

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

FIFTH SECTION

CASE OF GRESS v. UKRAINE

(Application no. 17573/14)

JUDGMENT

STRASBOURG

20 January 2022

This judgment is final but it may be subject to editorial revision.



In the case of Gress v. Ukraine,

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

Arnfinn Bårdsen, *President,*
Ganna Yudkivska,
Mattias Guyomar, *judges,*
and Martina Keller, *Deputy Section Registrar,*

Having regard to:

the application (no. 17573/14) 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, Mr Oleksandr Oleksandrovych Gress ("the applicant"), on 21 February 2014;

the decision to give notice to the Ukrainian Government ("the Government") of the applicant's complaints under Article 5 §§ 1, 3 and 4 of the Convention concerning his pre-trial detention and Article 6 § 1 and Article 13 concerning the length of the criminal proceedings against him and lack of effective remedies in this respect, and to declare inadmissible the remainder of the application;

the parties' observations;

Having deliberated in private on 9 December 2021,

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

INTRODUCTION

1. The case concerns the applicant's complaints under Article 5 §§ 1, 3 and 4 relating to his pre-trial detention and Article 6 § 1 and Article 13 of the Convention concerning the length of the criminal proceedings against him and lack of effective remedies in this respect.

THE FACTS

2. The applicant was born in 1971 and lives in Simferopol. He was represented by Mr O. Kudryashov, a lawyer practising in Kyiv.

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. On 12 June 2010 criminal proceedings were instituted against the applicant, a former local politician, on charges of the alleged appropriation of State-owned plots of land. On the same day he was arrested.

6. On 15 June 2010 the Leninskyy District Court of Sevastopol ("the District Court") ordered the applicant's pre-trial detention. It held that the applicant had been charged with particularly serious crimes and, relying on the investigator's submissions, stated that it had been established that after the institution of the criminal investigation into the facts of the case, he had

gone abroad, and planned to go again, thus absconding and continuing his criminal activities. It also generally referred to the applicant's family and material status, his residence in Sevastopol and his professional activities, and concluded that, despite his positive references and absence of criminal record, non-custodial preventive measures could not be applied to him.

7. The applicant appealed, stating that the court's finding that he planned to go abroad had been erroneous and not supported by any evidence. He further challenged the court's conclusion that, if he were released, he could continue criminal activities, because he had not appropriated the impugned plots and, if they had indeed been registered in his name, he was willing to return them to the State. As the court had taken into account his positive references, absence of criminal record, his family and material status, his residence in Sevastopol where the investigation was being conducted, and his relatives' willingness to pay bail for him, its decision to detain him had been groundless.

8. On 30 June 2010 the Sevastopol City Court of Appeal ("the Court of Appeal") upheld the decision of 15 June 2010. It referred to the District Court's conclusion that after the institution of the criminal investigation into the facts of the case the applicant had gone abroad and intended to go abroad again, so that he could abscond and obstruct justice. Also taking into account the gravity of the charges against him, he had to remain in detention.

9. The applicant's pre-trial detention was further extended by the District Court or the Court of Appeal on 6 August, 9 September, 11 October and 8 November 2010 (on the latter date, until 12 February 2011).

10. In his submissions before the courts, the applicant stated that his international passport had been seized by the investigators, so he could not abscond and go abroad, that he had not been in hiding before being detained, as he had gone abroad for business and then returned to Ukraine, that the risk he posed to society was minimal, that there was no evidence that he would avoid or obstruct justice, and that the management and staff of the company he was working at were willing to pay bail for him.

11. For their part, the courts stated that the pre-trial investigation had not yet been completed and referred essentially to the same grounds as in the decision of 15 June 2010, in particular that the applicant had been charged with serious crimes and that, if he were released, he could abscond and obstruct justice. In some decisions they held generally that they had taken into account all the circumstances, including the data about the applicant's character and his health, and that there were no reasons to change his preventive measure.

12. According to the applicant, on an unspecified date the pre-trial investigation was completed and on 31 January 2011 the case was referred to the District Court which, on 1 March 2011, held a preliminary hearing and decided to extend his pre-trial detention without fixing a time-limit for it.

13. When lodging his application with the Court, the applicant did not provide a copy of the decision of 1 March 2011, as requested by the Court, stating that the District Court had not provided him with one; he further submitted that court's letters of 4 December 2012 and 18 October 2013 which stated, respectively, that his lawyer could access the material in the case file in the court's premises and that there were no legal grounds for providing him with it. The Court again requested a copy of the decision of 1 March 2011 after communication of the case. The parties did not provide one; the applicant submitted no comments in that regard and the Government stated that they had been unable to access the case file because it was located in temporarily occupied territory.

