**ON BEHALF OF THE REPUBLIC OF AZERBAIJAN**

**DECISION**

**OF THE PLENUM OF CONSTITUTIONAL COURT**

**OF THE REPUBLIC OF AZERBAIJAN**

*On interpretation of provision “other persons” of Article 449.2.3 of the Criminal Procedure Code of the Republic of Azerbaijan*

**12 March 2015 Baku city**

The Plenum of the Constitutional Court of the Republic of Azerbaijan composed of FarhadAbdullayev (Chairman), Sona Salmanova, Sudaba Hasanova, Mahir Muradov, Jeyhun Garajayev, Rafael Gvaladze, Isa Najafov (Reporter-Judge) and Kamran Shafiyev;

attended by the Court Clerk Teymur Ojagverdov,

representative of interested party – Hasan Ahmedov, Judge of the 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;

specialists – Shahin Yusifov, Chair of the Criminal Board of Supreme Court of the Republic of Azerbaijan; Munis Abuzerli, Senior prosecutor - methodologist of Department of supervision of implementation of laws at investigative, analytical and operational search actions in law-enforcement bodies of Prosecutor Office of the Republic of Azerbaijan;

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

in accordance with the 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 Article 449.2.3of the Criminal Procedure Code of the Republic of Azerbaijan.

having heard the report of Judge Isa Najafov, the reports of the legal representative of the subjects interested in special constitutional proceedings and specialists, conclusions of expert, 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) asks for interpretation of Article 449.2.3 of the Criminal Procedure Code of the Republic of Azerbaijan (hereinafter referred to as the CPC).

In the inquiry and documents attached to it, it is shown that on May 20, 2014 the cars (“Mercedes” and “Nissan Juke”) collided. The cars were insured according to the Law of the Republic of Azerbaijan “On Obligatory Insurance” (hereinafter referred to as the Law “On Obligatory Insurance”). The Department of Insurance Incidents of the Open Joint Stock Company “Azsigorta” (hereinafter referred to as the DII JSC “Azsigorta”) was informed concerning it.

After the relevant investigation the senior investigator of Investigative Department of Nasimi District Police Administration of Baku city (hereinafter referred to as the ID of Nasimi DPA), had come to conclusion that the driver of “Mercedes” was not the owner of the car, and the road accident resulted from his traffic offense. Taking into consideration that actions of this person did not constitute any crime, initiation of legal proceedings on collected material has been rejected by the resolution of the investigator of July 5, 2014, who had come to a conclusion that action of driver could be specified as an administrative offense provided by Article 151.2 of the Code on Administrative Offenses of the Republic of Azerbaijan (hereinafter referred to as the CAO). Based upon the aforementioned the case was sent to the Department of the State Traffic Police of Nasimi DPA of Baku city.

The representative of insurer, being guided by Articles 449.1 and 449.2.3 of the CPC and proving that the resolution of the investigator dated July 5, 2014 concerning refusal of initiation of legal proceedings on material violates his right for subrogation, submitted in the order of judicial control, the complaint to Nasimi District Court of Baku city concerning cancellation of this resolution and return of material for a reconsideration.

The Nasimi District Court by the decision dated July 30, 2014 has refused to accept the complaint on proceeding and proved it by the fact that the complaint has been made by the person who did not have the right to appeal against the challenged resolution.

The representative of insurer, not concordant with the decision of Nasimi District Court, made the appeal complaint and Criminal Board of the Court of Appeal of Baku city by its decision as of August 19, 2014 satisfied the complaint, cancelled the decision and returned the case to the same court for reconsideration.

The Nasimi District Court upon the relevant consideration of the case had come to conclusion that DII JSC “Azsigorta” was not entitled to submit the complaint. Being not agreed with the judgment the representative of insurer made the appeal complaint again and asked for cancellation of the decision of Nasimi District Court dated September 12, 2014 and adoption of decision on return of case to the same court for reconsideration.

The Criminal Board of the Court of Appeal of Baku city having consider the appeal complaint accepted the DII JSC “Azsigorta” as the person with the infringed interests, have come to a conclusion that from the point of view of the arisen different approach in courts of the first and appeal instances to a possibility of submission of the complaint against the decision of investigative body “on dismissing of institution of criminal proceeding”, it is necessary to give interpretation of Article 449.2.3 of the CPC.

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

According to Article 60 of the Constitution of the Republic of Azerbaijan (hereinafter referred to as the Constitution) the protection of rights and liberties in the administrative manner and in court are guaranteed for everyone. Every person may appeal to court in the administrative manner against the actions and inaction of public authorities, political parties, legal entities, municipalities and their officials.

