**ON BEHALF OF THE REPUBLIC OF AZERBAIJAN**

**DECISION**

**OF THE PLENUM OF THE CONSTITUTIONAL COURT**

**OF THE REPUBLIC OF AZERBAIJAN**

*On verification of conformity of decision of the Military Board on Civil Cases*

*of the Supreme Court of the Republic of Azerbaijan dated 7July 2011 to Constitution and laws of the Republic of Azerbaijan*

**17 April 2012 Baku city**

Plenum of the Constitutional Court of the Republic of Azerbaijan composed of F.Abdullayev (Chairman), Sona Salmanova, Fikret Babayev, Sudaba Hasanova, Jeyhun Garajayev (reporter judge), Rafael Qvaladze, Isa Nadjafov and Kamran Shafiyev,

with participation of the secretary I.Ismayilov,

legal representative of applicant body Ilgar Jafarov, Head of Department for the Maintenance of State Prosecution of the Prosecutor’s Office of the Republic of Azerbaijan,

legal representative of respondent body – Ingilab Nasirov, Judge of the Supreme Court of the Republic of Azerbaijan;

expert: expert: Firuza Abbasova, associate Professor of the Criminal Procedure Board of Baku State University;

in accordance with Article 130.3 of the Constitution of the Republic of Azerbaijan examined in open judicial session via special constitutional proceedings the case on inquiry of Office of Public Prosecutor of the Republic of Azerbaijan on verification of conformity of the decision of Military Board of the Supreme Court of the Republic of Azerbaijan of July07, 2011 to Constitution and laws of the Republic of Azerbaijan.

Having heard the report of Judge J.Garajayev, speech of representatives of applicant and respondent body, having considered materials of the case, Plenum of the Constitutional Court

**DETERMINED AS FOLLOWS:**

 Prosecutor's Office of the Republic of Azerbaijan (hereinafter referred to as the Prosecutor's Office), having appealed to the Constitutional Court of the Republic of Azerbaijan (hereinafter referred to as the Constitutional Court) with inquiry, asked to verify compliance of the decision of Military Board of the Supreme Court of the Republic of Azerbaijan (hereinafter referred to as the Supreme Court) as of July 7, 2011 on criminal case concerning finding guilty and condemnation of Sh. Badirov under the Articles 178.2.1, 178.2.2, 178.2.4 and 178.3.2 of the Criminal Code of the Republic of Azerbaijan (hereinafter referred to as the CC) and Y. Talybov under the Articles 178.2.1, 178.2.2, 178.2.4, 178.3.2 and 341.1 of the CC, with the provisions of parts I, IV and VI of Article 125, parts II and VII of the Article 127, part III of the Article 129 of the Constitution of the Republic of Azerbaijan (hereinafter referred to as the Constitution), Articles 7.0.20, 28.1, 32.1, 65.1, 300.1.1 and 318.1 of the Criminal Procedure Code of the Republic of Azerbaijan (hereinafter referred to as the CPC).

 In inquiry it is specified that Sh. Badirov and Ya. Talybov found guilty and sentenced by a sentence of Military Court of the Republic of Azerbaijan on Cases of Grave Crimes as of November 18, 2010 under the above-noted articles of the Criminal Code.

At the same time, the resolution on an assessment of proofs adopted by investigative body as of April 26, 2010, was cancelled by the decision of court as of November 18, 2010 regarding the termination of criminal prosecution concerning the victims on criminal case, deviations of initiation of criminal prosecution concerning them in view of absence in their acts of corpus delicti.

By the decision of the Military Board of the Court of Appeal of Baku city which considered case on the appeal protest given on a sentence and the decision as of March 30, 2011, the sentence was partially changed, and the decision as of November 18, 2010 on cancellation of the resolution on an assessment of proofs adopted by investigative body in the corresponding part was upheld.

The cassation protest given on this decision by the public prosecutor was proved by fact that the court, at imposing of punishment, did not completely observe requirements of norms of criminal law, and also, coming to conclusions did not consider the corresponding actual facts of the case, and thus pronounced illegal and unfair sentence. In the cassation protest it was also specified that upholding by court of appeal instance of illegal and unreasonable decree on direction of the decision on assessment of proofs adopted by investigative body issued by court of the first instance as of April 26, 2010, in Military Prosecutor's office of the Republic of Azerbaijan for cancellation and legal assessment of materials, contradicts requirements of the Criminal Procedure Code.