14. On 23 April 2014, following the events in Crimea in March 2014, the District Court, acting in accordance with Russian law, released the applicant upon his undertaking not to abscond. It noted, *inter alia*, that the applicant had a permanent residence in Sevastopol and that there were no objective data that, if he were released, he would in any way obstruct justice.

15. The parties did not inform the Court about the subsequent events in the applicant's case. The Government provided a copy of a letter of the Kyiv City Court of Appeal of 21 January 2021, which stated that it had not yet received the case for the determination of court jurisdiction under the Law of 15 April 2014 on the protection of the rights and freedoms of citizens and legal regime of the temporarily occupied territory of Ukraine.

THE LAW

I. SCOPE OF THE CASE

16. The Court observes that the facts, as submitted by the parties, concern the period between 2010 and 2014. It also notes that the applicant has not informed it of any fact or made any complaints in relation to further developments in his case. It does not appear that, after March 2014, he sought continuation of his case in the Ukrainian courts (see paragraph 15 above). Indeed, the further examination of his case was undertaken by "Russian courts" (see paragraph 14 above).

17. In such circumstances, the Court considers that the applicant's complaints against Ukraine are limited to the above-mentioned period (June 2010 to March 2014) and finds it unnecessary to examine the question whether Ukraine continued to have jurisdiction within the meaning of Article 1 of the Convention with respect to the matters complained of following the events in Crimea in March 2014 (see, similarly, *Safonov and Safonova v. Ukraine*, no. 24391/10, § 47, 18 June 2020).

II. ALLEGED VIOLATIONS OF ARTICLE 5 OF THE CONVENTION

18. The applicant complained under Article 5 § 1 that no time-limit had been set for his detention after 31 January 2011; under Article 5 § 3 that his continued detention had been unjustified; and under Article 5 § 4 in substance that under domestic law he had not been able to challenge on appeal the decision of 1 March 2011. The above provisions read as follows:

> "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> ...
>
> (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
>
> ...
>
> 3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.
>
> 4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.
>
> ..."

A. The parties' submissions

1. The Government

19. The Government considered the complaints to be manifestly ill-founded. As regards the complaint under Article 5 § 1, they submitted that at the material time the 2012 Code of Criminal Procedure ("the CCP") had set out clear time-limits for the application and extension of periods of detention. They thus assumed that the court decisions adopted after 1 March 2011 had provided time-limits for the extension of the applicant's detention.

20. As to the complaint under Article 5 § 3, the Government argued that the extension orders had been based on the existence of relevant risks. The courts had not been guided by abstract assumptions but had relied on facts. They had given sufficient reasons and had taken into account the character of the applicant who was the owner of an overseas enterprise which had allegedly appropriated plots of land. That had proved the existence of the risk that the applicant could continue his criminal activities. In addition, his files contained information indicating that he regularly travelled abroad for long periods of time, which was taken to constitute a risk that he would

abscond. Also, he had not had a registered place of residence in Sevastopol where the investigation had been taking place. According to the Security Service of Ukraine, the applicant had intended to move to Turkey to abscond from the trial. The courts had considered requests for alternative measures but had rejected them as unsubstantiated. The applicant's continued detention had therefore been necessary and justified.

21. Lastly, as regards the complaint under Article 5 § 4, the Government noted that all relevant requests for release had been examined by the courts, which had not ignored, but had rather duly considered them. The fact that the applicant had not been successful in securing his release did not mean that the judicial review had been ineffective. The applicant had had the opportunity to challenge the lawfulness of his detention and had used it.

2. The applicant

22. As regards Article 5 § 1, the applicant submitted that his case had been examined under the 1960 CCP. The 2012 CCP referred to by the Government had come into force on 20 November 2012. In accordance with its transitional provisions, criminal cases submitted to the courts before that date were to be considered under the 1960 CCP.

23. As regards Article 5 §§ 3 and 4, the applicant generally expressed disagreement with the domestic courts, considering that their decisions had been unfounded and that the institution of the criminal proceedings against him and his detention had been politically motivated, as allegedly evidenced by his release following political changes in 2014.