This article of the Constitution gives a guarantee that the rights and freedoms of citizens reflected both in the Constitution, laws and other normative legal acts of the Republic of Azerbaijan are under legal protection. The judicial guarantee, on the one hand defines the right of appeal to the court for the purpose of restoration of the violated rights and freedoms of everyone, and with another – obligations of consideration by courts of these complaints and adoption on them of the fair decision.

According to Article 71 of the Constitution to observe and to protect the rights and liberties of a human and citizen specified in the Constitution is responsibility of bodies of legislative, executive and legal power. No one may restrict implementation of rights and liberties of a human and citizen.

According to Article 90.2 of the Law of the Republic of Azerbaijan “On Normative Legal Acts” at interpretation of the normative legal act the content of its norms is explained and specified, their place in the legislation, and also their functional and other connection with other norms that regulate the various aspects of an identical type of the public relations is defined.

Along with it, the right of submission of the complaint, being an integral part of the rights and duties forming legal status of the person, excluding provisions directly provided in the legislation, should not be limited and has to be provided for everyone.

Under the complaint at stages of pre-judicial trial is meant the verification of complaints and addresses concerning a crime, and also the requirement of the prosecutor, investigator, investigative body (investigator) concerning restoration of the rights and legitimate interests and for the clarification of whether they have been broken.

Submission of the complaint against decisions and actions of the bodies that were carrying out proceeding at a pre-judicial stage and the relations arising during consideration of these complaints, by the legal nature of criminal procedure character and the procedure of appeal is regulated by intra-branch criminal procedure norms. The complaint made on procedural actions or decisions only of authorized public authorities during pre-judicial proceeding acts as the legal fact being a reason for emergence of such relations.

According to interested persons, in pre-judicial criminal procedure proceeding, a subject of the complaint form the inaction of bodies of investigation, the investigation either the prosecutor or the procedural action expressed in non-execution of the procedural duties provided by the law violating the rights or threatening them.

Ensuring the rights and legitimate interests of participants of criminal trial is one of the important obligations of bodies of investigation, the investigation, the prosecutor and courts. Implementation of the true justice without necessary attention to the individual rights, in particular rights of participants of criminal trial, is impossible.

Protection and support of the rights and legitimate interests of each person who is involved in criminal trial is the base of a policy of the justice pursued by the constitutional state in legal proceedings. Increase in support of the rights and legitimate interests of such persons corresponds to interests not only the personality, but also society in general.

The Plenum of the Constitutional Court notes that the review of some articles relating to the status of the participants of criminal trial providing the rights and freedoms of the person and the citizen in the CPC is necessary for the analysis of interpreted norm.

Thus, according to Article 9 of the CPC, one of the basic principles and conditions of criminal legal proceedings is ensuring of protection of the person and citizen against cases of illegal restriction of his/her rights and freedoms. According to Article 12.1 of this Code, the bodies conducting criminal trial are obliged to provide respect for the rights and freedoms of the person and citizen affirmed by the Constitution for all persons who are involved in criminal trial.

During criminal proceedings, everyone shall have the right to defend their rights and liberties as set down by the Constitution in any manner not prohibited by law (Article 12.3 of the CPC).

According to Article 122.1 of the CPC the procedural actions or resolutions of the body conducting criminal trial can be appealed by participants of criminal trial, and also in cases and in the order provided by the present Code by other persons who are involved in criminal trial.

Submission of the complaint to the resolution of the investigator on a dismissal of initiation of legal proceedings is provided in the Article 212.3 of the CPC. In this norm it is specified that a complaint on a decision by a preliminary investigator, investigator or prosecutor in charge of the procedural aspects of the investigation not to proceed with a case may be lodged with the prosecutor in charge of the procedural aspects of the investigation, the senior prosecutor or the court, as appropriate.

Persons entitled to submit complaints against procedural actions and/or resolutions of body conducting criminal trial are specified in the Article 449.2 of the CPC. In Article 449.2.3 of the CPC it is noted that other persons whose rights and freedoms are violated as a result of the decision or act have the right to lodge the complaint in the order of judicial supervision, on procedural actions or resolutions of the investigator (the person which is carrying out his powers).

Under judicial supervision, the persons having the right of submission of the complaint during pre-judicial proceeding cannot appeal against all proceeding decisions and action (inaction) of the preliminary investigator, investigator and the prosecutor carried out the procedural management over preliminary investigation, but the only provided by the law following procedural actions and decisions:

- refusal to accept an application concerning an offence;

- custody and detention on remand;

- violations of the rights of the detained person;

- torture or other cruel treatment of the person detained on remand;

- the opening of the criminal case and the suspension or discontinuation of the criminal proceedings;

- the compulsory conduct of an investigative procedure, the application of a coercive procedural measure or the conduct of a search operation without a court decision;

- the removal of defender of accused (or suspect) from the criminal proceedings (Articles 449.3.1-449.3.7 of the CPC).

