practical issue is who would actually then be able to select and appoint judges to the required standard of abstract independence, and how? Other judges? Yet, if the experience of judicial self-governance has taught us anything, it is certainly that that form of administration of the judiciary is certainly not immune to internal influence or even corruption.[100] The only other plausible alternative that comes to mind is, with tongue in cheek, the immaculate conception of new judges, who happen to materialise in time and space, untainted by the doubts arising from the fact that somebody else had to appoint them.

The reasoning, logic, and extreme prophylactic approach of the majority applied to the pre-selection stage again leads to untenable results. Virtually any selection of judges by political actors (e.g. by the Parliament, the President, the Government, or a combination thereof) could be seen as violating the Convention. By way of example, one may think of the members of the Court itself or the members of the Court of Justice of the European Union (nominated by their respective Member States and appointed by common accord of the Member States) or, for instance, the selection of justices of the German Federal Constitutional Court. In the latter case, the leaders of the main German political parties make the nominations behind closed doors.[101] Does that mean that the German Federal Constitutional Court is also not an independent court because the doctrine of appearances was violated at the moment of the appointment of its members?

Clearly not. In lieu of a conclusion, one may only mention the rebuttal that came in this regard from the Court of Justice in the case of *Repubblika*. The question raised was whether the decisive power of the Maltese Prime Minister in the process of appointing the members of the judiciary in Malta was compatible with the requirement of judicial independence as part of effective legal protection required under EU law. In reply, the Court of Justice emphasised that what is key to judicial independence is genuine independence and impartiality "while on the job", not complete insulation in the appointment procedure.[102] Moreover, by way of a broader analogy, the Court itself was in the past rather cautious of categorically stating that every and any violation of whatever rules in the selection procedure for judges would have repercussions on there being an independent tribunal established by law.[103]

A more reasonable approach?

The highly problematic approach of the majority in *Grosam* and the untenable results to which it inevitably leads already foreshadow a more reasonable understanding of the principle of "judicial independence", if it is to be applied by an international court. By means of a short conclusion to this section, it could perhaps be summarised as follows:

First, there must be clarity as to what is being reproached and why. The failure of a national system must always have taken place in the individual case. It may consist of either: (i) the individual failure of an otherwise proper model; or (ii) problems and issues identified in the individual case which demonstrate, and are the consequences of, a problematic model.

[100] See Kosař, *Perils of Judicial Self-Government in Transitional Societies* (2016), pp.407, 419–420.

[101] See e.g. U. Kischel, "Party, Pope, and Politics? The Election of German Constitutional Court Justices in Comparative Perspective" (2013) 11 *International Journal of Constitutional Law* 962.

[102] *Repubblika v Il-Prim Ministru* (C-896/19) EU:C:2021:311; [2021] 3 C.M.L.R. 18 at [56]–[57]. In a similar vein, see *Simpson v Council of the European Union* (C-542/18 RX-II and C-543/18 RX-II) EU:C:2020:232; [2020] 3 C.M.L.R. 27.

[103] Cf. *Guðmundur Andri Ástráðsson v Iceland* (26374/18) 1 December 2020 at [243]–[252], which effectively reversed the Chamber's approach by establishing a gravity test.

It is indeed in the latter scenario that international courts might be called upon to provide a broader assessment of the functioning of a system, reaching beyond the confines of the individual case. At that stage, a "paper assessment only" is unlikely to be enough.[104] Hence, such an assessment must take into account how the system operates, what problems it generates, and whether it has been misused on an ad hoc or even structural basis. What matters is not de jure but de facto judicial independence. Assessing judicial independence in this way calls for a highly contextual and fact-sensitive assessment.[105] That is all the more difficult for the Court as it may not have enough information or the capacity to conduct such a contextual assessment, because it may not be able to rely on the information submitted by the parties. The verification of statements concerning the actual application and national practice which is based on the case file and arguments presented before the Court is thus a very sensitive issue. The Court must also be aware that it should not provide an over-generalised response to a particular, or even peculiar, abuse of a certain mechanism in a rule-of-law backsliding State. The very same measure may very well function correctly in other jurisdictions. On the whole, however, even if such statements in a case are put in a more general way, suggesting that there is not just an individual mishap, but rather a structural flaw, that statement must always be traceable to the facts and legal framework applied in the individual case. That is the core of and *condition sine qua non* for the legitimacy of any *judicial* pronouncement.

Second, if the potential, or a fortiori the practice, of abuse of an institutional framework is suggested, it is vital to be equally clear about who is the potential "beneficiary", or rather the culprit. *Qui bono*? Or, to put it differently, who is supposed to hold the proverbial smoking gun?

Certainly, in cases of clear failures in the individual case, that element is likely to be obvious. If, for example, a criminal case is to be decided by a three-judge panel, in which the national Minister of Justice, who happens at the same time to be the prosecutor general and an outspoken member of the new ruling party at odds with what would commonly be perceived as the basics of the rule of law, is allowed effectively to nominate one or even two members of that panel by seconding lower instance judges to that panel and terminating that secondment at any time he or she so desires, there is perhaps no need for long meditations on "qui bono".[106] However, the more a case moves towards alleged structural shortcomings, and the more the doctrine of appearances is invoked in the abstract sense, i.e. that somebody or "the public" might be concerned about something, the greater clarity there must be about who could misuse the system, and why.