B. The Court's assessment

1. Admissibility

(a) Article 5 §§ 1 and 4

24. As regards the applicant's complaint under Article 5 § 1 that no time-limit had been set for his pre-trial detention after 31 January 2011, the Court notes that in the decision of 8 November 2010 his detention was extended until 12 February 2011 (see paragraph 9 above). Accordingly, the applicant's pre-trial detention was covered by a court decision until 12 February 2011.

25. As to the period after 12 February 2011, the Court notes that the applicant did not provide a copy of the court decision of 1 March 2011 (see paragraph 13 above). Although he initially submitted that he had not been provided with a copy of it, the District Court's letter of 4 December 2012 (see paragraph 13 above) clearly stated that his lawyer had the possibility of accessing the case file, which implies that it was possible to make a copy of the above decision. The applicant did not allege that his lawyer had been unable to do so in the period up until 18 October 2013, when the same court rejected his lawyer's subsequent request (ibid.). The Court also notes that

the applicant did not submit any comments on its second request, made on communication of the case, to provide a copy of the above decision. In particular, he did not state that after 18 October 2013 or after his release in April 2014 the circumstances had remained such that he or his lawyer had still not had the possibility of obtaining a copy of the above decision. The Court notes, lastly, the Government's submission that they had not been able to access the material in the case file for objective reasons.

26. In such circumstances, and in the absence of a copy of the court decision of 1 March 2011, the Court is unable to examine the applicant's complaint that his detention after 1 March 2011 was unlawful and to make any conclusion in this respect. Nor is it able to examine his complaint concerning part of the period between 12 February and 1 March 2011, because there is no information in the case file that the above-mentioned decision was indeed adopted on 1 March 2011, as stated by the applicant, and not earlier or on any other date. The Court thus concludes that the applicant's allegation that he was unlawfully detained after 12 February 2011 has not been sufficiently made out and confirmed by documents (see, *mutatis mutandis*, *Kirillov v. Ukraine* [Committee], no. 64603/12, §§ 21-24, 27 May 2021).

27. Similarly, the Court cannot examine the applicant's complaint under Article 5 § 4 that he was unable to appeal against the decision of 1 March 2011. In the absence of a copy of that decision, it cannot determine its nature and contents or make any conclusions in this respect.

28. Accordingly, this part of the application is manifestly ill-founded and must be rejected pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

(b) Article 5 § 3

29. The Court notes that the applicant's complaint under Article 5 § 3 is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

2. Merits

30. Under Article 5 § 3, justification for any period of detention, no matter how short, must be convincingly demonstrated by the authorities. The requirement for a judicial officer to give relevant and sufficient reasons for the detention – in addition to the persistence of reasonable suspicion – applies already at the time of the first decision ordering detention on remand. Furthermore, when deciding whether a person should be released or detained, the authorities must consider alternative measures. "Relevant" and "sufficient" justifications have included the danger of absconding, the risk of pressure on witnesses or of evidence being tampered with, the risks of collusion, reoffending or causing public disorder and the need to protect the detainee (see *Buzadji v. the Republic of Moldova* [GC], no. 23755/07,

§§ 87-88 and 102, 5 July 2016). Those risks must be duly substantiated and the authorities' reasoning on those points cannot be abstract, general or stereotyped (see *Merabishvili v. Georgia* [GC], no. 72508/13, § 222, 28 November 2017). Thus, the risk of absconding cannot be gauged solely on the basis of the severity of the possible sentence; it must be assessed with reference to other factors, such as the accused's character, morals, assets, links with the jurisdiction, and international contacts (ibid., § 223). It is essentially on the basis of the reasons set out in the domestic judicial decisions and of the arguments made by the applicant in his or her requests for release or appeals that the Court is called upon to decide whether or not there has been a breach of Article 5 § 3 (ibid., § 225).

31. In the present case, the Court notes that it can only examine the court decisions adopted in the period between 15 June and 8 November 2010. In this respect, it further notes that in ordering the applicant's pre-trial detention on 15 June 2010 (see paragraph 6 above), the District Court mainly referred to the gravity of the charges against him and the risk of his absconding and continuing his criminal activities. The court referred to the investigator's submissions, without examining the plausibility of the grounds invoked. The reasoning contained in the initial detention order was subsequently repeated in the further extension orders of 6 August, 9 September, 11 October and 8 November 2010 (see paragraph 11 above) and did not evolve over time (see, similarly, *Kharchenko v. Ukraine*, no. 40107/02, §§ 80-81 and 99, 10 February 2011, and *Ignatov v. Ukraine*, no. 40583/15, § 41, 15 December 2016). Furthermore, there is no indication that the domestic courts duly examined alternative measures. Even though they stated generally that they had examined such a possibility, they did not elaborate on why none of those measures could be applied (see *Aleksandrovskaya v. Ukraine* [Committee], no. 38718/16, § 111, 25 March 2021).

