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OBLIGATIONS RELATED TO THE APPLICATION OF A PREVENTIVE MEASURE IN THE FORM OF BAIL: PROBLEMS OF IMPLEMENTATION IN THE CONTEXT OF THE CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS

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Annotation. The purpose of the article is to identify the problems in the fulfilment of the obligations related to bail as a preventive measure based on the approaches formulated in the case law of the European Court of Human Rights, as well as to offer recommendations on how to resolve them.

Methods. The general philosophical basis of the study was formed by axiological and hermeneutical approaches. In particular, the first one allowed to carry out a value analysis of the fundamental human right to liberty and to assess the impact of the amount of bail to provide an effective alternative for the restriction of this right. Meanwhile, the second made it possible to apply an in-depth study and interpretation of the legal texts of the European Court of Human Rights judgments and the national legislation. When building the system of recommendations, we used the systemic and structural method, as well as the logical research method and the method of legal modelling with.

Results and conclusions. The analysis of the legal positions of the ECtHR made it possible to conditionally single out the following standards and recommendations for national judges for ensuring the legality and reasonableness of the determination the amount of bail in criminal proceedings: 1) the main purpose of bail is to ensure the appearance of a person, not to punish him or her or to create conditions for compensation for the damage caused by a criminal offence; 2) the accuracy in determining the amount of bail as an alternative to possible keeping in custody should be equal to the thoroughness in justifying the continued keeping of a person in custody; 3) if the bail is provided by the suspect/accused, the key thing to consider when determining the optimal amount of bail is his/her assets (property status) and solvency. However, if the bail is provided by another person (the bail bondsman), the relationship between the bail bondsman and the suspect/accused should be taken into account to

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determine the effective bail amount; 4) the extent of the damage caused by the criminal offence may be taken into account as an exception when determining the bail amount - but this cannot be applied as a general rule due to the different purpose of the bail; 5) a suspect/accused person who is being considered the possibility of being granted bail must provide the court with information that may be necessary to adequately determine the amount of potential bail and be verified for this aim; 6) the amount of bail must be substantiated in the decision of the investigating judge or court, which will serve as an important guarantee of preventing arbitrariness; 7) failure of a person to fulfil the obligation to provide bail after it has been set may be a sign that the amount of bail is excessive and disproportionate for the suspect/accused.

Key words: criminal proceedings, preventive measures, right to liberty, procedural obligations, bail.

Formulation of the problem. One of the fundamental human rights guaranteed at both the national and international levels is the right to liberty. In particular, this refers to the provisions of Article 29 of the Constitution of Ukraine, Article 5 of the European Convention on Human Rights (hereinafter – the ECHR or the Convention), as well as Article 12 of the Criminal Procedure Code of Ukraine (hereinafter - the CPC), which define the basic standards for the protection of this right, a limited range of grounds for its restriction, as well as legal safeguards against abuse and violations. For instance, the principle of presumption of liberty (or presumption in favour of liberty), which follows from the conceptual content of paragraph 1 of Article 5 of the Convention, is generally recognised, as it enshrines the right to liberty and security of person, the general prohibition of deprivation of liberty of any person, and exceptional cases of such deprivation of liberty, clearly defined and in accordance with the procedure established by law. Another important aspect that illustrates the existence of the presumption of liberty is the imperative requirement of Article 5 of the ECHR that deprivation of liberty may only be permitted for a period that is absolutely necessary.

An important attribute of the presumption of liberty arising from the context of Article 5(3) ECHR is the need for national courts to consider the possibility of applying alternative non-custodial measures to a person. This guarantee is based on the provision of the Convention that the possibility of releasing a person during the proceedings should be considered - in particular, «such release may be conditioned by guarantees to appear at the court hearing». Therefore, for example, in the judgment of the case «Idalov v. Russia», the ECtHR stated that the authorities are obliged to consider alternative measures to ensure the appearance of a person in court when deciding on his release or detention. In contrast, in particular, failure to consider alternative measures of restraint would mean that there are insufficient grounds to justify the duration of the person's detention (paragraphs 140 and 149) [4].

Blatantly obviously, one of the most effective alternative measures of restraint in this regard is bail, provided with an essential material motivation (threat of loss of funds deposited as bail), which should encourage a person to

comply with the procedural obligations imposed on him/her. This conclusion is confirmed by the enshrining in the Ukrainian criminal procedural legislation (part 3 of Article 183 of the CPC) of the obligation of the investigating judge and the court, when deciding on the application of keeping in custody, to determine the amount of bail as an alternative, which, if paid, ensures the release of the person from custody.

