**ON BEHALF OF THE REPUBLIC OF AZERBAIJAN**

**DECISION**

**OF THE PLENUM OF CONSTITUTIONAL COURT**

**OF THE REPUBLIC OF AZERBAIJAN**

*On interpretation of Article 54.3 of the Code on Administrative Offences*

*of the Republic of Azerbaijan*

**31 January 2017 Baku city**

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

attended by the Court Clerk Faraid Aliyev,

representatives of interested parties – Vidadi Jafarov, Judge of Court of Appeal of Sumgait city; Eldar Askerov, Senior Advisor of the Department for Administrative and Military Legislation of Milli Mejlis of the Republic of Azerbaijan;

expert – Subhan Aliyev, Docent of Board of Constitutional Law of the Baku State University, Doctor of Legal Sciences;

specialists – Shahin Yusifov, Chair of the Criminal Board of Supreme Court of the Republic of Azerbaijan; Nazir Bayramov, Head of Scientific-educational Center of the Prosecutor's Office of the Republic of Azerbaijan; Sardar Imanov, Public Prosecutor of Sumgait city;

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 concerning inquiry of Court of Appeal of Sumgait city on interpretation of Article 54.3 of the Code on Administrative Offences of the Republic of Azerbaijan.

having heard the report of Judge Sudaba Hasanova, the reports of the legal representatives 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 Sumgait city having applied to the Constitutional Court of the Republic of Azerbaijan (hereinafter referred to as the Constitutional Court) asks for interpretation of Article 54.3 of the Code on Administrative Offences of the Republic of Azerbaijan (hereinafter referred to as the Code on Administrative Offences).

In the inquiry it is indicates that on April 18, 2016 I. Abbasov, having appealed to the 3rd Police Department of the Municipal Police Department of Sumgait city, reported that her brother was beaten by V. Abbasov, and asked to bring him to trial.

According to this appeal, the Police Department held an investigation and on the basis of the Article 39.1.2 of the Criminal Procedural Code of the Republic of Azerbaijan (hereinafter referred to as the Criminal Procedural Code), the decision on refusal in initiation of legal proceedings has been made.

Then Police Department made the protocol on administrative offense as of June 7, 2016, which was sent to the Sumgait City Court for consideration.

By the ruling of the Sumgait City Court as of June 7, 2016 the protocol on administrative offense made under the Article 157 of the Code on Administrative Offences concerning V. Abbasov and other documents were returned to the state body, which made them (the 3rd Police Department of the Municipal Police Department of Sumgait city).

The prosecutor of the Baku city, having given an appeal protest, has asked to cancel this ruling of the Sumgait District Court and to adopt the new decision. The Court of Appeal of Sumgait city, considering the uncertainty connected with increase in cases of receipt of protests of such character from Prosecutor's Office and existence at the prosecutor of the right of giving of a protest by such ruling according to the Code on Administrative Offences, has come to the decision to appeal to the Constitutional Court. According to the conclusion of applicant, by the legislation it is not clearly established by what else ruling the prosecutor has rights of giving of a protest, along with cases in which he participates.

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

In the Article 12 of the Constitution of the Republic of Azerbaijan (hereinafter referred to as the Constitution), ensuring of human rights and civil liberties and an adequate standard of living for the citizens of the Republic of Azerbaijan is established as the supreme objective of the State.

State bodies, along with evasion from illegal restriction of the human rights and freedoms, shall provide legitimacy in society. According to Article 71.1 of the Constitution, the legislative, executive and judicial powers shall observe and protect human rights and freedoms fixed in the Constitution. This regulation of the Constitution, along with remedies of the human rights and freedoms, provides regulations of protection of criminal, administrative and other repressive and preventive rights as a guarantee of these rights.

In the sphere of administration the norms, which protect the administrative relations are reflected in the Code on Administrative Offences that came into force on March 1, 2016.