32. In view of the above, the Court concludes that there has been a violation of Article 5 § 3 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 6 § 1 AND ARTICLE 13 OF THE CONVENTION

33. The applicant also complained under Article 6 § 1 and Article 13 of the length of the criminal proceedings against him and the lack of effective remedies in this respect. The above complaints fall to be examined solely under Article 6 § 1, the relevant part of which reads as follows:

> "In the determination of ... any criminal charge against him, everyone is entitled to a ... hearing within a reasonable time by [a] ... tribunal ..."

A. The parties' submissions

34. The Government submitted that, taking into account the complexity of the case and the nature of the crimes the applicant had been charged with, as well as the number of charges and the presence of other co-defendants, the length of the criminal proceedings had been reasonable. The case had been examined by the courts very swiftly; there had been no unreasonable delays or periods of inactivity for which the authorities could be held responsible.

35. The applicant made no specific comments in respect of this complaint, submitting the same arguments as for his complaints under Article 5 §§ 3 and 4 of the Convention (see paragraph 23 above).

B. The Court's assessment

36. The Court notes that its examination of the applicant's complaint is limited to the period between 12 June 2010 and March 2014 (see paragraphs 16-17 above). This period of three years and nine months involved a pre-trial investigation and proceedings before one level of jurisdiction. Having examined all the material submitted to it and regard being had to the criteria established in its case-law on the subject (see, among many other authorities, *Pélissier and Sassi v. France* [GC], no. 25444/94, § 67, ECHR 1999-II, and *Frydlender v. France* [GC], no. 30979/96, § 43, ECHR 2000-VII), the Court cannot conclude that the above period was excessive in the particular circumstances of the present case. It notes that the applicant neither specifically challenged the Government's submissions (see paragraph 35 above), nor provided any specific comments on this complaint. Nor did he point to any concrete period of inactivity which could be attributed to the domestic authorities dealing with his case.

37. In view of the above, the Court considers that this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

38. 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

39. The applicant claimed 11,046.76 euros (EUR) in respect of pecuniary damage for alleged loss of profit, and EUR 250,000 in respect of non-pecuniary damage.

40. The Government submitted that the claims should be rejected as there had been no violations in the present case. Alternatively, they argued that the claim in respect of pecuniary damage was speculative and unrelated to the alleged breaches.

41. The Court finds no causal link between the violation found and the pecuniary damage claimed. On the other hand, it awards the applicant EUR 3,000 in respect of non-pecuniary damage.

B. Costs and expenses

42. The applicant claimed 1,500 United States dollars in respect of legal costs which he had been required to pay to his lawyer under the contract of legal assistance of 2 August 2013. The applicant provided an invoice of 15 March 2021, which stated that he had to pay his lawyer the equivalent of the above amount, 41,478 Ukrainian hryvnias (for legal analysis of the documents, consultations, and preparation of the application and the observations).

43. The Government invited the Court to reject the claim as the applicant had not provided a contract of legal assistance and had not indicated an hourly rate and scope of his lawyer's services.

44. 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 have been actually and necessarily incurred and are reasonable as to quantum. The Court observes that the applicant has provided only his lawyer's invoice in substantiation of the costs claimed. No document has been provided that would indicate that he has actually paid the amount billed under that invoice or that he undertook and was bound to pay it.

45. Regard being had to the documents in its possession and to its case-law, the Court therefore rejects the claim (see, similarly, *Kornilova v. Ukraine* [Committee], no. 47283/14, §§ 90-91, 12 November 2020).

C. Default interest

46. 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 complaint under Article 5 § 3 of the Convention admissible, and the remainder of the application inadmissible;

2. *Holds* that there has been a violation of Article 5 § 3 of the Convention;

3. *Holds*
   (a) that the respondent State is to pay the applicant, within three months, EUR 3,000 (three thousand euros), plus any tax that may be chargeable, to be converted into Ukrainian hryvnias at the rate applicable at the date of settlement, in respect of non-pecuniary damage;
   (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 20 January 2022, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Martina Keller Deputy Registrar	Arnfinn Bårdsen President