



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF ISTOMINA v. UKRAINE

(Application no. 23312/15)

JUDGMENT

Art 5 § 3 • Reasonableness of pre-trial detention • Domestic courts' failure to provide relevant and sufficient justification for decisions setting applicant's bail • No assessment of relevant factors and lack of satisfactory explanation for exceptionally high bail amount

STRASBOURG

13 January 2022

FINAL

13/04/2022

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Istomina v. Ukraine,

The European Court of Human Rights (Fifth Section), sitting as a Chamber composed of:

Síofra O’Leary, *President*,
Mārtiņš Mits,
Ganna Yudkivska,
Lətif Hüseynov,
Jovan Ilievski,
Ivana Jelić,
Mattias Guyomar, *judges*,
and Victor Soloveytchik, *Section Registrar*,

Having regard to:

the application (no. 23312/15) against Ukraine lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Ukrainian national, Ms Olena Volodymyrivna Istomina (“the applicant”), on 15 May 2015;

the decision to give notice to the Ukrainian Government (“the Government”) of the complaints concerning the justification of the applicant’s detention and to declare the remainder of the application inadmissible;

the parties’ observations;

Having deliberated in private on 7 December 2021,

Delivers the following judgment, which was adopted on that date:

INTRODUCTION

1. The case concerns the alleged lack of justification of the applicant’s detention and the domestic courts’ alleged failure to duly justify the amount of bail, in breach of Article 5 §§ 1 (c) and 3 of the Convention.

THE FACTS

2. The applicant was born in 1973 and lives in Dnipro. She was represented before the Court by Mr S.V. Karchagin, a lawyer practising in Dnipro.

3. The Government were represented by their Agent, Mr I. Lishchyna.

4. The facts of the case, as submitted by the parties, may be summarised as follows.

5. In February and March 2015 criminal proceedings were initiated against the applicant on suspicion of tax evasion, involvement in a sham business and forgery of documents. According to the investigator, the applicant created and managed a number of sham companies with the aim of tax evasion. As the head of the group of sham companies, the applicant forged the financial documents and instructed the accountant officers of the above

companies to prepare necessary reporting documentation. The investigator considered that the applicant had been an organiser of those offences, which had caused damage amounting to 12,250,479 Ukrainian hryvnias¹ (UAH). In his submissions the investigator requested that the court set bail in that amount in respect of the applicant who was at liberty at that time.

6. On 21 March 2015 the Zhovtnevyi District Court of Dnipropetrovsk (“the District Court”) decided to set bail for the applicant as a preventive measure. It also found that there existed risks that the applicant might evade the investigation and trial, hinder the establishment of the truth, influence witnesses or continue engaging in criminal activity. The District Court further considered that since the applicant was accused of a serious offence, the maximum amount of bail that could be set for that type of offence under domestic law (see paragraph 20 below) could not ensure the applicant’s compliance with procedural obligations. Having regard to the gravity of the charges and the amount of damage allegedly caused in the criminal proceedings, the court set bail at UAH 12,249,426 (about EUR 495,000) which was 125 times higher than the amount of bail that could be set for the type of offence the applicant was accused of.

7. On 25 March 2015 the applicant asked the District Court to change the preventive measure from bail to house arrest, arguing that the amount of bail was excessive and disproportionate to her income over the previous two years. On 6 April 2015 the District Court rejected the applicant’s request as unfounded.

8. The applicant appealed, arguing that the amount of bail had been excessive. She asked to have the bail reduced to UAH 24,360,² which would correspond to the amount of bail permitted by domestic law in respect of a serious offence. On 10 April 2015 the Dnipropetrovsk Regional Court of Appeal (“the Court of Appeal”) rejected the applicant’s appeal and upheld the District Court’s decision.

9. On 7 April 2015 the District Court found that the applicant had failed to pay bail and had therefore breached the preventive measure ordered on 21 March 2015. Given these circumstances, the risk that she could influence witnesses, in particular subordinates involved in her business activities, and the risks indicated in paragraph 6 above, it decided to place the applicant in pre-trial detention. As an alternative preventive measure, it maintained her bail in the same amount. The applicant was detained on the same day.

10. The applicant appealed, arguing that there were no reasonable grounds for suspecting her of any crime and that the District Court had not considered her family situation (she had a minor child) and her level of income when determining the amount of bail.

¹ About 495,000 euros (EUR) at the time.

² About EUR 986.

11. On 17 April 2015 the Court of Appeal dismissed the applicant's appeal and upheld the District Court's decision. It noted that the applicant had failed to pay bail, that there was a risk that she could influence witnesses and that she might abscond given the gravity of the charges. It also held that the District Court had lawfully determined the amount of bail. The Court of Appeal observed that there was nothing apparent in her family situation which would call for any reassessment of the preventive measure. At the applicant's request, it examined her medical file and found no indication of any health reasons precluding her from being held in custody. The Court of Appeal lastly found that there was sufficient material in the criminal case file to substantiate the suspicions against her.