By the decision of Military Board of the Supreme Court as of July 7, 2011 the cassation protest was partially satisfied, the decision of court of appeal instance was partially cancelled and returned to the Court of Appeal of Baku city for reconsideration and upholding other part, including in the part concerning the decision on an assessment of proofs adopted by investigative body.

Plenum of the Supreme Court rejected the additional cassation protest given by the Attorney-General of the Republic of Azerbaijan on this decision of Military Board of the Supreme Court.

According to inquirer, noted decision of court of cassation instance contradicts to the principles and norms of the Constitution and international treaties which the Republic of Azerbaijan is a party too, concerning acceptance by courts on itself a neutrality, impartiality, functions of charge and protection, violates requirements of the criminal procedure legislation on consideration of the case only within the charge brought into court, concerning binding force of the decisions of body which is carrying out criminal trial excluding criminal prosecution at adjudgement or other final decision concerning possibility of cancellation of these decisions only as judicial supervision.

The prosecutor's office considers it expedient the verifying of compliance of the decision of the Supreme Court with the Constitution and laws from the point of view of formation of uniform jurisprudence and accurate observance of the criminal procedure legislation.

In connection with the inquiry the Plenum of the Constitutional Court notes that the Prosecutor's Office acting as the party of charge on the specified criminal case consistently challenged legality of judicial decisions, gave protests on these decisions and considering that the law was interpreted by courts incorrectly, appealed to the Constitutional Court.

According to above, and according to requirements of point 4 of part III of Article 130 of the Constitution, Plenum of the Constitutional Court finds possible to verify of compliance of the decision of the Supreme Court of the Constitution and to laws on the basis of inquiry of Prosecutor's Office.

Plenum of the Constitutional Court considers necessary to note following concerning constitutional bases, the principles and conditions of implementation of judicial authority, a role and function of court in criminal legal proceedings, and the status of the party of charge for the correct solution of the issue raised in inquiry.

Strict observance of provisions of the Constitution, the Criminal Procedure Code, other laws of the Republic of Azerbaijan and international treaties at administration of justice in the democratic, constitutional state, has to be a fundamental obligation of courts and participants of criminal trial. Justice has to be carried out within the procedural norms of law established by the legislation of the Republic of Azerbaijan, and courts have to accurately observe the rules established by the criminal procedure legislation. Along with it, court of cassation instance having created uniform jurisprudence is obliged to eliminate within the powers the procedural violations introduced by the courts which were carrying out justice and by that to create the base for the correct application of criminal procedure norms.

 Judicial power of the Republic of Azerbaijan can only be exercised by courts through a fair trial. Judicial power is exercised by the Constitution, through civil and criminal court proceedings and through other means provided by the law. The Prosecutor’s Office of the Republic of Azerbaijan and the defense are the parts of the criminal court proceeding. Structure of the court and rules for court proceedings are defined by the law. In consideration of legal cases judges must be impartial, fair, they should provide juridical equality of parties, act based on facts and according to the law. A court decision should be grounded in law and evidence (parts I, III, IV, V of Article 125, Article 127.2 and Article 129.3 of the Constitution).

Plenum of the Constitutional Court notes that one of the purposes of the basic principles of implementation of justice is providing in court of protection of rights and freedoms of everyone enshrined in the Article 60 of the Constitution.

These constitutional provisions, emphasizing justice implementation as the main function of judicial authority, note that no any other body has right to assume this function, and on the other hand, the functions which are not corresponding to the status of judicial body cannot be assigned to court.

According to the principle of implementation of criminal legal proceedings, only the courts that are one of the basic principles of the criminal procedure legislation, criminal legal proceedings are carried out by the authorized court entering into judicial system of the Republic of Azerbaijan (Article 23.1 of the CC).

