**ON BEHALF OF THE REPUBLIC OF AZERBAIJAN**

**DECISION**

**OF THE PLENUM OF CONSTITUTIONAL COURT**

**OF THE REPUBLIC OF AZERBAIJAN**

*On interpretation of Articles 430.1, 430.2.1 and 430.2.3 of the Code on Administrative Offences of the Republic of Azerbaijan*

**15 July 2013                                                                            Baku city**

The Plenum of the Constitutional Court of the Republic of Azerbaijan composed of Farhad Abdullayev (Chairman), Sudaba Hasanova, Rovshan Ismaylov,Mahir Muradov, Rafael Gvaladze, Jeyhun Garajayevand Kamran Shafiyev (Reporter-Judge);

attended by the Court Clerk Elmaddin Huseynov,

representatives of interested parties – Gail Mamedov, Judge of Court of Appeal of Baku city; Eldar Askerov, Senior Advisor of the Department for Administrative and Military Legislation of Milli Majlis of the Republic of Azerbaijan;

expert – Farhad Mehdiyev, Associate Professor of the Department of History of State and Law of Faculty of Law of the Baku State University, Doctor of Philosophy in Law,

specialist: Elhan Kazimov, senior advisor of the Department of Generalization of Court Practice and Analysis of Judicial Statistics of the Supreme Court of the Republic of Azerbaijan;

in accordance with Article 130.6 of the Constitution of the Republic of Azerbaijan examined in open judicial session via special constitutional proceedings the case on inquiry of the Court of Appeal of Baku city on interpretation of Articles 430.1, 430.2.1 and 430.2.3 of the Code on Administrative Offences of the Republic of Azerbaijan.

having heard the report of Judge Kamran Shafiyev, the reports of the legal representatives of the subjects interested in special constitutional proceedings, expert and specialist, examined the materials of the case the Plenum of Constitutional Court of the Republic of Azerbaijan

**DETERMINED AS FOLLOWS:**

The Court of Appeal of Baku city having applied to the Constitutional Court of the Republic of Azerbaijan (hereinafter referred to as the Constitutional Court) asked to give an interpretation of Articles 430.1, 430.2.1 and 430.2.3 of the Code on Administrative Offences of the Republic of Azerbaijan (hereinafter referred to as the CAO).

As evident from the inquiry by the determination of Service of State Control on Technical Regulation and Standardization at the State Committee of the Republic of Azerbaijan on Standardization, Metrology and Patent (hereinafter referred to as Service of State Control on Technical Regulation and Standardization) of October 23, 2012 the firm “Nemət-Ə” was found guilty according to the Article 228.0.3 of the CAO for production that not meet the requirements of normative documents and fined it in the amount of 4.000 AZN.

The firm “Nemət-Ə” appealed to Nasimi District Court of Baku city with a petition to cancel the decision dated October 23, 2012 on application of administrative punishment. By the judgment of December 14, 2012 the decision of Service of State Control on Technical Regulation and Standardization of October 23, 2012 concerning firm "Nemət-Ə" was cancelled and proceedings on administrative offense were stopped.

The Service of State Control on Technical Regulation and Standardization has made the appeal complaint to the decision of Nasimi District Court of Baku city. The court of the first instance in its ruling of January 7, 2013, referring to the Article 438 of the CAO, has specified that submission of the complaint by public authority in court of the court of appeal is not directly provided in the legislation on administrative offenses.

After that, the Service of State Control on Technical Regulation and Standardization has appealed to the Court of Appeal of Baku city with the appeal complaint to this ruling.

In view of existence of disagreements in practice, in connection with the right of authorized public authority to file a complaint of the court of appeal instance, the Court of Appeal of Baku city has appealed to the Constitutional Court with a inquiry to interpret:

- a possibility of submission of the complaint to court of court of appeal instance based on Article 430.1 of the CAO on the decision made by the judge according to the protocol on administrative offense made by authority (official) who sent case of administrative offense for consideration to district (city) court on accessory according to requirements of Article 360 of CAO;

- presence at authority (official) of the right to file a complaint to the court of appeal instance to the judgment specified in Article 430.2.1 of the CAO;

- a possibility to file to court for revision of the complaint to the decision made by higher authority as a result of submission of the complaint to the decision of authority if it is provided by Article 430.2.3 of the CAO.

In connection with the inquiry, the Plenum of the Constitutional Court considers necessary to note the following facts.

The basic obligation of state bodies is the protection enshrined in the Constitution of the Republic of Azerbaijan (hereinafter referred to as Constitution) a system, a method of management, the state and public order. Implementation of this obligation serves for protection of interests of each member of democratic and legal society. For this reason ensuring of protection of state interests, in general is closely connected with ensuring of protection of human and citizens’ rights and legitimate interests.