However, it is important that such appointment of an alternative measure of restraint, in particular in the form of bail, is effective and enforceable, and does not turn into a fiction due to the exorbitant amount of bail, which will lead to the prolongation of detention and, under certain circumstances, may cause violation of the requirements set out, particularly, in paragraph 3 of Article 5 of the Convention. In view of the above, it seems appropriate to consider the obligations related to the application of a preventive measure in the form of bail through the prism of the problem of their actual fulfilment in the light of the approaches defined by the European Court of Human Rights (hereinafter - the ECtHR or the Court).

The aim of the study. The purpose of the article is to identify the problems in the fulfilment of the obligations related to bail as a preventive measure based on the approaches formulated in the case law of the European Court of Human Rights, as well as to offer recommendations on how to resolve them.

The state of problem solving. Certain problems of applying bail as a preventive measure, as well as its use as an alternative to detention, have been studied in the scientific works of such researchers as, K.D. Volkov, T.V. Danchenko, M.I. Derevianko, A.V. Zakharko, M.O. Karpenko, O.M. Koriniak, D.O. Savytskyi, V.O. Sichko, O.I. Tyshchenko, A.R. Tumanians, O.H. Shylo, K.Yu. Shyroka and others. However, the author of the article intends to focus on a different approach to covering this broad issue, in particular, by analysing the impact of the amount of bail set by the investigating judge or court on the ability of the suspect, accused or bailor to fulfil their obligations to post it.

Presenting main material. Firstly, it should be noted that the scope of procedural obligations imposed on a person when a bail measure is applied to him/her is polystructural, since it includes the following groups:

1. Obligations that constitute the essence of this type of preventive measure. Given the normative content of Part 1 and Part 6 of Art. 182 of the CPC, they include the obligation to directly deposit funds in the monetary unit of Ukraine to a special account determined in accordance with the procedure established by the Cabinet of Ministers of Ukraine (in case of bail as the main preventive measure, the legislation also establishes a specific time limit for fulfilling this obligation - 5 days). If the funds are provided by the pledgor, the suspect or accused is obliged to ensure that they will be paid by him or her. In addition, this group also includes the obligation to submit to the investigator, prosecutor or court a payment document with a bank's stamp of execution (part 6 of Article 182 of the CPC, clause 6 of the Procedure for depositing funds to a special account in case of bail as a preventive measure [12]);

2. Conditionally, «accompanying» obligations imposed on the suspect or accused to minimise the risks of their negative behaviour in order to obstruct

criminal proceedings. This group, on the one hand, includes those specific procedural obligations that are imposed on a person on the basis of a decision of an investigating judge or court from the list set out in part 5 of Article 194 of the CPC (and additionally, in relation to crimes related to domestic violence, the obligations set out in part 6 of Article 194 of the CPC). On the other hand, this also refers to the general obligations of the suspect or accused, defined at the legislative level – in part 7 of Article 42 of the CPC, which include the obligation to appear when summoned by the investigator, prosecutor, investigating judge, court (or to notify in advance of the impossibility of appearing at the appointed time), as well as the obligation to obey the lawful requirements and orders of the investigator, prosecutor, investigating judge, court.

We will focus on the analysis of the first group of obligations. It should be emphasised that the process of fulfilling the obligations imposed on the suspect or accused is accompanied by control measures, which will include verification of compliance with the conditions regarding the amount of bail, timeliness of fulfilment of this obligation, nonviolation of the ban on depositing bail by certain categories of persons (part 2 of Article 182 of the CPC), as well as receipt of a payment document for depositing bail to a special account of the territorial department of the SJA.

Equally significant in the context of ensuring the fulfilment of obligations during the application of bail are also compensatory measures, which cover criminal procedural liability measures that may arise in the event of a suspect or accused person's failure to fulfil or improper fulfilment of procedural obligations related to the application of a personal commitment, personal guaranty or bail. Such measures include, firstly, the consequences of failure to provide bail within the 5 days stipulated by law and failure to provide a payment document in support - namely, the possible change of the chosen bail to another preventive measure.

Nevertheless, it is positive that the Ukrainian CPC is not overly formalised in this regard, since if the prosecution has not yet submitted a motion to the investigating judge or court for another preventive measure, and the investigating judge or court has not yet considered it, the relevant bail obligation may be fulfilled after the 5-day period has expired. It seems that this approach is quite logical, considering that the reasons for the failure to deposit the required amount may be both objective and subjective (e.g., inadequate explanation of the procedure for depositing bail to a special account, legal restrictions on the possibility of depositing bail only in the national currency, while part of the person's property may already be seized, which complicates the process of selling the property belonging to the person - potential funds for bail, etc.). In view of this, each delay in providing bail should not automatically lead to a change of the preventive measure to another, including a more severe one.