Proceeding from noted constitutional principles, according to Article 3 of the Law of the Republic of Azerbaijan “On Courts and Judges” of June 10, 1997, devoted to obligations of courts, “Activity of the courts of the Republic of Azerbaijan is aimed solely at the administration of justice and, in cases and order provided by legislation, at the enforcement of judicial supervision. While administering justice, courts protect rights and freedoms of person and citizen, rights and lawful interests of all enterprises, establishments and organizations irrespective of the form of property, political parties, civil associations, other legal persons, from any encroachments and law violations, fulfill other objectives provided for in Constitution of the Republic of Azerbaijan and this ACT. Vesting of other objectives on courts is inadmissible”.

 At the same time, according to Article 127.9 of the Constitution, everyone has right for defense during all stages of legal proceedings. The principle of competitiveness in criminal trial is also enshrined in criminal procedure legislation. Thus, according to Article 32.1 of the CPC, in the Republic of Azerbaijan criminal legal proceedings are carried out on the basis of principle of competitiveness of parties of charge and defense.

The principle of competitiveness includes such structure of criminal legal proceedings at which legal proceedings function (solution of case) completely separates from functions of charge and defense. Function of solution of case belongs to court. The court is obliged to provide fair and impartial consideration of the case, to create to the parties equal opportunities for implementation of the procedural duties and protection of interests. Considering that competitiveness is possible only in the presence of neutral court, acceptance by court on itself procedural functions of the parties (charge or defense) it is inadmissible.

Plenum of the Constitutional Court in the Decision “On Interpretation of Article 409 of the Criminal Procedure Code of the Republic of Azerbaijan” of July 19, 2002 in connection with the principle of competitiveness noted that establishment by the legislator of implementation of criminal legal proceedings according to the principle of competitiveness is aimed to provide in certain limits of procedural independence of the parties, a specification of their procedural positions and the purposes, and also on an equilibration of procedural functions of the parties. Competitiveness of the parties of charge and defense covers all stages of criminal legal proceedings and creates conditions for adopting of a lawful, reasonable and fair sentence by court.

In turn, the criminal procedure legislation, based on the principle of competitiveness, differentiated functions of subjects of criminal trial, having accurately established their rights and duties.

In the decision of Plenum of the Constitutional Court “On interpretation of provision “if the public prosecutor or private accuser withdraws the criminal prosecution” provided by Articles 43.1.1 and 314.2 of the Criminal Procedure Code of the Republic of Azerbaijan on inquiry of  the Office of Public Prosecutor of the Republic of Azerbaijan” of February 15, 2008 it is specified that “being guided by norms of the Constitution, the legislator according to provisions of CPC which along with other principles is based on a competitiveness principle, has differentiated the functions of prosecution, defense and the settlement of a case (by adopting of corresponding judicial acts) and clearly established their purpose, a direction and the maintenance, as well as a circle of subjects and scope of authority”.

In criminal procedure legislation judicial supervision acts as a special form of justice.

Judicial supervision is function of the supervision exercised by court for activity of bodies of operative search, inquiry and investigation in connection with criminal prosecution. The purposes of this function consist in the law enforcement of activity of bodies of operative search, inquiry and investigation that are carried out by them of separate actions, made by them decisions, and an exception of unreasonable and illegal restriction and protection of the rights and freedoms, legitimate interests of the person and citizen in connection with criminal prosecution.

According to Article 442.1 of the CPC, judicial supervision are exercised by the relevant court of first instance within the bounds of its authority in places where compulsory investigative procedures, coercive procedural measures or search operations are conducted.

In the legislation the consideration of petitions and submissions of compulsory carrying out the investigative actions which are lawfully limiting the rights and freedoms of the person and the citizen, application of measures of procedural coercion or implementation of operative search measures, complaints to procedural actions or resolutions of the body which is carrying out criminal trial is referred to a subject of judicial supervision (Article 442.2 of the CPC).

Accused (suspect) and his/her defender, victim and his/her lawful representative, other persons, rights and freedoms of which are broken due to adoption of relevant resolution or carrying out of respective action are entitled to appeal to court exercising judicial supervision the procedural actions or resolutions of the body which is carrying out criminal trial, including, resolutions on refusal of initiation of legal proceedings, stay or cessation of procedure on criminal case (Article 449 of the CPC).