In more structural terms, two options come to mind: either a given system was already conceived with bad intentions from the outset (it can be established that it was put in place with *suspect intent*) or through alterations, amendments, or even outright hijacking, an otherwise originally proper model is now being abused (current and present *suspect practice*).

The structural implications

In our rather painstakingly long but, in view of the severity of the criticisms raised against the Court, necessary journey through the submissions of the parties contained in the Court's file carried out above, we revealed that what the dissenting judges mentioned in their separate opinion is not only correct, but is in fact even a diplomatic understatement. The key issues in the case were not simply raised ex proprio motu. It rather seems that the case for the applicant was actually created by the majority of the Court

[104] Further see the Opinion of AG Bobek in *Asociația "Forumul Judecătorilor din România"* (C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19) EU:C:2020:746 at [235]–[248].

[105] In a similar vein, see O. Kadlec and D. Kosař, "Romanian Version of the Rule of Law Crisis Comes to the ECJ: The AFJR Case is not just about the Cooperation and Verification Mechanism" (2022) 59 C.M.L. Rev. 1823, 1843 (concerning judicial independence jurisprudence of the CJEU).

[106] Cf. in this regard *Criminal proceedings against WB* (C-748/19-C-754/19) EU:C:2021:931; [2022] 2 C.M.L.R. 14.

which, through successive waves of additional questions, essentially guided the applicant to what he was supposed to be claiming, so that eventually, in the third and especially fourth rounds of pleadings, the applicant first raised the issues that the majority then used as the backbone of its reasoning. The fact that that took place only about two and a half years after the application to the Court was made and following what cannot but be called a set of leading questions by the Court itself is rather clear at this stage.

That raises the final and, perhaps in structural terms, the most onerous set of questions, which essentially boils down to this: how can such a decision be permitted to pass through the system? Are there no red flags or alarm bells which ring if a case takes such a turn? Are there no institutional safeguards, no internal due diligence mechanisms?

Certainly, every court has a bad day now and then. Moreover, there is only so much one can generalise from one case. Making structural claims on the basis of just one case is problematic. In general, we fully agree. In this specific case, the problem is nonetheless twofold. First, it may be up for discussion, far exceeding the scope of this contribution, whether *Grosam* is indeed merely one isolated instance.[107] Second, and perhaps more important, it is simply *the gravity of the one instance*, where so many extraordinary elements come together at once, which is bound to raise eyebrows. In such cases, even a single instance becomes a structural problem, simply because it constitutes such a concentrated and grave departure from all the rules, procedures, and substance that are supposed to guide the decision-making of an institution. Is such a system functioning well if it is not able to detect and prevent such instances from happening?

This section, in the spirit of a gentle good faith pushback,[108] first recaps and re-formulates, at a systemic level, the structural problems arising from the *Grosam* judgment. Based on this analysis, we then propose a few ideas concerning the operation of the Court that could potentially be beneficial in terms of discouraging such grave departures from the proper decision-making practice at the Court.

The principle of subsidiarity turned on its head

In structural terms, as is already clear from the discussion in the preceding section, there are at least four problematic issues which emerge from the majority reasoning. Most of them can be placed, in one form or another, under the principle of the subsidiarity of the Convention mechanism, which is the cornerstone of the Strasbourg system of fundamental rights protection.[109]

First, the majority departed from the case law on the exhaustion of domestic remedies. The Convention right must be raised in domestic proceedings either expressly or "at least in substance".[110] This is crucial as the contracting State must have an opportunity to prevent, redress, or rebut the alleged violation of the Convention.[111] Yet, the applicant's individual constitutional complaint was entirely based on the erroneous assumption that the disciplinary proceedings against him were subject to the Convention principles governing criminal proceedings. Moreover, it did not address the institutional aspects of the composition of the disciplinary chamber of the Supreme Administrative Court. In claiming only the absence of the ability to appeal against the decision of the disciplinary chamber under art.2 seventh Protocol, and with

[107] For a recent similar incident, albeit certainly not reaching such a magnitude, see judgment *Fu Quan s. r. o. v Czech Republic* (24827/14) 17 March 2022.

[108] See M. Rask Madsen, P. Cebulak and M. Wiebusch, "Backlash against International Courts: Explaining the Forms and Patterns of Resistance to International Courts" (2018) 14 *International Journal of Law in Context* 197, 202.

[109] See R. Spano, "Universality or Diversity of Human Rights—Strasbourg in the Age of Subsidiarity" (2014) 14 *Human Rights Law Review* 487; and P. Popelier and C. Van de Heyning, "Subsidiarity Post-Brighton: Procedural Rationality as Answer International Legal Theory" (2017) 30 *Leiden Journal of International Law* 5.

[110] *Azinas v Cyprus* (56679/00) 28 April 2004 at [40]–[41]; *Fressoz and Roire v France* (29183/95) 21 January 1999 at [38]; *Farzaliyev v Azerbaijan* (29620/07) 28 May 2020 at [55].