The issue of determining the amount of bail as a preventive measure requires special attention, as this factor plays a key role in light of the matter of potential fulfilment of the obligation to contribute bail to a deposit account. This aspect is particularly relevant in the context of the impressive bail amounts that have

been set by the High Anti-Corruption Court in high-profile cases over the past few years. For example, the «record holders» include bail in the amount of UAH 3 bln. 891 million UAH [11], which has now been reduced to 2.4 billion UAH [13], as well as 523 million UAH and 402 million UAH (the first amount has now been reduced almost tenfold to 65 million UAH) [14]. Based on information from open sources, there are more than ten proceedings where the amount of bail that can be posted is more than UAH 100 million. It should be noted that in the vast majority of cases, bail in these criminal proceedings remains unpaid even after repeated reductions in the amount of bail. This circumstance may be due, among other things, to problems in finding the optimal balance between the investigating judge or court in determining the amount of bail - sufficient to encourage a person to refrain from unlawful actions, and, on the other hand, moderate and affordable for actual payment in a particular proceeding.

It is this balance that the ECtHR emphasises in its judgments in relevant cases. Thus, we will now focus on the analysis of its key approaches to this issue. In particular, the study of several crucial judgments of the Court (for example, in the cases of *Mangouras v. Spain*, *Gafa v. Malta*, *Istomina v. Ukraine* and a number of others) gives grounds to determine the system of basic rules that should guide investigating judges or courts when deciding on the amount of bail (as a main or alternative measure of restraint):

(1) The main purpose of bail is to ensure the appearance of a person, not to punish him or her or to create conditions for compensation for the damage caused by a criminal offence.

This aspect is particularly highlighted in such cases as *Gafà v. Malta*, (para. 70) [2], *Mangouras v. Spain* [GC] (para. 78) [7], *Neumeister v. Austria* (para. 14) [8], where the Court underlines that «the guarantee provided for in Article 5 § 3 of the Convention is not intended to ensure compensation for damages, but, in particular, the appearance of the accused at the hearing». This rule seems quite logical given that Ukrainian legislation, as well as the criminal procedure legislation of most European countries, considers bail primarily as a preventive measure designed to prevent attempts by a person to obstruct criminal proceedings in various ways. Obviously, if a person is found guilty, under certain circumstances, the bail can be used to execute the sentence, including to compensate for the damage caused. Nevertheless, this is a secondary objective, and the principle of presumption of innocence must be respected.

(2) Proper care in setting bail as an alternative to possible keeping in custody should be equal to the thoroughness in justifying the continued detention of a person.

Thus, this aspect is emphasised in a number of cases (namely, the judgments in *Bojilov v. Bulgaria* (para. 60) [1], *Skrobol v. Poland* (para. 57) [9]), where it is noted that the approach of the authorities to the issue of determining the appropriate bail should be as thorough as when deciding whether to continue the accused's detention. This rule obviously stems from the conclusion that bail should be an effective alternative to detention, and therefore the weighing of the possibility of its application, as well as the conditions of its granting (in

particular, the amount of the relevant sum) should be subject to a separate proper assessment by national courts.

(3) If the bail is provided by the suspect/accused, the key factors to be considered in determining the optimal bail amount are the suspect's assets (property status) and ability to pay. Meanwhile, if the bail is provided by another person (the bail bondsman), the relationship between the bail bondsman and the suspect/accused should be taken into account to determine the effective bail amount.

In the light of this rule, it is worth pointing out what underlies the effectiveness and efficiency of bail as a preventive measure. Given that we are talking about the threat of losing money deposited by the suspect or accused personally or by persons («bail bondsmen») who instead materially guarantee the proper procedural behaviour of these subjects, the amount of bail set should be optimal to act as a deterrent to the suspect/accused from wanting to escape the investigation and justice in general.

This conclusion has been repeatedly emphasised by the ECtHR, as exemplified by the judgments in *Gafà v. Malta* (para. 70) [2]; *Toshev v. Bulgaria* (paras. 69–73) [10], etc. It should be noted, however, that in the judgment in *Mangouras v. Spain* [GC] [7] the majority of the Grand Chamber judges also cited a number of other circumstances that may be taken into account when determining the appropriate amount of bail, such as «the professional environment that forms the conditions for the relevant activities in order to ensure that the measure remains effective» (para. 87), «nationality and place of residence, as well as the lack of ties in Spain and ... age», «the specific context of the case» (para. 92).