Plenum of the Constitutional Court in the Decision “On Interpretation of Article 449.2.3 of the Criminal Procedure Code of the Republic of Azerbaijan” of August 5, 2009 noted that “Implementation of the right to the appeal makes special sense in a pre-judicial stage of criminal legal proceedings, since during this stage (especially at a stage of preliminary investigation) there is a possibility of groundless affection or illegal restriction of the rights and legitimate interests of a wide range of persons”.

Thus, Plenum of the Constitutional Court notes that procedural actions or decisions of body conducting the criminal procedure can be considered as judicial supervision only on the basis of the complaint of the persons listed in Article 449.2 of the CPC.

The circle of the issues resolved by court at realization of function of implementation of justice is established by limits of judicial proceedings. According to Article 318.1 of the CPC that set the limits of judicial review, during the court’s examination of a case, the criminal case file, the file on simplified pre-trial proceedings or the complaint lodged with a view to a private prosecution may be examined only within the limits of the charge laid against the accused or brought before the court. As a result of its examination, the court shall have the right to classify the act committed by the accused as a less serious offence and to remove specific points from the charge brought.

In general, the category of a limit in criminal trial acts as a procedural condition. Limits of judicial review are the borders of judicial proceedings established by the law and the decisions, caused by the charge protected in court, brought against accused.

Properly, the criminal procedure legislation, having accurately defined limits of judicial review:

• limits the borders of judicial review to a circle of people and the content of charge;

• accurately defines limits of change of charge by court as a result of judicial review.

As it is seen from Article 318.1 of the CPC, judicial proceedings in court of the first instance are limited only to a certain framework of the indictment with carrying out only within the charge presented to court, concerning the accused persons.

Such restriction of limits of judicial review follows from a problem of providing a lawful order of the criminal prosecution and the right accused on protection. In this sense, the court is not competent to consider case on persons to which charge is not brought. Thus, the court has no right to go beyond the charge determined by the decision on purpose of judicial proceedings. Accurate definition in the law of limits of judicial proceedings guarantees the organization of court session in a purposeful form, and inadmissibility of complication of the status of accused.

According to Article 318.2 of the CPC during the court’s examination of the case, if the ingredients of a more serious offence are determined in the acts of the accused, the court shall suspend its examination of the charges at the request of the public prosecutor. In this event, the court give a reasoned decision on returning the criminal case or the file on simplified pre-trial proceedings, as the case may be, to the prosecutor in charge of the procedural aspects of the investigation in order to consider the matter of bringing another charge against the accused within 10 (ten) days.

The legislation does not provide power (right) of court to suspend judicial proceedings, or to return case or materials to the prosecutor executing procedural management of preliminary investigation without petition of the mentioned persons, on own initiative at establishment during judicial proceedings of the circumstance able to aggravate charge, and also to accept concerning any other person against whom it is not brought charge and which is not prosecuted, any decision, in particular having accusatory character.

On request of the principle of legality consolidated by the Criminal Procedure Code, courts and participants of criminal trial have to strictly observe the provisions of the Constitution of the Republic of Azerbaijan, the present Code, other laws of the Republic of Azerbaijan, and international treaties (Article 10.1 of the CPC).

In relation to limits of judicial proceedings, the essence of this principle is expressed that the elements entering limits of judicial proceedings are established by the law and their strict observance belongs to duties of courts. Non-compliance with the specified principle, in turn, can lead to violation of the constitutional principles.

On the legal position of Plenum of the Constitutional Court reflected in the above-mentioned decision as of February 15, 2008, the functions of court and the prosecution party on the settlement of criminal case strictly differ from each other and each of them is assigned to corresponding subject. The beginning of criminal prosecution, indictment and defense in courts are realized by bodies and officials established by law, and also by victims in cases provided by law. The court which is carrying out judicial authority by means of judicial criminal legal proceedings on the basis of competitiveness and equality of the parties, during process, having incurred procedural powers of the prosecution party and defense should not support any of the parties or replace them, and should remain the objective and impartial arbitrator during all process. Such approach originates also from requirements of the Article 318.1 of CPC establishing limits of judicial proceedings. According to these provisions, during the court’s examination of case, the criminal case file, file on simplified pre-trial proceedings or the complaint lodged with a view to a private prosecution may be examined only within limits of the charge laid against the accused or brought before the court.