[111] *Radomilja v Croatia* (37685/10) 20 March 2018 at [117].

the sole purpose of ascertaining that the exception contained in that Article did not apply, did it question whether a body the majority of which is made up of lay members can be regarded as the "highest tribunal".[112]

Second, the majority did not respect the Court's *scope of review*. Instead, ex proprio motu it extended the subject matter of the proceedings to cover also issues not raised by the applicant either in the domestic proceedings or in his application to the Court. According to long-established case law, it is the applicant that determines the scope of the case before the Court by his or her complaint or "claim".[113] Mr Grosam claimed before the Court only violations of his rights in criminal matters (namely a violation of the presumption of innocence under art.6(2) of the Convention and his defense rights under art.6(3)(d) of the Convention) and his right to appeal in criminal matters under art.2 seventh Protocol to the Convention. Nowhere in the application did Mr Grosam mention that the disciplinary chamber, due to its composition, manner of creating the lists of candidates for lay assessors, or lack of safeguards against outside pressure, could not be considered a "tribunal" or even an "independent and impartial tribunal" within the meaning of art.6(1) of the Convention. Article 6(1) claims were made by Mr Grosam before the Court only following several rounds of leading questions put by the Court itself. Yet, the majority cavalierly held that it was irrelevant that Mr Grosam had mentioned the institutional aspect of the disciplinary court's composition only while referring to art.2(2) seventh Protocol, since the legal characterisation of the applicant's claims is up to the Court and the majority was of the view that his assertions should be examined under art.6(1) of the Convention.[114] The majority ignored the fact that the institutional aspect of the disciplinary court's composition raised by Mr Grosam under art.2 seventh Protocol was wholly different from the institutional aspects addressed by the majority under art.6(1) of the Convention. The majority simply used the application in question as a vehicle for dealing with a completely different aspect of the system of disciplinary justice under Czech law.

Third, the abstract review of the domestic framework for disciplining enforcement officers, prosecutors, and judges had limited, or rather no, connection with the specific facts of the case. Once again, it is a longstanding position of the Court that its task is not to review the relevant law and practice *in abstracto*, but rather to determine whether the manner in which they were applied to the case or the applicants were affected gives rise to a violation of the Convention.[115] Most importantly, the Court simply cannot conduct an abstract review of domestic legislation.[116] However, that is exactly what the majority did. It ignored the facts of the case. It blamed the lack of independence of public prosecutors as lay members of disciplinary courts on the Minister of Justice, despite the fact that no public prosecutor was a member of the Disciplinary Chamber that heard and decided Mr Grosam's case or ever sat on a Disciplinary Panel for enforcement officers. The majority thus addressed a *purely hypothetical situation*, which had nothing to do with the proceedings in the case at hand.

Fourth, such "unlimited jurisdiction" of an essentially first instance inquisitorial court that may hear whatever issues it pleases was finally translated into an immediate "application" of art.46 of the Convention,[117] in which the majority asked the Czech Republic to adopt the necessary general measures to prevent similar violations from taking place in the future.[118] As the dissenting judges put it, the judgment

[112] See *Grosam* (19750/13) 23 June 2022 (Dissenting Opinion) at [3], [5(i)], [8]–[9] and [18]–[20].

[113] *Radomilja v Croatia* (37685/10) 20 March 2018 at [108]–[109]; *Ramos Nunes* (55391/13) 6 November 2018 at [102]–[106]. See also *Grosam* (19750/13) 23 June 2022 (Dissenting Opinion) at [3], [5(ii)], [10], [12], [18], [20].

[114] See *Grosam* (19750/13) 23 June 2022 (Majority Opinion) at [68]–[71] and [75].

[115] See *Savickis v Latvia* (49270/11) 9 June 2022 at [97]; *McCann v United Kingdom* (18984/91) 27 September 1995 at [153].

[116] See *Perinçek v Switzerland* (27510/08) 15 October 2015 at [136]; *Navalnyy v Russia* (29580/12) and four others, 15 November 2018 at [121]; and *Magyar Kétfarkú Kutya Párt v Hungary* (201/17) 20 January 2020 at [96]. See also *Grosam* (19750/13) 23 June 2022 (Dissenting Opinion) at [3], [5(iii)], [21]–[24].

[117] *Grosam* (19750/13) 23 June 2022 (Majority Opinion) at [166]–[168].

[118] *Grosam* (19750/13) 23 June 2022 (Majority Opinion) at [168].

thus de facto "call[ed] for legislative or other regulatory measures to … correct the purported deficiencies identified by the majority of their own motion and without proper adversarial argument on the points addressed".[119]

Here, the majority opinion is again simply at odds with virtually all the established case law of the Court.[120] General measures under art.46 are reserved only for structural problems when the violation of the Convention is occurring or likely to occur in the future.[121] A typical example falling under the right to a fair trial is one where a judicial system is deficient as regards the reasonable-time requirement in art.6(1) of the Convention.[122] Regarding the appointment of judges, the Court indicated general measures when the Icelandic Minister of Justice failed to follow the statutory procedure and inappropriately interfered in the procedure for appointing the judges of the newly-created Court of Appeal,[123] or in situations of the rule of law crisis, when the Polish judicial council was captured by politicians.[124] Neither of those situations is present in the *Grosam* case. To indicate general measures in such a scenario is an abuse of art.46 of the Convention.