The assessment of the majority of judges in this case regarding potential pledgers is quite remarkable, as this was the main basis of the ECtHR's argumentation. In particular, in para. 92, the judges noted that the national courts had sufficiently taken into account the status of a person as an employee of the shipowner, as well as his professional relations with the persons who were to provide the bail. In addition, it was noted that «the relationship [of the accused] with the persons who are to provide bail is one of the criteria to be used in assessing the amount of bail» (para. 84 of the said judgment) [7].

However, the application of the relevant approach in the above case was subjected to reasoned criticism by a minority of judges (7 judges) of the Grand Chamber, which was reflected in their separate dissenting opinion. Among other things, the judges stressed that «at the time of setting the bail, no guarantors offered to post bail on his behalf, and there is no reason to believe that the applicant, being the captain of the cargo vessel, was able to find guarantors who could post such a sum himself». In addition, it was noted that «...at no stage prior to the applicant's release had the domestic courts clarified the legal obligations of the shipowners to post bail, if any, or the relevant insurance agreements that existed between the shipowners and their insurers. Specifically, it does not appear that the question of whether the insurers were liable to reimburse the shipowners for the security deposit of the master of the vessel who was detained by the maritime authorities in the circumstances of

this case was examined.» The judges criticised the approach of the majority of the Grand Chamber, which, as noted, was based on «at best an unsupported assumption that shipowners or their insurers would feel a moral obligation to come to the aid of the applicant by posting bail rather than allowing him to languish in detention during the preliminary investigation». The dissenting opinion concluded that «in the absence of such guarantors, the accused and his property should be the main reference point for determining the amount of bail» [7].

The above argumentation leads to the conclusion that the assessment of possible bail bondsmen by national courts should be realistic (not hypothetical), taking into consideration the circumstances of a particular case and the expressed willingness and/or readiness of certain persons to act as bail bondsmen for the suspect or accused.

(4) The amount of damage caused by the criminal offence may exceptionally be taken into account in determining the sum of bail - but this cannot apply as a general rule because of the differing purpose of bail (see paragraph 1).

The greatest detailed elaboration of this rule is provided in the aforementioned judgment of *Mangouras v. Spain* [GC]. In particular, referring to the Court's inability to ignore «the growing and legitimate concern both in Europe and internationally about environmental offences» (para. 86), and taking into account a number of the attendant circumstances mentioned above («including the professional environment which shapes the conditions for the activities concerned, so as to ensure that the effectiveness of the bail is maintained»), the ECtHR stressed that «the facts of the present case, which concern marine pollution on a rare scale causing enormous environmental damage, are of an exceptional nature and have very significant consequences in terms of both criminal and civil liability. In such circumstances, it is not surprising that the judicial authorities should adjust the amount of bail to the level of liability so that those responsible have no incentive to evade justice and forfeit their bail» (para. 88). In view of this, the Court did not find a violation of the guarantees of Article 5(3) of the ECHR in the actions of the state agents, explaining that the catastrophic environmental and economic consequences of the oil spill affected the seriousness of the offences and the amount of damages incriminated to the applicant [7].

However, in the already mentioned separate dissenting opinion of 7 judges of the Grand Chamber in this case, such conclusions of the majority of judges were criticised with reference to the fact that, given the purpose of bail as a preventive measure, «... the amount set cannot be determined by reference to the damages that may be incurred by the accused or his employers, but must be assessed primarily in the light of the accused, his property and the relationship with those persons, if any, who offer themselves as guarantors...» [7].

Considering the above, we can state that in exceptional cases, provided that other factors are also present, the amount of damage caused may be taken into account when determining the amount of bail. However, this

should be subjected to a thorough analysis, primarily in terms of the real ability of the suspect/accused to provide this bail (otherwise, the relevant alternative to keeping in custody will become illusory) or the willingness of other persons to act as bail bondsmen in such criminal proceedings.

(5) The suspect/accused who is being considered for possible bail shall provide the court with information that may be necessary to adequately determine the amount of potential bail and may be examined for this aim.

In the context of the above rule, it seems appropriate to note, first of all, that in general, the burden of proof for the application of the relevant preventive measure and the circumstances to be taken into account is mainly on the prosecution. Nevertheless, when it comes to determining the optimal bail amount and it is the suspect or accused who has the most relevant information regarding his or her own financial situation (a key factor in determining the bail amount as noted above), it may be the responsibility of the suspect or accused to provide the factual data essential for a thorough and adequate assessment by the investigating judge or court in this regard.