12. On 15 May 2015 the District Court rejected as unfounded a further request from the applicant to change the preventive measure from pre-trial detention to house arrest.

13. On 22 May 2015 the Court of Appeal upheld the decision of 15 May 2015. It noted that the amount of bail had been determined properly in view of the amount of damage that the applicant had allegedly caused, the risks justifying the preventive measure, which had neither diminished nor disappeared, the fact that the applicant had been provided with medical assistance in pre-trial detention and the fact that her family or personal situation could not justify changing the preventive measure.

14. On 3 June 2015 the District Court decided to extend the applicant's detention until 20 July 2015, maintaining the same amount of bail and the same reasons for her detention as in its previous decisions. On 3 July 2015 that decision was upheld on appeal.

15. On 17 July 2015 the District Court again extended the applicant's pre-trial detention until 15 September 2015 on the grounds that the risks justifying the preventive measure given previously persisted. As an alternative preventive measure, it maintained her bail in the same amount.

16. On 29 July 2015 the Court of Appeal found that the extension of the applicant's detention had not been justified. It therefore quashed the decision of 17 July 2015 and placed the applicant under house arrest, ordering her to stay in her home from 7 p.m. to 7 a.m. every day.

17. On 15 September 2015 the applicant's house arrest expired and no other preventive measure was applied to her.

RELEVANT LEGAL FRAMEWORK

18. Article 182 § 4 of the Code of Criminal Procedure of 2012, requires that, when setting bail, the courts must take into account the circumstances of the offence to which the charge pertains, the financial and family situation of the defendant, other information concerning his or her character and the risks which the bail is designed to prevent. The amount of bail must guarantee the

defendant's compliance with his or her procedural obligations and not be patently excessive (*завідомо непомірним*) for the defendant.

19. Article 182 § 5 lays down ranges for the bail to be set according to the level of seriousness of the offence (see paragraph 20 below). The ranges are set out as multiples of the minimum wage. For "serious" offences, bail must be set in an amount between twenty and eighty times the minimum wage. At the relevant time the latter amount was the equivalent of EUR 3,940.

However, Article 182 § 5 also provides that in "exceptional cases" (*у виключних випадках*) the judge can set a higher amount of bail for a defendant accused of a "serious" offence where the judge finds that ordering an amount of bail within the range set by law might not ensure the defendant's compliance with his or her procedural obligations.

20. Relevant extracts from the Criminal Code and other provisions of the Code of Criminal Procedure 2012 can be found in *Plachkov v. Ukraine* ([Committee], no. 76250/13, §§ 57-60, 15 April 2021).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 5 OF THE CONVENTION

21. The applicant complained under Article 5 §§ 1 (c) and 3 of the Convention that the courts' decisions regarding her pre-trial detention had been unsubstantiated and had not been based on relevant and sufficient reasons. She further complained that the amount of bail had been excessive and that the courts had not examined her ability to pay it. The Court considers that the applicant's complaints fall to be examined under Article 5 § 3 of the Convention, which reads as follows, insofar as relevant:

"3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article ... shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial."

A. Admissibility

22. The Court notes that the application is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

B. Merits

23. The applicant reiterated her complaints as outlined in paragraph 21 above, namely that her detention between 7 April and 29 July 2015 had not been justified and that the amount of bail had not been substantiated given the level of her income.

24. The Government submitted that the domestic courts had properly justified the applicant's detention and had lawfully fixed the amount of bail, taking into account both the need to ensure her proper behaviour during the proceedings and the amount of damage she had allegedly caused.

25. The applicable general principles regarding the justification of a suspect's detention and the determination of the amount of bail are set out in *Korban v. Ukraine* (no. 26744/16, §§ 154-57, 4 July 2019) and *Mangouras v. Spain* ([GC], no. 12050/04, § 78-81, ECHR 2010). In particular, the guarantee provided for by Article 5 § 3 of the Convention is designed to ensure not the reparation of any loss suffered in consequence of the suspected offence but only the presence of the accused at the hearing. Therefore, the amount of bail must be set principally by reference to the accused, his or her assets and his or her relationship with the persons who are to provide the security, in other words to the degree of confidence that is possible that the prospect of loss of the security or of action against the guarantors in the event of the defendant's non-appearance at the trial will act as a sufficient deterrent to dispel any wish on his or her part to abscond (see *Gafà v. Malta*, no. 54335/14, § 70, 22 May 2018). Since the issue at stake is the fundamental right to liberty guaranteed by Article 5, the authorities must take as much care in setting an appropriate amount of bail as in deciding whether or not continued detention is indispensable. The seriousness of the charges against the accused cannot be the decisive factor justifying the amount of bail (see *Hristova v. Bulgaria*, no. 60859/00, § 111, 7 December 2006).