Housekeeping in Strasbourg: a couple of suggestions

In this sub-section we discuss some possible changes to the internal functioning of the Court that could perhaps help to prevent judgments such as *Grosam* from being reached. We are certainly not suggesting that any of those measures, certainly in and of themselves, represent the silver bullet solution. It is rather a type of list of possible measures that may incline one to pause for thought. They include measures such as the increased individual accountability of judge rapporteurs; reconsidering the role of "rule 26(3)" judges; diffusing and thereby better controlling the role of national judges; a reflection on the practice of setting up the Court's sections and making up the chambers; and introducing an internal red flag system.

First, *judge rapporteurs*, if appointed, should be *publicly named*.[125] The Court's judgments do not show who was the judge rapporteur in a given case. In general, practice in this regard varies amongst both international and national courts. We find, nonetheless, that the practice of the Court of Justice of the EU, as well as a number of national highest jurisdictions, which names the judge rapporteur in the masthead of each of its decision, is more conducive to the individual accountability of each judge and thus, hopefully, to quality reasoning. Under the current practice, only Court insiders who are bound by confidentiality

[119] *Grosam* (19750/13) 23 June 2022 (Dissenting Opinion) at [25].

[120] For a helpful and updated summary of the case law see ECtHR, *Guide on Article art.46: Binding force and execution of judgments* (updated on 31 August 2022), *https://www.echr.coe.int/Documents/Guide_Art_46_ENG.pdf*. See also A. Donald and A.K. Speck, "The European Court of Human Rights' Remedial Practice and its Impact on the Execution of Judgments" (2019) 19 *Human Rights Law Review* 19, 83–117. For a broader perspective see V. Fikfak, "Structural Remedies: Human Rights Law" in *Max Planck Encyclopaedia of International Procedural Law* (Oxford: Oxford University Press, 2022).

[121] It originated in the pilot judgment procedure, even though the Court now also orders general measures outside this procedure, indicating general measures under art.46 ECHR that concern the prevention of future violations in what is known as a "semi-pilot" judgment. See H. Keller and C. Marti, "Reconceptualizing Implementation: The Judicialization of the Execution of the European Court of Human Rights' Judgments" (2015) 26 *European Journal of International Law* 829.

[122] See *Stanev v Bulgaria* (36760/06) 17 January 2012 at [253]–[258] and *Gazsó v Hungary* (48322/12) 16 July 2015 at [39]. See also European Council Recommendation CM/Rec(2010) 3 on effective remedies for the excessive length of proceedings, *https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805cf8e9*.

[123] *Guðmundur Andri Ástráðsson v Iceland* (26374/18) 1 December 2020 at [311]–[314].

[124] See *Dolińska-Ficek and Ozimek v Poland* (49868/19 and 57511/19) 8 November 2021 at [366]–[369]; *Advance Pharma sp. z o.o v Poland* (1469/20) 3 February 2022 at [362]–[366].

[125] For a similar proposal from judge Albuquerque, see Alison Donald and Phillip Leach, "3 steps to save the European Court of Human Rights" (16 January 2018), *https://mdxminds.com/2018/01/16/how-to-save-the-european-court-of-human-rights-in-3-steps/*.

know the identity of a judge rapporteur. Thus, a judge rapporteur may hide behind the majority. One may object that individual accountability of judges can be abused. However, we do not find this argument persuasive. In the past, there might have been plausible threats to national judges who voted against their governments as the government could retaliate by not re-nominating a sitting judge for another term.[126] As, at present, the term of office of Court judges is non-renewable that argument became moot.[127]

Second, there is the issue of what we would call the *problem of "rule 26(3)" judges*. By "rule 26(3)" judges we mean judges deciding cases under r.26(3) of the Rules of the Court, which stipulates that "[e]ven after the end of their terms of office, judges shall continue to deal with cases in which they have participated in the consideration of the merits". Certainly, such a measure is understandable for the efficiency of case processing, preventing extra resources from being spent by the new judges having to study the file again, especially in view of the non-renewable mandate and the ensuing higher turnover within the Court. However, the same rule also significantly reduces the accountability of "rule 26(3)" judges. Such judges may no longer care much about the final decision and their reputation after they have left the Court. Moreover, a judge rapporteur may "stack" controversial decisions towards the end of their term. Thereby, he or she is not only effectively prolonging his or her tenure at the Court, sometimes for years. He or she is also making decisions on the bench well *outside his or her mandate*, effectively in parallel to the normally appointed successive "regular" judge from the same contracting party.

The *Grosam* case was also peculiar in this regard. The case came to the Court on 15 March 2013. It was deliberated on 22 May 2022 and delivered on 23 June 2022, about six months after two of the judges in the majority had left Strasbourg, but remained on the *Grosam* case due to the abovementioned r.26(3), despite the fact that new judges on behalf of Croatia and the Czech Republic were elected in the meantime. Moreover, another member of the majority was a "holdover" judge, because the original nine-year term of a Polish judge who acted as the chamber president in *Grosam* expired in 2021. He was still a member of the Court when *Grosam* was decided only because a new judge on behalf of Poland had not yet been elected. In other words, two out of the four judges in the majority were "rule 26(3)" judges. Another member of the majority (a presiding judge) was a "holdover" judge whose term had expired but who was still sitting since his successor had not been elected.