Protection of human and citizens’ rights and freedoms, human health, sanitary and epidemiologic wellbeing of the population, public morals, property, economic interests of persons, public order and public safety, the environment, rules of management, strengthening of legality and the prevention of administrative offenses belongs to duties of the legislation of the Republic of Azerbaijan on administrative offenses (Article 2 of the CAO). At the same time, according to Article 5.2 of the CAO this Code guarantees the prevention of violation by state bodies (officials) of human and citizens’ rights and freedoms and respect for them.

Implementation of the specified tasks of the legislation on administrative offenses are assigned on appropriate authorized public authorities (officials).

The simplified implementation of investigation and hearing of cases on administrative offenses, including initiations of proceedings on administrative offenses, based on the principles of respect for human and citizens’ rights and freedoms, legality, equality before the law, a presumption of innocence, justice and prevention of administrative offenses are provided in the CAO.

According to the CAO it is possible to allocate several independent procedural stages providing solution of cases on administrative offenses:

- initiation of proceedings on administrative offense and its direction on proper party (Articles 409-416 of the CAO);

- consideration of the case by authority (official) or district (city) court (Articles 417, 420-424 of the CAO);

- decision making on cases on administrative offenses (Articles 425-427 of the CAO);

- review of decisions on cases on administrative offenses (Articles 430-438 of the CAO);

- execution of decisions on cases on administrative offenses (Articles 439-449 of the CAO).

Bodies, authorized to consider cases on administrative offenses, are specified in Article 357 of the CAO. Based on this article cases on administrative offenses are considered by district (city) courts, by commissions on cases and protection of the rights of minors (collegial body), and also by relevant organs of the executive authority of the Republic of Azerbaijan, by Central Bank, by Service of Financial Monitoring at the Central Bank (officials). According to Article 359.1 of this Code, the officials authorized to consider cases on administrative offenses can impose the administrative penalties provided by the Special Part of this Code within the powers conferred to them and only on duty.

In Article 360.1 of the CAO the norms providing the cases on administrative offenses considered by district (city) courts are specified.

It should be noted that, as well as in any administrative legal relations, also in the relations arising from administrative offenses, one of the parties is the body (official) which is carrying out function of the government. These authorities (officials) have the right to adopt acts, to make the legal documents establishing the direction and the outcome of the case. Authorities (officials) constitute protocols, make decisions, cancel, change them and implement decisions. Considering that the protection of the rights of other persons reflects in itself common (public) interests, the state fulfill a duty on accomplishment of the corresponding liabilities assigned to it in this area. In that case, if necessary, acceptance by the state of positive measures for protection of the rights of other persons is required.

It is necessary to consider that subjects of the relations arising in the field of administrative offenses on the obligations are in various procedural provision. First of all because the authorized state body (official), in case of application of measures of responsibility concerning the subject who made offense has powers of coercion of administrative nature. In addition, officials of the authorities applying such measures shall be perceived as subjects of the procedure connected with administrative offenses.

According to the theory of a common law, the participants of the public relations having rights and liabilities, having social (acting as the subject expressing and fulfilling an independent and resolute will in the public relations) and legal signs (being carriers of the rights and obligations which possibility of participation in legal relations is established by norms of law) are considered as legal subjects.

Along with the above, it is also necessary to note that according to the legislation on administrative offenses, the authorized state bodies implementing administrative prosecution cannot be considered as the party in legal procedure on cases of administrative offenses. Nevertheless, in procedure on cases of administrative offenses, officials of authorized state bodies act as the instance considering such cases or the actual party in this process (if in higher authority or court the complaint to the decision made by the official is made).At the same time, the official who constituted the relevant protocol on administrative offense actually acts as the party of administrative procedure in cases of administrative offenses.

Chapter 33 of the CAO establishes rules of review of decisions on cases on administrative offenses. According to Article 430.1 of this Code natural person, the legal representative of minor, the representative of the legal entity on which the decision is made, the victim and also the defender and the representative have the right to appeal against the decision on the case of administrative offenses, and the prosecutor - to protest it.

According to Article 430.2 of the CAO the complaint or a protest concerning the decision on cases of administrative offenses shall be submitted in the following order:

- on the decision of the judge - to court of appeal;

- on the decision of collegial body - to court in the location of collegial body;

- on the decision of authority (official) - to higher authority (official) or to court.

Based on the Article 438 of the CAO the claim of natural person, the legal representative of the minor, representative of the legal entity, victim, defender and representative, and also the prosecutor's protest concerning the decision made according to the claim or a protest to the decision on the case on administrative offense are considered by courts in the order established by this Code.

The Plenum of the Constitutional Court notes that participation of the official who draw up the protocol on administrative offenses or passed the decision on administrative offenses as the subject at a stage of review of decisions on cases of administrative offenses, is important from the point of view of ensuring of interests of society and the state in administrative procedure, protection and upholding of common (public) interests by hearing of cases on administrative offenses, and also, executions of tasks of the legislation on administrative offenses stipulated in Article 2 of the CAO.