With regard to the relevant case law of the ECtHR in this context, we would like to draw attention to the judgment in the case of *Gafa v. Malta*, where the Court noted that if the national courts are ready to release a person on bail, it is the accused who is obliged to provide sufficient information that can be verified if necessary (para. 70) [6]. A similar conclusion was formulated by the ECtHR in the case of *Toshev v. Bulgaria* (para. 68) [10].

(6) The amount of bail should be justified in the decision of the investigating judge or court, which will serve as an important guarantee against arbitrariness.

This rule is a logical continuation of the previous ones, since the consideration and thorough analysis of the above circumstances by national court judges should be presented objectively and illustrated in the relevant court decision (ruling). This fulfils a multifaceted task: it ensures that restrictions on human rights and freedoms are motivated, creates the necessary preconditions for a possible appeal against the relevant ruling, prevents arbitrariness by state bodies and their representatives, and, ultimately, makes the exercise of judicial power «visible» to society, i.e. promotes transparency of the judiciary.

In most of its judgments on this issue, the ECtHR implicitly or explicitly points out the significance of compliance with the above rule. Examples of this are the Court's judgments in *Gafa v. Malta* (para. 80) [2], *Georgieva v. Bulgaria* (paras. 15 and 30-31) [3], *Istomina v. Ukraine* (paras. 30-32) [5].

(7) Failure of a person to fulfil the obligation to provide bail after it has been granted may be an indication that the amount of bail is excessive and beyond the means of the suspect/accused. This should be subject to scrutiny, including by reducing the amount of possible bail.

In a number of its cases, such as *Gafa v. Malta* [2], *Kolakovic v. Malta* [6], the ECtHR has emphasised the existence of an obligation on the part of the authorities to conduct proceedings «with particular care» even after the amount of bail has been officially set, but the person still stays in custody due

to the inability to pay it. In view of this, the Court formulates a quite logical conclusion that in such circumstances the national courts failed to do their best to determine the appropriate and optimal amount of bail. In particular, in paragraph 75 of the first of the above judgments, the ECtHR noted that «despite the continuation of the applicant's detention after the posting of bail on the contested financial conditions due to his insolvency, at no stage – during a period of just under a year, within which the applicant filed several motions - did the courts consider it sufficient to reduce the amount of bail, which would have given him a real opportunity to benefit from the bail. The domestic courts did not give any relevant or sufficient reasons related to the applicant's financial situation for such a course of action...» [2].

Based on the above, we conclude that periodic judicial control over the issue of setting bail is of great significance, as it can serve as a necessary compensatory measure in case the investigating judge or court failed to set the most appropriate bail amount for a particular suspect or accused at the first time.

Conclusions. The analysis of the relevant case law of the ECHR made it possible to formulate a number of important rules and recommendations that can be used by national courts when deciding on the adequate amount of bail as an important guarantee for an alternative to keeping in custody. These include, in particular, the following: 1) the main purpose of bail is to ensure the appearance of a person, not to punish him or her or to create conditions for compensation for the damage caused by a criminal offence; 2) the accuracy in determining the amount of bail as an alternative to possible keeping in custody should be equal to the thoroughness in justifying the continued keeping of a person in custody; 3) if the bail is provided by the suspect/accused, the key thing to consider when determining the optimal amount of bail is his/her assets (property status) and solvency. However, if the bail is provided by another person (the bail bondsman), the relationship between the bail bondsman and the suspect/accused should be taken into account to determine the effective bail amount; 4) the extent of the damage caused by the criminal offence may be taken into account as an exception when determining the bail amount - but this cannot be applied as a general rule due to the different purpose of the bail; 5) a suspect/accused person who is being considered the possibility of being granted bail must provide the court with information that may be necessary to adequately determine the amount of potential bail and be verified for this aim; 6) the amount of bail must be substantiated in the decision of the investigating judge or court, which will serve as an important guarantee of preventing arbitrariness; 7) failure of a person to fulfil the obligation to provide bail after it has been set may be a sign that the amount of bail is excessive and disproportionate for the suspect/accused. The above should be subject to a thorough review, in particular by reducing the amount of possible bail. To conclude, we would like to underline that the failure of national courts to assess the applicant's financial capacity/ability to pay the required amount may lead to the ECtHR finding a violation of Article 5.3 ECHR.

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