We acknowledge that abolishing r.26(3) altogether may have negative effects on the efficiency of the Court. However, milder reforms are conceivable in order to keep that rule in principle, while preventing extreme cases from happening. The revised r.26(3) should stipulate that after the end of their terms judges cannot take part in cases the *first deliberation* of which did not take place during their term. That means that the judgment can be fine-tuned or published, but cannot be written from scratch or deliberated *de novo*, after some members of the relevant judicial formation have left the Court. The Rule of the Court should also nudge outgoing judges to write up and deliberate on cases in which they act as judge rapporteurs as swiftly as possible. For instance, it can stipulate that within the last six months of his or her term, a judge cannot be designated a judge rapporteur in new cases, and automatically ceases to be the judge rapporteur in pending cases after the expiry of his or her term.

However, what ought to be structurally prevented are cases which, after almost a decade of proceedings, are rushed through by judges whose mandate has already expired. That may raise an eyebrow or two, not

[126] See e.g. N. Paul Engel, "More Transparency and Governmental Loyalty for Maintaining Professional Quality in the Election of Judges to the European Court of Human Rights" (2012) 32 H.R.L.J. 448; and B. Çalı and S. Cunningham, "Judicial Self Government and the Sui Generis Case of the European Court of Human Rights" (2018) 19 *German Law Journal* 1977, 1991.

[127] There certainly remains the possibility that especially younger judges with no post-Court job security concerns may act cautiously in order not to jeopardize their later career development (see Çalı and Cunningham, "Judicial Self Government and the Sui Generis Case of the European Court of Human Rights" (2018) 19 *German Law Journal* 1991–1992). That, however, hints at a different and, in structural terms, much greater issue, which certainly cannot be resolved by a culture of judicial secrecy.

least in view of the doctrine of appearances. Without wishing to sound too tautological, "term of office" simply means "limited time", which directly translates into the (lack of) legitimacy for decisions taken outside that term of office. The Court thus should revisit the application of Rules 26(3) and 24(4) and their compatibility with art.26(4) of the Convention[128] and provide clear guidelines regarding the circumstances under which and for how long "rule 26(3)" judges can take part in the Court's judicial decision-making.

Third, the current Rules of the Court give significant - one could even say *excessive - influence to a national judge* in cases against his or her contracting party. A national judge may not as a single judge examine any application against the contracting party in respect of which that judge has been elected (or of which that judge is a national).[129] He or she cannot preside in a case against his or her contracting party.[130] A national judge is, however, an ex officio member of the chamber[131] as well as the Grand Chamber[132] formations concerning cases against his or her contracting party. Very significantly, however, a national judge can also serve as a judge rapporteur in cases against his or her contracting party, which is again what happened in *Grosam*.[133]

If the national judge is also appointed as a reporting judge, that person comes very close to being a super-judge who conclusively shapes and de facto "owns" the case. That is not healthy. It is of course natural that, in a system that adjudicates on an individual violation of the Convention in a specific case, "local knowledge" of that system at issue is crucial. The input of somebody familiar with the national law, asking the right questions, and then contextualizing all that for the benefit of their colleagues is essential. There are, however, two counter-arguments to that, conceptual (structural) and pragmatic (personal).

On the more conceptual level, what is the role of a "European Court"? One could assume that it is to craft a pan-European jurisprudence of human rights at the appropriate level of abstraction that indeed unites all the Contracting Parties. It is not the role of that court to get involved in the minutiae of national rules and procedures. Within such a mindset, going too far down the road of too detailed local law and knowledge might even be dangerous, since there will inevitably not be "pan-European" case law, but national, locally dependent clusters: Czech case law on the notion of the use of property will be simply too Czech. Then there will be a French, a Finnish, and a Greek cluster, since the articulation of that case law in the particular instances has become too intertwined with and dependent upon domestic law.

On the more personal level, even national judges may not be angels, whether consciously or subconsciously. They may pursue their own agendas in their home countries; they may want to settle the score with their intellectual opponents, re-fighting the battles they have perhaps previously lost back home; or they may be strategically preparing their return to the home country towards the end of their terms (not necessarily to public service, but also to private practice).[134] They may be tempted to steer the case accordingly and interpret the domestic law in the way that fits their strategic aims. Moreover, even if an angel, a national judge has simply just one view on the national law: his or her personal one.

[128] Incidentally, the Court has already invited criticism on a similar account for the presence of Russian judge Lobov in the *Fedotova* Grand Chamber judgment that was delivered after Russia's exit from the Council of Europe. See Dissenting Opinion of judge Poláčková in *Fedotova v Russia* (40792/10) and two others, 17 January 2023 at [11].

[129] Rule 27A(3) Rules of the Court.

[130] Rule 13 Rules of the Court.

[131] Rule 26(1)(a) Rules of the Court.

[132] Rule 24(2)(b) Rules of the Court.

[133] It transpired from the procedural documents from the files which were disclosed to the authors by the Court (above, fn.11) that the reporting judge in the case was Mr Aleš Pejchal.

[134] Çalı and Cunningham, "Judicial Self Government and the Sui Generis Case of the European Court of Human Rights" (2018) 19 *German Law Journal* 1991–1992.