The above-mentioned also follows from the relevant norms of international legal documents. Thus, according to “Basic Principles on the Independence of the Judiciary”, approved by the resolution of General Assembly of the United Nations (hereinafter referred to as the UN) as of November 29, 1985, the principle of the independence of the judiciary entitles and requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected. According to the “Procedures of effective implementation of the basic principles of independence of judicial authorities” approved by the resolution of Economic and Social Council of the UN of May 24, 1989 No. 1989/60 any judge cannot be demanded to discharge of the functions incompatible with his independent status.

According to the principle of objectivity and impartiality provided in “The Bangalore principles of judicial conduct” at execution of the duties the judge is free from any favour, bias or prejudice. According to “Commentary to the Bangalore principles of judicial conduct”, a judge is entitled to ask questions to clarify issues, but if judge constantly interferes and virtually takes over the conduct of a civil case or the role of the prosecution in a criminal case and uses the results of his or her own questioning to make conclusion in the judgment in the case, the judge becomes advocate, witness and judge at the same time and the litigant does not receive a fair trial.

The right of everyone in the determination of any criminal charge against him for a fair and public hearing by a competent, independent and impartial tribunal established by law is enshrined in Article 14 of the International Covenant on Civil and Political Rights, and also in the Convention on Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as the Convention).

The right for the fair trial guaranteed by Article 6 of the Convention is a procedural right of everyone. This right is considered broken in case if courts violate procedural rules (decision of the Commission on case of Jaakko Johannes Markkula vs. Finland of December 3, 1997).

The European Court of Human Rights emphasized on case of Vera Fernandez-Huidobro vs. Spain that the requirement of impartiality provides: the court, proceeding from the essence, has to be characterized from the point of view of the judicial function: to resolve the issues relating to its powers on the basis of norms of law and according to procedural rules (No. 74181/01, 6 of January, 2010, §108).

Plenum of the Constitutional Court considers deserving attention the position that is available in practice of the Constitutional Court of the Russian Federation on a similar issue. In the decision of court it is specified that “Vesting a court with a power to institute criminal proceedings does not conform to the constitutional provisions on independence of the judiciary… Therefore, instituting criminal proceedings as an aspect of criminal prosecution function, which is to be performed by one of the parties in the adversarial proceedings, that is a public prosecutor and/or a victim, does not belong to a court’s role within administration of justice and may not be imposed on a court since it contradicts the principles of independence, objectivity and impartiality of courts” (decision of Plenum of the Constitutional Court of the Russian Federation as of January 14, 2000).

Thus, during judicial proceedings criminal case is considered only within the charge brought against accused, or presented to court. If during judicial proceedings in acts of the accused existence of signs of more serious crime is established, the court according to the petition of the public prosecutor, victim or his lawful representative has to suspend judicial proceedings on the brought charge, and issue the motivated decree on the direction to the prosecutor performing procedural management of preliminary investigation for consideration of a issue of promotion against the accused of other charge.

Considering the above, Plenum of the Constitutional Court comes to the following conclusion:

- according to requirements of the Article 318.1 of the CPC, criminal case during judicial proceedings is considered only within the charge brought against accused or presented to court.

- according to requirements of Articles 442 and 449 of the CPC, the court exercising judicial supervision, having the right to consider procedural actions or resolutions of the body which is carrying out criminal trial, on the basis of the complaint of accused (suspect) and his defender, the victim and his lawful representative, other persons, the right and which freedoms were broken owing to adoption of the resolution or carried out action.

Despite of that Sh. Badirov and Y. Talybov were found guilty and condemned by sentence of Military Court of the Republic of Azerbaijan on Cases of Grave Crimes as of November 18, 2010, at the same time court, having violated requirements of Articles 318.1, 318.2 of the CPC, cancelled in some parts the decision on an assessment of proofs adopted by investigative body as of April 26, 2010, concerning termination of criminal prosecution concerning the victims on criminal case, a deviation of initiation of criminal prosecution in their relation in view of absence in their acts of corpus delicti.