26. The domestic courts' failure to assess the applicant's ability to pay the sum required may lead the Court to find a violation. However, an accused whom the judicial authorities declare themselves prepared to release on bail must faithfully submit sufficient information, which can be checked if need be, about the amount of bail to be set (see *Toshev v. Bulgaria*, no. 56308/00, § 68, 10 August 2006, and *Iwanczuk v. Poland*, no. 25196/94, § 66, 15 November 2011).

27. Having regard to the material before it and to the parties' observations as regards the justification given for the applicant's detention at the earliest stages of the proceedings against her, the Court finds that the main reason for the applicant's detention was the risk that she could influence witnesses, in particular subordinate people involved in her business activities (see paragraph 9 above). In this connection the Court notes that the applicant was accused of forgery of documents and tax evasion with involvement of more than twenty sham and real companies during the period from January 2013 to February 2015. Given the character and scale of the crime imputed to the applicant, it would therefore appear indispensable for the authorities to ensure the availability of documentary evidence in the case and of witnesses' testimonies given without pressure.

28. In the light of the foregoing, although the reasons for the detention complained of, which lasted from 7 April to 29 July 2015, might appear to be repetitive and general, the domestic courts reviewed the issue on six occasions, reassessing the arguments provided by the parties to the proceedings. In view of the above, the Court is prepared to accept that the domestic courts gave “relevant” and “sufficient” reasons for the applicant’s measure of restraint.

29. Nonetheless, the Court will analyse whether the domestic courts sufficiently justified their decisions fixing the amount of bail to meet the requirements of Article 5 § 3 of the Convention.

30. It appears that in setting bail, the domestic courts did not make an assessment of the applicant’s wealth or assets at the time. The applicant consistently argued that the amount of bail was excessive and disproportionate to her income and asked the domestic courts to reduce it referring, in particular, to her family situation (see paragraph 10 above). However, all her submissions to that effect were rejected by the courts as unsubstantiated without any explanation being given. It appears from the domestic courts’ decisions that the amount of damage allegedly caused by the applicant was the principal reason referred to by the courts in substantiating their decisions setting bail.

31. The Court observes that the amount of bail set by the District Court was 125 times higher than the maximum amount that could be set for the type of offence the applicant was accused of (see paragraph 6 above). It notes in this connection that although the domestic legislation allowed the court to set higher amounts of bail in “exceptional cases” (see paragraph 19 above), such a decision shall provide a thorough analysis of the circumstances of the case to justify its “exceptional” character.

32. In these circumstances, referring to the principles in the case-law outlined above (see paragraphs 25 and 26 above), the Court finds that by focussing on the amount of damage allegedly caused by the applicant, failing to provide a thorough assessment of all relevant factors including her ability to pay the bail set, and absent satisfactory explanation why bail was set at such exceptionally high level, the domestic courts did not comply with their obligation to provide relevant and sufficient justification for their decisions setting bail, as required by Article 5 § 3 of the Convention. There has accordingly been a violation of that provision.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

33. Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

A. Damage

34. The applicant claimed 25,000 euros (EUR) in respect of non-pecuniary damage for the alleged violation of her rights under the Convention.

35. The Government contested those claims as unsubstantiated and irrelevant to the subject matter of the case.

36. Having regard to the subject matter and particular circumstances of the case, the Court awards the applicant EUR 1,000 in respect of non-pecuniary damage, plus any tax that may be chargeable.

B. Costs and expenses

37. The applicant also claimed 60,000 Ukrainian hryvnias (UAH – EUR 2,430) in respect of the costs and expenses incurred before the domestic courts and UAH 45,000 (EUR 1,820) in respect of those incurred before the Court. The claim for legal fees was supported by a legal services agreement dated 6 April 2015 (stipulating that the amount of fees was to be determined in the payment receipt) and relevant payment receipts of services rendered dated 6, 7 and 30 April 2015.

38. The Government submitted that those claims were unsubstantiated.

39. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these were actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 1,000 covering costs under all heads, plus any tax that may be chargeable to the applicant.

C. Default interest

40. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;
2. *Holds* that there has been a violation of Article 5 § 3 of the Convention as regards the failure of the domestic courts to provide relevant and sufficient justification for their decisions setting bail;

3. *Holds*

- (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:
 - (i) EUR 1,000 (one thousand euros) plus any tax that may be chargeable, in respect of non-pecuniary damage;
 - (ii) EUR 1,000 (one thousand euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;
- (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

4. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 13 January 2022, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Victor Soloveytschik
Registrar

Síofra O'Leary
President