According to Article 2 of this Code the legislation of the Republic of Azerbaijan on administrative offences has objectives on protection of rights and freedom of people and citizens, protection of health, sanitary-epidemiology welfare of population, public moral, property, economic interest of persons, public order and public security, environment, management rules, strengthening legalities and preventing administrative violations.

This Code provides prevention by the state authorities (officials) violation of humans and citizens’ rights and freedoms and respect for these rights and freedoms (Article 5.2 of the Code on Administrative Offences).

This Code is based on principles of respect for rights and freedoms of humans and citizens, legality, equality before law, presumption of innocence, justice and prevention of administrative offences (Article 4 of the Code on Administrative Offences).

Material norms of the Code provide the rights and legitimate interests of each subject in the sphere of administration with establishment of a type of offense. Administrative offenses (the administrative delict) regulate the disputes arising in connection with administrative offenses between legislative authorized bodies and individuals, legal entities and officials and in these disputes the authorized state body acts as the main subject.

In the Article 40 of the Code on Administrative Offences are specified the bodies (officials) authorized to consider the cases connected with administrative offenses. Based on these norms, the cases connected with administrative offenses are considered by district (city) courts, commissions (collegial body) on protection of rights of minors and the Central Bank, the structure (officials) created by relevant organs of the executive authority.

The authorized body (official), in case of application of measures of responsibility against the subject who made offense has powers of coercion of administrative nature. According to Article 42.1 of the Code on Administrative Offences, officials, authorized to consider cases of administrative punishments, can apply the administrative punishments provided by the Special Part of this Code only during execution of service duties.

On demand of the legislation on administrative offenses, district (city) courts, in difference from body and officials applied an administrative penalty considers the cases concerning the administrative penalties, which are coming to the end with rather heavy sanctions (punishments). Cases of administrative offenses which consideration concerns the district (city) courts are provided in the Article 43 of the Code on Administrative Offenses.

At the same time, the circle of subjects which administrative prosecution is found possible is specified in Articles 16, 17 and 18 of the Code on Administrative Offences. Among these subjects are individuals, official and legal entities.

The procedural order of consideration of cases concerning administrative offenses are established in Parts III and IV of the present Code.

Apparently, the legislation on administrative offenses, having regulate a procedural order of implementation of execution on cases concerning administrative offenses is precisely determines a circle of bodies (officials), authorized to consider cases concerning administrative punishments and subjects whose administrative prosecution is found possible.

The principle of legality has special value in case of implementation of obligations of the legislation of the Republic of Azerbaijan on administrative offenses. According to the Article 6 of the Code on Administrative Offences, disciplinary actions for administrative violations are applied in compliance with this Code. Observance of requirements of the legislation, when applying measures on provision of execution of administrative violation cases, is ensured by managerial supervision of the higher authorities and officials, by court and prosecutor supervisions and by the right of appeal.

The special place in the Code on Administrative Offences is allocated to public prosecutor's supervision. According to the Article 54.1, the prosecutor undertakes timely measures for elimination of an offense, committed during proceeding on cases of administrative offenses, and exercises public prosecutor's supervision over application and execution of the Constitution and laws under the authority of proceeding on cases of administrative offenses.

Implementation of public prosecutor's supervision in case of law enforcement in proceeding on cases of administrative punishments is based on the Article 133 of the Constitution.

According to the Article 133.1 of the Constitution the Prosecutor’s Office of the Republic of Azerbaijan, in the procedure and cases, specified by law, exercises control over the accurate and uniform execution and application of laws; supports in court State prosecution; brings in an action; institutes and proceedings and holds investigations; brings objections to the court's decisions.

In Article 4 of the Law of the Republic of Azerbaijan “On Prosecutor's Office” (hereinafter referred to as the Law “On Prosecutor's Office”), along with other activities of prosecutor's office, also specified such powers as prosecution of claim in court, participation as the claimant at consideration of cases concerning civil and economic disputes; participation as the party at consideration of criminal cases in court, to protect crown case; lodging protest against the judgments.