Certainly, a judicial decision is still a collective one. Therefore, the other members of the chamber maintain a degree of control too. Equally, or within the Strasbourg system perhaps most importantly, there are the highly skilled lawyers from the Registry assisting the Court in its judicial functions. Ideally, both the registry lawyer working on the case and the national judge are there to operate as a safeguard for the Court. They are there to provide national knowledge, speak the language, and guide the Court in the understanding of the law. However, the present case would indicate that the current institutional design places perhaps too much power and influence in the hands of just one person, allowing him or her, *in extremis*, potentially to hijack the procedure.[135]

We thus propose that the roles of national judges be diffused throughout all judicial formations of the Court. The easiest way is to amend the Rules of the Court and stipulate that a national judge of a country involved in a case cannot act as judge rapporteur. The new r.13A would read as follows: "Judges of the Court may not act as judge rapporteurs in cases in which the Contracting Party of which they are nationals or in respect of which they were elected is a party…". Another option could be to strengthen the role of Jurisconsult, which is already to ensure the quality and consistency of the Court's case law.[136] The genuine functioning of Jurisconsult and his or her impact on the Court's decision-making is, however, a black box.[137] What we know is that a jurisconsult circulates a case law update to all the Judges and Registrars, including warnings "against discrepancies or omissions of jurisprudence".[138] When the Jurisconsult "considers that there is a potential conflict or divergence on the cards", he or she communicates it to the relevant Sections.[139] That is not necessarily to say that a Jurisconsult ought to be upgraded to a fully-fledged rapporteur public or advocate general, as known in the French legal cultures and at the Court of Justice in Luxembourg.[140] The common theme is, however, the strengthening of some sort of intellectual counterbalance and control, in particular as far as matters of interpretation of national law and practice are concerned.

Fourth, the mechanism for setting up the Court's sections and making up the chambers may require further reflection and fine-tuning. While the Court's judicial decision-making is fully transparent, its wider judicial governance practices are largely obscure.[141] The criteria regarding the setting up of sections[142] and

[135] Which, in addition, is simply not a necessary element of an international jurisdiction. One may contrast the Strasbourg system with that of the Court of Justice of the EU, where: (i) a judge from a given Member State will never be appointed as the reporting judge for cases coming from his or her Member State, and (ii) the reporting judge is, in all the procedural steps taken before the deliberation itself, constrained by the view of an Advocate General, who is asked about his or her view as regards all procedural decisions in a case before the president of the chamber or the president of the Court of Justice takes the final decision on the matter.

[136] Rule 18B Rules of the Court.

[137] See, in general, H. Keller and C. Heri, "Deliberation and Drafting: European Court of Human Rights" in *Max Planck Encyclopaedia of International Procedural Law* (Oxford: Oxford University Press, 2018), paras 16 and 39.

[138] Vincent Berger, Jurisconsult of the Court (2006–2013), *https://www.berger-avocat.eu/en/vincent-berger/career-ecthr*.

[139] J.P. Costa, speech, given at Zagreb University Faculty of Law (30 March 2009) p.3, *https://www.usud.hr/sites/default/files/dokumenti/President_Costas_Speech_given_at_the_Zagreb_Faculty_of_Law_on_30_May_2009.pdf*.

[140] Even though that has in fact already been suggested, including the idea that the information provided by the Jurisconsult should be made public, as suggested by judge Albuquerque. See Donald and Leach, "3 steps to save the European Court of Human Rights" (16 January 2018). In general on the function see M. Bobek, "A Fourth in the Court: Why Are There Advocates General in the Court of Justice?" (2012) 14 *Cambridge Yearbook of European Legal Studies* 529.

[141] Çalı and Cunningham, "Judicial Self Government and the Sui Generis Case of the European Court of Human Rights" (2018) 19 *German Law Journal* 1977.

[142] Rule 25 Rules of the Court.

the making up[143] of individual chambers are at present rather vague.[144] The Sections are set up by the plenary Court on a proposal from its President.[145] Their compositions "shall be geographically and gender balanced and shall reflect different legal systems among the Contracting Parties".[146] In making up the chambers for a particular case, there are even fewer rules. Apart from the two *ex officio* members (a Section President and a national judge), a chamber's composition is designated solely by the Section President, who must choose only "in rotation" from among the members of the relevant Section.[147] No further criteria are laid down. Hence, it is not clear when exactly the chamber is made up (at the same moment as the judge rapporteur is chosen or at a later stage) and how the five "non *ex officio*" chamber members are selected from the judges assigned to a given Section (by lot, from several pre-designated combinations of judges of a given Section, or otherwise). This practice may lead to speculation about "voting blocs"[148] and "strategic" moves by the Section President as well as by the judge rapporteur.[149]

There is certainly an argument in favour of some necessary flexibility in this regard. Rules that are too rigid in terms of the section and chamber formation may lead to rather problematic outcomes, when an objective, ex ante designed rule allows for the coming together of, for instance, a one-sided bench or a composition that, for personal reasons, simply cannot work together, and so on. The problem with that argument is that, if the Court wishes to maintain the status quo and the current flexibility, it must then be held accountable for its possible failures. The current institutional arrangements are left somewhere in a problematic "no-man's land", where there are neither clear rules, nor occasionally sensible results that could, at least pragmatically, justify retaining improved flexibility. One must move in the direction of either actually using the flexibility there is in order to deliver some results (in the form of preventing, through sensible discretionary choices made when composing sections and chambers, problematic formations from emerging) or move, to a greater extent, in the direction of more objective and transparent criteria (having clear criteria for how and why sections and chambers are formed). The latter option may indeed also become necessary in view of the court's own legitimacy, which recently expanded its understanding of the "established by law" criterion in art.6 of the Convention[150] and created "the right to a lawful judge" at the domestic level.[151] The opacity of its own internal functioning delegitimizes this new strand of case law. The Court appears to be abiding by different standards from those it is imposing on domestic courts.