The Military Board of the Court of Appeal of Baku city, as opposed to noted requirements of the legislation, by the decision as of March 30, 2011 upheld the decision of court of the first instance.

The Article 416 of the CPC establishes the bases for cancellation or change of sentence or decision of court in a cassation order. According to this article if court, adopting a judgment or decision on a case, exercised the powers of another authority or exceeded its own powers (Article 416.0.16 of the CPC), court of cassation instance has the right to cancel or change a sentence or the decision of court of the first or appeal instance in a cassation order. According to Article 419.1 of the CPC, at conducting its substantive examination of the complaint or appeal, the court of cassation instance only verify whether the rules of criminal law and of this Code on points of law are applied correctly or not. Military Board of the Supreme Court, in its decision as of July 7, 2011 without observing Articles 416.0.16 and 419.1 of the CPC upheld the decision of Military Board of the Court of Appeal of Baku city and by that violated requirements of parts I, III, IV, V of Article 125, parts II and VII of Article 127, part III of Article 129 of the Constitution.

According to the above, Plenum of the Constitutional Court comes to conclusion that

- the decision of Military Board of the Supreme Court of the Republic of Azerbaijan dated July 7, 2011 on criminal case concerning recognition as guilty and condemnation of Sh. Badirov's under the Articles 178.2.1, 178.2.2, 178.2.4 and 178.3.2 of the CC and Y. Talybova under Articles 178.2.1, 178.2.2, 178.2.4, 178.3.2 and 341.1 of the CC, regarding the decision on assessment of proofs adopted by investigative body has to be considered as not corresponding to provisions of parts I, IV and VI of Article 125, parts II and VII of Article 127, part III of Article 129 of the Constitution, Articles 28.1, 416 and 419 of the CPC; the decision in this part is subject to revision in order established by criminal procedure legislation taking into account the legal position of Plenum of the Constitutional Court reflected in the present Decision.

Being guided by Article 130.3 of the Constitution of the Republic of Azerbaijan, Articles 52, 62, 63, 65-67 and 69 of the Law of the Republic of Azerbaijan “On Constitutional Court”, the Plenum of the Constitutional Court of the Republic of Azerbaijan

**DECIDED:**

1. According to requirements of the Article 318.1 of the Criminal Procedure Code, criminal case during judicial proceedings is considered only within the charge brought against accused or presented to court.

2. According to requirements of the Articles 442 and 449 of the Criminal Procedure Code, the court exercising judicial supervision is entitled to consider procedural actions or resolutions of body carrying out criminal trial, on the basis of complaint of accused (suspect) and his/her defender, victim and his/her lawful representative, other persons, rights and freedoms of which were broken due to adoption of relevant resolution or taking respective measures.

3. The decision of Military Board of the Supreme Court of the Republic of Azerbaijan dated July 7, 2011 on criminal case concerning recognition as guilty and condemnation of Sh. Badirov's under the Articles 178.2.1, 178.2.2, 178.2.4 and 178.3.2 of the Criminal Code and Y. Talybov under the Articles 178.2.1, 178.2.2, 178.2.4, 178.3.2 and 341.1 of the Criminal Code, regarding the decision on assessment of proofs adopted by investigative body has to be considered as not corresponding to provisions of parts I, IV and VI of the Article 125, parts II and VII of Article 127, part III of Article 129 of the Constitution, the Articles 28.1, 416 and 419 of the Criminal Procedure Code; the decision in this part is subject to revision in order established by criminal procedure legislation taking into account the legal position of the Plenum of the Constitutional Court reflected in the present Decision

4. The decision shall come into force from the date of its publication.

5. The decision shall be published in “Azerbaijan”, “Respublika”, “Xalq Qazeti” and “Bakinskiy Rabochiy” newspapers, and “Bulletin of the Constitutional Court of the Republic of Azerbaijan”.

6. The decision is final, and may not be cancelled, changed or officially interpreted by any body or official.