According to the Article 27 of this law, prosecutors in the order and cases provided by the procedural legislation submit the protest against the judgments. The protest is the complaint made by the prosecutor in superior court concerning the judgment on case in which he took part, and equated on the legal status, legal results to the claim of the counter party.

The limit of public prosecutor's supervision during execution on cases concerning administrative offenses is precisely defined in the Code on Administrative Offences.

In the Article 54.2 of the Code on Administrative Offences, the decision on the beginning of proceeding on cases of administrative offenses provided by Articles 191.1, 195.1, 197.3, 197.4, 197.5, 205, 249, 284.2, 339.2-339.5, 340.2, 341, 376, 399, 410.3, 531, 558.2, 558.3, 559, 563.2, 567, 568, 569, 573, 595.2, 596, 601 and 606.1 of this Code shall be made by the prosecutor. Based on the Article 99.3 of this Code, the prosecutor is also entitled to make a decision concerning beginning of proceeding on other cases of administrative offenses.

In the Articles 99.1 and 99.2 of this Code, direct detection or detection by means of special technical equipment by the authorized official of the reasonable grounds specifying availability of an event of administrative offense are the reasons of initiation of proceedings on administrative offense; receipt of materials from state bodies and organizations or municipalities; the information provided by individuals and legal entities or announced in mass media. Information is considered by the official who authorized on initiation of proceedings on administrative offense. The basis for initiation of proceedings on administrative offense is availability in this information of signs of administrative offense and lack of the circumstances excluding proceedings on administrative offense.

At the presence of one of the reasons specified in the Article 99.1 of this Code and reasonable grounds specified in the Article 99.2 of this Code, the authorized official initiates proceedings on administrative offense (the Article 99.3 of the Code on Administrative Offences).

The analysis of the administrative offenses listed in the first sentence of the Article 54.2 of the Code on Administrative Offences shows that if state bodies or the organizations, and also their officials, during accomplishment of the functions assigned to them, make the administrative offense causing damage to interests of the state, to the human rights and freedoms, then the prosecutor makes the decision on initiation of proceeding on this administrative offense.

According to the Article 54.4 of the Code, the prosecutor, considering the data provided by the Articles 99.1.2 and 99.1.3 of this Code within fifteen days makes the decision on the beginning of proceeding on cases of administrative offenses or reasonable ruling on a deviation of initiation of proceedings on administrative offense. The copy of ruling goes to the persons who provided these data. This ruling can be appealed within ten days from the date of presentation in an official order with submission of the claim to the higher prosecutor or to court.

Apparently, by the legislation on administrative offenses to the prosecutor, with the purpose of law enforcement, was granted the right to make decisions on initiation of proceedings on administrative offenses or on a deviation of initiation of proceedings in the cases provided by the Articles 99.1 – 99.3 of the Code.

Along with it, in the Article 54.6 of the Code on Administrative Offences it is specified that the prosecutor is informed concerning the place and time of consideration of cases concerning administrative offenses concerning minors, and also the proceedings on administrative offenses initiated at the initiative of the prosecutor. Such case can be considered without participation of the prosecutor only when there are data on the timely information of him concerning the place and terms of consideration of the case or if there are no petition from him concerning adjournment of consideration of the case.

At the same time, the legislation on administrative offenses precisely set a limit of participation of the prosecutor in judicial proceedings on the case concerning administrative offenses.

Thus, according to the Article 54.3 of the Code, the prosecutor also has the right to be involved in hearing of cases concerning administrative offenses, to counsel or submit petitions on the issues arising during consideration of the case, to submit a protest on the decisions or ruling adopted on the case of administrative offense.

As evident, along with other rights of the prosecutor, in the Article 54.3 of the Code on Administrative Offences are provided three more rights: to be involved in judicial review of cases concerning administrative offenses; during consideration of the case to submit the conclusion or the petition, to submit a protest on the decisions or rulings adopted on the case concerning administrative offense.