Finally, the more recent structural reforms of the Strasbourg system understandably primarily addressed its backlog, efficiency, and case processing. However, the quality of the Court's output and questionable practice within the Court should become a concern as well. Under this heading, the Court could perhaps consider an internal "red flag system" that would detect potentially problematic handling of an application

[143] Rule 26 Rules of the Court.

[144] For rare insights into these processes and their repercussions see Keller and Heri, "Deliberation and Drafting: European Court of Human Rights" in *Max Planck Encyclopaedia of International Procedural Law* (2018), paras 3–8, 26–28, 38–44 and G. Kucsko-Stadlmayer, "Chambers: European Court of Human Rights" in *Max Planck Encyclopaedia of International Procedural Law* (Oxford: Oxford University Press, 2021), paras 3–17.

[145] Rule 25(1) Rules of the Court.

[146] Rule 25(2) Rules of the Court.

[147] Rule 26(1)(b) Rules of the Court.

[148] See Donald and Leach, "3 steps to save the European Court of Human Rights" (16 January 2018).

[149] For instance, if several chamber formations within the section are known in advance and if the particular chamber formation is not decided at the same moment as the judge rapporteur is designated, the judge rapporteur can strategically delay the submission of the draft decision until the chamber is "favourably" composed.

[150] See Logi Karlsson, "The Emergence of the Established 'By Law' Criterion for Reviewing European Judicial Appointments" (2022) 23 *German Law Journal* 1051; and Bustos Gisbert, "Judicial Independence in European Constitutional Law" (2022) 18 *European Constitutional Law Review* 591.

[151] Sillen, "The concept of 'internal judicial independence' in the case law of the European Court of Human Rights" (2019) 15 *European Constitutional Law Review* 114–116, 120–121, 127–128.

by a judge rapporteur. Alas, yet again, the *Grosam* case offers a number of those at the same time: a long period of inactivity by the judge rapporteur; several sets of questions asked over a period of several years, and rather unusual ones come to that; the Government repeatedly protests at the expansion of the case before the Court beyond the arguments made at the domestic level, to name but a few. While fully respecting judicial independence in the decision-making process, all those elements combined should have triggered some warnings, in terms of the sound judicial management of an institution.

Housekeeping in Strasbourg would certainly be much easier, or perhaps even unnecessary, if the selection of Strasbourg judges worked smoothly and always led to the selection of a high calibre judge.[152] There has been a growing literature that shows that this has not always been the case,[153] even though the selection process has improved at the Strasbourg level.[154] Despite this improvement, democratic decay and resulting attacks on the rule of law in several Council of Europe States have resulted in a dual challenge for the Strasbourg system of fundamental rights protection. At the level of *legitimacy*, it must live up to increased scrutiny if it wishes to remain credible while explaining their failures to others. At the more *practical* level, it is quite likely that problematic Member States will keep sending their national nominees to the Court. It may also be assumed that not all of them will have only stellar credentials.[155] Thus, even though the Court is rather well insulated from eventual attacks targeting its structural features or the judicial personnel,[156] internal mechanisms must be built which help to accommodate and contain problematic choices at the judicial level and safeguard institutional quality and legitimacy beyond the mandate of one or even multiple questionable incumbent(s).

Conclusions and outlook

The primary function of this article has been to serve as a flight recorder of what is, by all accounts, an extraordinary case. We have recorded elements that led to the crash. Based on that accident, we have sought to make a few structural suggestions, substantive and institutional, that could perhaps help to avoid future collisions. In doing so, the first part of this article set out, in quite some legal detail, the relevant national law and practice in order to rebut the highly problematic elements of the majority opinion. That was necessary, given the gravity of the criticisms contained in this article. However, in providing such a detailed case study, this article is unique. In recent years, there has been no shortage of critical voices against one or another element of the operation of the Strasbourg system. Such structural criticisms and potential dissatisfaction nonetheless tend to remain at quite some level of abstraction. They can accordingly be rebutted at that level of abstraction, and it can be claimed that, if only the author of such critical article had studied the case law or the reasoning of the Court in greater detail, all would be clear. By contrast,

[152] There are naturally other considerations in selecting Strasbourg judges, such as professional diversity. See recently e.g. K. Dzehtsiarou and A. Schwartz, "Electing Team Strasbourg: Professional Diversity on the European Court of Human Rights and Why it Matters" (2020) 21 *German Law Journal* 621. However, these other considerations should become relevant only once all candidates meet the high calibre standard.

[153] For the most thorough analysis see M. de S.-O.-L'E Lasser, *Judicial Dis-Appointments: Judicial Appointments Reform and the Rise of European Judicial Independence* (Oxford: Oxford University Press, 2020).

[154] See D. Kosař, "Selecting Strasbourg Judges: A Critique" in M. Bobek (ed), *Selecting Europe's Judges: A Critical Review of the Appointment Procedures to the European Courts* (Oxford: Oxford University Press, 2015), pp.120–161, 127–129; and Çalı and Cunningham "Judicial Self Government and the Sui Generis Case of the European Court of Human Rights" (2018) 19 *German Law Journal* 1977.