Along with it, the right of lodging by the official who has drawn up the statement or passed the decision of the appeal complaint for upholding of the motives which have become the basis for adoption of this act has to be connected not with revision of a kind and volume of an administrative penalty, but in a large extent with violation of the material and procedural norms of law which have become the reason of adoption of the judicial act. It is necessary to consider that if at consideration in court of the issues connected with resolutions on cases on administrative offenses, application of administrative punishment or the requirement of any administrative report is acknowledged as unreasonable, then administrative procedure can be stopped. In that case, taking into account the principles of the legislation on administrative offenses, the possibility of giving from the official who draw up the administrative report or passed the decision on administrative offenses, claims in court of appeal instance at a stage of judicial proceedings for the purpose of protection of the common (public) laws can be regulated in a legislative order.

Because participation of the official on cases on administrative offenses in the court of appeal instance is pursues the aim to protect the common (public) interests, it has to be regarded as additional procedural tool. This approach does not contradict to the constitutional principles.

Considering above-stated and law-enforcement practice, the Plenum of the Constitutional Court comes to such conclusion that it the right of officials of authorities applying administrative punishment to file a claim to court of appeal instance shall be regulated in a legislative order. In Article 94.1.6 of the Constitution it is specified that establishment general rules of legal procedures, implementation of court's decisions is in the competence of Milli Majlis of the Republic of Azerbaijan (hereinafter referred to as Milli Majlis).

According to it, the legislator, on the basis of Article 94 of the Constitution, using the special powers have the right to establish the right of officials of authorized public authorities to file a complaint to court of appeal instance.

Due to the appeal to the court for revision of the decision passed by higher authority as a result of the appeal of the decision of the official of the authorized public authority applying an administrative penalty, the Plenum of the Constitutional Court considers necessary to note the following:

On the basis of Article 60 of the Constitution the legal protection of the rights and freedoms of everyone is guaranteed. This provision guarantees the legal protection not only in court of the first instance, but also in courts of appeal and cassation instances. The right of submission of the complaint to court of any instance proceeds from the right of legal protection.

In the Article 6.1 of the Convention for the Protection of Human Rights and Fundamental Freedoms it is stated that in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

Due to the case in point, it should be noted that this right allows everyone to solve a dispute in court. In that case, the restriction of appeal to the court for revision of the decision of higher authority can be regarded as violation of the right for fair trial.

The Plenum of the Constitutional Court also notes that the legislation has not limited the right to appeal to court for revision of the decision made by higher authority on the basis of the appeal of the decision of the official of the authorized public authority applying an administrative penalty.

Based on the above, the Plenum of the Constitutional Court comes to the following conclusions:

- a possibility of submission to court of appeal instance of the complaint to the judgment of the first instance (judge) from the official of the plenipotentiary public authority which made the administrative report or passed the decision on application of an administrative penalty is not excluded in the cases provided by Articles 430.1, 430.2.1 and 430.2.3 of the CAO;

- regulation of legal status, and also features of submission of the appeal complaint at a stage of revising of decisions on cases on administrative offenses which are carried out by the official of plenipotentiary public authority who made the administrative report or passed the decision on application of an administrative penalty shall be recommended to Milli Majlis;

- considering requirements of Article 60 of the Constitution, and also the fact that in the legislation the norms excluding appeal to the court for revision of the decision passed by higher authority as a result of the appeal of the decision of authorized public authority in the cases specified in Article 430.2.3 of the CAO are not established, the complaints to these decisions can be considered by courts.

Being guided by the Article 130.6 of the Constitution of the Republic of Azerbaijan and Articles 60, 62, 63, 65-67 and 69 of the Law of the Republic of Azerbaijan “On Constitutional Court”, Plenum of the Constitutional Court of the Republic of Azerbaijan

**DECIDED:**

1. A possibility of submission to court of appeal instance of the complaint to the judgment of the first instance (judge) from the official of the plenipotentiary public authority which made the administrative report or passed the decision on application of an administrative penalty is not excluded in the cases provided by the Articles 430.1, 430.2.1 and 430.2.3 of the Code on Administrative Offences of the Republic of Azerbaijan.

2. Regulation of legal status, and also features of submission of the appeal complaint at a stage of revising of decisions on cases on administrative offenses which are carried out by the official of plenipotentiary public authority who made the administrative report or passed the decision on application of an administrative penalty shall be recommended to Milli Majlis of the Republic of Azerbaijan.

3. Considering requirements of Article 60 of the Constitution of the Republic of Azerbaijan, and also the fact that in the legislation the norms excluding appeal to the court for revision of the decision passed by higher authority as a result of the appeal of the decision of authorized public authority in the cases specified in Article 430.2.3 of the Code on Administrative Offences of the Republic of Azerbaijan are not established, the complaints to these decisions can be considered by courts.

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 institution or official.