It should be noted that Article 54.1 of the Code on Administrative Offences providing powers of the prosecutor, and the Article 54.3 determining the prosecutor's rights are articles that are in system connection with each other and characterized by normative unity.

Thus, the prosecutor can be involved in judicial review of case, submit the conclusion and the petition, to give a protest on the decisions or rulings adopted on case of administrative offense only in case of initiation of proceeding (adoption of decision) on the case of administrative offenses.

In addition, the right of prosecutor to submit a protest against the decision was stipulated in the Article 128.1 of this Code. According to this norm, individual, legal representative of the minor, representative of the legal entity concerning which the decision is adopted, victim, defender and representative, and also the official provided in the Article 43.2 of this Code have the right to appeal the decision on case of administrative offense, and the prosecutor - to protest it.

In the decision of the Plenum of the Constitutional Court as of November 2, 2016 “On interpretation of the Article 128.1 of the Code on Administrative Offences of the Republic of Azerbaijan”, it was concluded that as in the Article 128.1 of this Code the circle of the subjects having rights of submission of the complaint is not specified precisely, then it cannot be widely commented and only the persons listed in this article have the right to appeal the decision on case of administrative offense, and the prosecutor – to protest it.

Taking into consideration the foregoing, the Plenum of the Constitutional Court considers that according to the Article 54.3 of the Code on Administrative Offences, the prosecutor, participating at consideration of cases concerning administrative offenses, can submit a protest to courts of higher instance against the decisions or rulings adopted on such case.

This provision of the Plenum of the Constitutional Court corresponds to the judicial and legal reforms undertaken in our country after adoption of the new Constitution. Thus, in our country the new acts regulating activity of law enforcement agencies and meeting to the constitutional state and democratic society, including Criminal, Criminal Procedure, Civil, Civil Procedure Codes, the Code on Administrative Offences and other Codes have been adopted. In new legislations many articles of the former Soviet legislation have been rejected, the essence of institute of public prosecutor's supervision was changed.

Participation of the prosecutor in civil court was limited and provided only for special proceeding. Thus, according to the Article 306.3 of the Civil Procedure Code of the Republic of Azerbaijan (hereinafter referred to as the Civil Procedure Code) if an appropriate application is filed by legal entity whose founders are state (state bodies or organizations), a prosecutor may - for the protection of state interests - give statements on cases concerning possession of property with regard to ownership right, its use and disposition thereof; on cases concerning acknowledgement of movable property ownerless and recognition of state ownership right over immovable property.

According to the Article 50.2 of the Civil Procedure Code the individuals and legal entities filing a claim for protection of their personal interests or interests of a third party, a prosecutor filing a claim for protection of interests of state upon application of legal entities, founded by the state or state authorities, or organizations are recognized as the claimants.

If the prosecutor is a claimant or the applicant on judicial review in the above-stated cases, then he can give a protest under judicial acts. According to Article 357.3 of the Civil Procedure Code, the protest of the prosecutor is the complaint to court of appeal instance in respect of case where he participates, and shall be equivalent of appeal complaint by its legal nature and legal consequences.

According to the Article 383.2 of the Criminal Procedure Code the public prosecutor participating in the examination of a case in the court of first instance have the right to lodge an appeal against any part of the judgment which does not take into consideration his/her conclusions and proposals.

It should be noted that, despite of usage of term “public prosecutor's supervision” for expression of activities of legal body of prosecutor's office, the essence of this term was not disclosed. However, the essence of public prosecutor's supervision and limits were specifically determined in the legislation, and in connection with a case in point are determined in the Code on Administrative Offences.

The procedural legislation, in a single order, delivered submission of the claim or a protest under judicial acts in dependence on participation of the person in process as the parties. The right of the prosecutor to submit a protest on cases concerning administrative offenses connected with his participation in this process as in other procedural legislation.