[155] However, in all fairness, even fully functional democratic Contracting Parties can simply make a bad choice. See the examples of problematic nominations from Western democracies discussed by Lasser, *Judicial Dis-Appointments: Judicial Appointments Reform and the Rise of European Judicial Independence* (2020).

[156] J. Petrov, "The Populist Challenge to the European Court of Human Rights" (2020) 18 *International Journal of Constitutional Law* 476.

this contribution offers exactly that: a concrete and detailed case study from which others may draw broader inferences. At this stage therefore, three closing points only will be made.

First, we may start with the moderately good news. The proverbial *file rouge* of this contribution has been the issue of the absence of safeguards and (in)ability of a system to autocorrect. However, it is fair to admit that in a way the *Grosam* case also demonstrated that some safeguards did exist. First, a red flag was in fact raised clearly by the remarkable and robust minority opinion. Second, no doubt also thanks to that vocal and convincing minority opinion, on 14 November 2022 the Grand Chamber panel of five judges decided, following the request made by the Czech Government, to refer the *Grosam* case to the Grand Chamber of the Court.[157]

It is true that the *Grosam* case may be used as an example to underline the vital importance of minority opinions. A more sceptical voice may nonetheless point out that the purpose of a minority opinion should lie in transparent intellectual discourse about the law. It should not really be the only possible avenue for judges sitting in a deciding formation publicly to voice their disagreement with internal judicial mismanagement or the outright abuse of procedure by their peers, at a time where the judgment has already been delivered. By that time it is simply too late. Equally, a rather long discussion could be had about whether the proper role of the Grand Chamber within the Strasbourg Court is indeed to correct such types of "mistakes".[158]

Second and connected to the previous point is the issue of the consequence and perception, not to speak of enforcement, of the Court's judgments at the national level in the given contracting party. Assuming that the Grand Chamber of the Court will indeed feel compelled to "correct" the Chamber's judgment, irrespective of what it does and how, the damage will already have been done. On the one hand, if the Grand Chamber finds the original *Grosam* application inadmissible and quashes the Chamber's judgment for that very reason, it will not have contradicted the substantive assessment of the Chamber. On the other hand, if the Grand Chamber decides to rebut the Chamber judgment on the merits and correct the many problematic substantive propositions, it will have to stretch the admissibility criteria artificially—but what admissibility criteria will then be used in future cases? Will other applicants get the same generous treatment in assessing admissibility of their applications? They will surely expect so. Finally, if, assuming, rather surprisingly, that the Grand Chamber were to find the application admissible and then find a violation (that is to accept the Chamber judgment in full), the Court is unlikely to maintain its reputation in the eyes of Czech lawyers in the future.[159]

For the Strasbourg system, therefore, the damage has already been done, irrespective of what the Grand Chamber decides. The same is in fact true also for the Czech system of disciplinary chambers at the Supreme Administrative Court. Following the referral of the *Grosam* case to the Grand Chamber, the disciplinary chambers for judges, public prosecutors, and enforcement officers again resumed their judicial business, which they had informally suspended following the chamber's judgment. However, the system's reputation appears to be irreparably damaged, certainly in the public discourse, which does not read judgments of the Court in any detail. The system will have to be modified, most likely by reverting to the post-Communist world of judicial insulation, where only judges are allowed to pass judgments on anybody else. All in all, there are no winners, just losers on both sides.

[157] Registrar of the Court, press release, ECHR 359 (14 November 2022).

[158] In detail see M. Bobek, "What Are Grand Chambers for?" (2021) 23 *Cambridge Yearbook of European Legal Studies* 1.

[159] The Czech Republic may also resist compliance with such judgment. It can either attempt to label the *Grosam* judgment as an "isolated case" before the Committee of Ministers and resort to minimalist compliance or challenge the Court as misunderstanding domestic circumstances and announce the intention not to comply. This is arguably another part of "checks and balances" against potentially ultra vires decisions being enforced, with, however, rather problematic implications for the authority of the Court.

Thirdly and finally, cases such as *Grosam* are a calamity for the reputation and legitimacy of international courts. That is perhaps not necessarily because of the outcome reached, even if one might strongly disagree with it. It is for *not playing by the rules*. The *Grosam* judgment was received very critically within the Czech judiciary and by the professional public in general. It is considered to be a blatant excess, abuse of power, and instance of judicial arbitrariness. The last decade has shown that the highest national courts are more and more reluctant, even openly, to comply with international courts' judgments where those international courts are perceived to be acting beyond the powers formally conferred upon them, or are considered to be disregarding their established case law without proper justification. A system that allows its organs to generate such decisions risks a rather stern and unilateral rebuke from the domestic levels.[160] Such reaction can be seen as regrettable, but probably not all that surprising, if those highest national courts see that three senior members of the Court itself are calling such a decision an ultra vires act and suggesting that the respondent State should disregard it. What authority is there left for a court whose own judges end up being forced to ask the parties "please, disregard us"?

[160] Even if, in general, the Czech Republic is a good complier with the Court's case law (D. Kosař and J. Petrov, "Determinants of Compliance Difficulties among 'Good Compliers': Implementation of International Human Rights Rulings in the Czech Republic" (2018) 29 *European Journal of International Law* 397).