 The circle of these procedural actions and decisions, the order of judicial supervision provided in the law is final and the appeal of other procedural actions and decisions of the body conducting criminal trial is not admissible.

 As evident from Article 449.2.3 of the CPC, the legislator, in the order of judicial supervision, at the approval of a circle of people having rights of appeal the procedural actions or decisions of the preliminary investigator, investigator and prosecutor performing procedural management over preliminary investigation in a procedural order was not content only by participants or persons recognized as the parties without having assumed as a basis their recognition, in the order established by the law as parties, but also with adoption of these resolutions and commission of actions (inactions), have taken as a basis a considering as broken the rights and freedoms of other persons.

The Plenum of the Constitutional Court considers that the provision “other persons” provided in Article 449.2.3 of the CPC provides those persons who are not a participant or the party in process. Other persons who are involved in criminal trial provided in Chapter X of the CPC: witnesses; witness; specialist; expert; translator and others. The list of other persons who are involved in criminal trial provided in Chapter X of the CPC cannot be considered as the final list. To “other persons” may be refer also: the person who has reported about the committed or prepared crime (Article 204.3 of the CPC); the person who is directly pointing to person as on who made criminal action (Article 148.2.2 of the CPC); the doctor participating in a corpse identification (Article 238.4 of the CPC); close relatives or lawful representatives of the person which is subject exhumations (Article 237.2 of the CPC); representative of the witness (lawyer) (Article 95.6.11 of the CPC); lawful representative of the minor witness (Article 228.2 of the CPC); the teacher, the doctor (psychologist) participating at interrogation of the minor witness, suspect or accused person (Article 228.2 of the CPC); commander of military unit (Article 171 of the CPC); the person to whom the guarantee of the minor suspect or the accused person (the personal guarantee) is entrusted (Article 166.2 of the CPC); the depositor (except the accused person) (Article 164.3of the CPC); the person presented to an identification (Article 239.5of the CPC), and also all other persons which in any form are carrying out the procedural rights or duties.

In view of the fact that the fact of violation of the rights and freedoms of the citizens guaranteed by the Constitution is important, it gives enough grounds for appeal to the court during pre-judicial proceeding.

Taking into account the specified features (criteria), along with persons specifically specified in the law, to persons with the right of the appeal are also carried those participants of criminal procedure activity the legal status of whose is partially settled in the law. Or those whose legal status is not defined in general. By the actions or resolutions of body of preliminary investigation the specified persons, actually fall in the provision of a subject of the criminal procedure relations and during these relations their rights and the interests can be broken or violated.

At the same time, according to Article 22.2.7 of the Law “On Obligatory Insurance”, the insurer, except for the cases provided by Article 925.5 of the Civil Code of the Republic of Azerbaijan, should not make changes in the place that can be considered as an insured event, or in property to which the damage is caused, before carrying out their survey by the insurer or his representative and (or) other authorized persons.

The insurer after delivery of the insurance compensation have the right to use the right of the subrogation against the corresponding persons in the order provided by Article 936 of the Civil Code of the Republic of Azerbaijan and Article 25 of the Law “On Obligatory Insurance”.

On the base of Article 63.1 of the Law “On Obligatory Insurance”, taking into account the Article 63.2 of the present Law, for insurer who provides insurance compensation, the right of subrogation at a rate of given insurance compensation against a person, guilty of incident, arises even if a driver during an insured event (within obligatory insurance of civil liability of vehicles’ owners) leaves the place of accident.

For establishment of the truth in connection with an insured event, the legislator, according to the Law “On Obligatory Insurance”, having given to the insurer the chance to investigate all circumstances on the scene, have actually turned him into the incidental participant of criminal procedure activity.

Thus, having taken the above into account, the Plenum of the Constitutional Court notes that the provision “other persons whose rights and freedoms are violated as a result of the decision or act” of Article 449.2.3 of the CPC, in case of violation by procedural resolutions or actions reflected in the Constitution and laws of the Republic of Azerbaijan of the rights and freedoms of the persons which are not participants and the parties of criminal trial, however participating or in any form carrying-out the criminal procedure rights or duties, does not exclude the right of the appeal of these resolutions or actions.

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. The provision “other persons whose rights and freedoms are violated as a result of decision or act” of the Article 449.2.3 of the Criminal Procedure Code of the Republic of Azerbaijan, in case of violation by procedural resolutions or actions reflected in the Constitution and laws of the Republic of Azerbaijan of rights and freedoms of persons not participating in criminal trial, however participating or in any form carrying out the criminal procedure rights or duties, does not exclude the right of appeal against these resolutions or actions.

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

3. 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”.

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