Apparently, according to norms of administrative offenses, the civil and criminal procedural legislation, and also the Law “On Prosecutor's Office”, the right of the prosecutor to submit a protest to the judgment is caused only by his participation in consideration in court of the specific case.

Along with it, it should be noted that the section LII that is referred to as “implementation of judicial supervision” was entered into the Criminal Procedural Code, which came into force on September 1, 2000 in an order of special proceeding.

According to the Article 442.1 of the Criminal Procedure Code, judicial supervision is 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.

Judicial supervision, at the same time, found the reflection in the Article 45 of the Law “On Prosecutor's Office”. Based on this article, implementation by prosecutor's office of the legal proceedings limiting the humans’ and the citizens’ rights and freedoms provided by the Constitution is allowed based on the court’s decision in order and cases established by the law.

Plenum of the Constitutional Court, analyzing the above-stated legal acts, came to such conclusion that public prosecutor's supervision on cases concerning administrative offenses unlike the former legislation, neither in activity of the courts, nor during hearing of cases concerning administrative offenses, should not be accepted as supervision over application and execution of the Constitution and laws.

It should be noted that public prosecutor's supervision over application and execution of the Constitution and the laws provided in the Code on Administrative Offences includes taking measures for timely elimination of the violations of the law allowed during implementation of these activities covering activities of relevant organs of the executive authority connected with execution on cases concerning administrative offenses.

On a similar issue the Article 24.6 of the Code on Administrative Offences of the Russian Federation has established that the Prosecutor General of the Russian Federation and prosecutors appointed by him shall exercise, within the scope of their jurisdiction, supervision over observance of the Constitution of the Russian Federation and the laws related to proceedings in cases concerning administrative offences, effective on the territory of the Russian Federation, except for cases which are being in court proceeding.

Apparently, in the legislation on administrative offenses of the Republic of Azerbaijan as well as in the legislation of the Russian Federation, public prosecutor's supervision covers the cases, being in court proceeding.

However, unlike the legislation of the Republic of Azerbaijan on administrative offenses, the Code on Administrative Offences of the Russian Federation provides the right to lodge a protest against a decision in respect of a case concerning an administrative offence, regardless of his participation in the case (Article 25.11 of the Code on Administrative Offences of the Russian Federation).

Along with it, the Plenum of the Constitutional Court notes that recognition of the right of submitting of a protest against the decision adopted on cases concerning administrative offenses at the prosecutor's participation is estimated as the independence of judges provided by Article 127 of the Constitution, conditions of implementation of fair trial and also as violation the right of equality of the parties and their rights and also as intervention in activity of the courts.

Along with the specified, the Plenum of the Constitutional Court once again informs courts that considering hearing of cases concerning administrative offenses in the simplified order, a possibility of application of an administrative penalty only for the term of three months upon the demand of the legislation concerning the person who has made administrative offense, and the direct concern towards them of the applied materials, the arrived materials have to be considered objectively and incessantly with compliance with the law, abstention from their groundless return, have to provide the timely direction to the court of highest authority of the appeal complaint (protest) submitted according to the decision and ruling of court. Also it is necessary to mark that the official who made the protocol on administrative offense by the ruling specified by the Sumgait City Court on the given case can protect the situation with submission of the appeal complaint in term, provided by the legislation.

On the basis of the above, the Plenum of the Constitutional Court has come to such conclusion that according to Article 54.3 of the Code on Administrative Offences the prosecutor involved in hearing of cases concerning administrative offenses, has rights to submit a protest on the decisions or ruling adopted on this case.

Being guided by the Article 130.6 of the Constitution of the Republic of Azerbaijan and Articles 60, 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. According to the Article 54.3 of the Code on Administrative Offences of the Republic of Azerbaijan the prosecutor involved in hearing of cases on administrative offenses shall be entitled to submit a protest on the decisions or rulings adopted on this case.

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.