**ON BEHALF OF THE REPUBLIC OF AZERBAIJAN**

**DECISION**

# OF THE PLENUM OF THE CONSTITUTIONAL COURT

**OF THE REPUBLIC OF AZERBAIJAN**

# *On Interpretation of Article 157.5 of the Criminal Procedure Code*

# *of the Republic of Azerbaijan*

**09 July 2010 Baku city**

The Plenum of the Constitutional Court of the Republic of Azerbaijan composed of Judges F.Abdullayev (Chairman), S.Salmanova, F.Babayev, S. Hasanova, , R.Qvaladze (Reporter Judge) and I.Najafov;

attended by the Court Clerk I.Ismayilov,

the legal representatives of interested parties: S.Mirzoev, judge of the Baku Appeal court, I.Jafarov, senior advisor of the Department for Administrative and Military Legislation of Milli Majlis of the Republic of Azerbaijan,

the expert F.Abbasov, head of the Department of Criminal Procedure of Baku State University, specialists - T.Mahmudov, judge of the Supreme Court of the Republic of Azerbaijan, A.Beylarov, deputy head of Department of the General Prosecutor’s Office on Supervision of Execution of Laws in Investigatory and Investigation and Search Operations Activity of the Ministries of Justice and Taxes, the State Customs Committee of the Republic of Azerbaijan and H.Shihaliev, the senior public prosecutor-methodologist,

 has examined in open session via special constitutional proceedings in accordance with Article 130.VI of the Constitution of the Republic of Azerbaijan the constitutional case on inquiry of the Court of Appeal of Baku city concerning the interpretation of Article 157.5 of the Criminal Procedure Code from the point of view of Articles 154.4, 156.2 and 163.2 of the same Code.

Having heard the report of Judge R. Gvaladze and statements of representatives of interested parties, opinions of expert and specialists, studied materials and examined the case, the Plenum of the Constitutional Court of the Republic of Azerbaijan

**DETERMINED AS FOLLOWS:**

By the decision of Yasamal district court of Baku city of January 28, 2010 in regard to R.Allahverdiyev accused by Article 206.1 of the Criminal Code of the Republic of Azerbaijan (hereinafter referred to as CC) there was taken a measure of restriction the arrest for a period of 2 months and court by its own initiative has changed the given measure of restriction to a measure of restriction as house arrest.

Court making of the given decision has referred to Articles 157.5, 448 of Criminal Procedure Code of the Republic of Azerbaijan (hereinafter referred to as CPC).

The judgment was appealed by the defender accused in order of appeal.

The judicial board on cases of administrative offences of the Appeal Court of Baku city taking into consideration the availability in judiciary practice of different approaches concerning a question of replacement of arrest by house arrest, by own initiative of court or on the basis of the petition of advocacy, has applied to the Constitutional Court of the Republic of Azerbaijan (hereinafter referred to as the Constitutional Court) for interpretation of Article 157.5 of CPC from the point of view of requirements of Articles 154.4, 156.2 and 163.2 of the same Code.

Plenum of the Constitutional Court, for the correct resolving of a question, considers necessary to give an explanation of an essence of the measure of restriction, some positions of Articles 154, 156, 157, 163 and 164 of CPC concerning such measures of restriction, as arrest, house arrest and order of consideration by courts of these measures of restriction.

In the Constitution of the Republic of Azerbaijan (hereinafter referred to as the Constitution) it is provided that everyone has the right for freedom. Right for freedom might be restricted only as specified by law, by way of detention, arrest or imprisonment (parts I and II of Article 28 of the Constitution).

The right to freedom of everyone and the right to personal immunity is fixed also in the international acts devoted to the rights and freedom of the person, including in Article 3 of the Universal Declaration of Human Rights, Article 9 of the International Covenant on Civil and Political rights and Article 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as Convention).

The European Court of Human Rights in the decision of March, 29th, 2010 (№3394/03) on case Medvedev and others against France has specified that The Court reiterates that Article 5 of the Convention protects the right to liberty and security. This right is of the highest importance “in a democratic society” within the meaning of the Convention.

All persons are entitled to the protection of this right, that is to say, not to be deprived, or continue to be deprived, of their liberty, save in accordance with the conditions specified in paragraph 1 of Article 5. The list of exceptions to the right to liberty secured in Article 5.1 is an exhaustive one and only a narrow interpretation of those exceptions is consistent with the aim of that provision.

The Court further reiterates that where the “lawfulness” of detention is in issue, including the question whether “a procedure prescribed by law” has been followed, the Convention refers essentially to national law but also, where appropriate, to other applicable legal standards, including those which have their source in international law. In all cases it establishes the obligation to conform to the substantive and procedural rules of the laws concerned, but it also requires that any deprivation of liberty be compatible with the purpose of Article 5, namely, to protect the individual from arbitrariness.

The Court stresses that where deprivation of liberty is concerned it is particularly important that the general principle of legal certainty be satisfied. It is therefore essential that the conditions for deprivation of liberty under domestic and/or international law be clearly defined and that the law itself be foreseeable in its application, so that it meets the standard of “lawfulness” set by the Convention.

The criminal-procedure legislation, being based on requirements of the Constitution and international legal acts, has established the legal procedures governing criminal prosecution and defense of suspects or accused persons as provided for by criminal law (Article 1.1 of CPC).

According to the criminal-procedure legislation the right to liberty may be limited only in cases of detention, detention on remand or imprisonment in accordance with the law (Article 14.1 of CPC).

The concept of a measure of restriction, base of application, order and terms have found the reflection in Articles 154-175 of chapter XVII of CPC.

According to Article 154.1 of CPC, a measure of restriction is a coercive procedural measure intended to prevent unlawful behavior by the suspect or accused during criminal proceedings and to ensure the execution of the sentence.

Kinds of measures of restrictions are specified in Article 154.2 of CPC. As evident from the content of this Article, and also Articles 154.3 and 154.4 of Code such measures of restriction as arrest, house arrest or bail may be applied only to an accused person, and other measures of restriction may be applied both concerning accused, and concerning the suspected person.

The criminal-procedure legislation has established that house arrest and bail may be alternatives to arrest and, after a court decision to arrest the accused, may be applied instead of arrest (Article 154.4 of CPC). From this position follows that the bases of application of house arrest as a measure of restriction are identical with the bases of application of a measure of restriction in the form of arrest and consequently at choice of these measures of suppressions requirements of Articles 155.1-155.3 of CPC should be seriously observed.

In Article 153.3 of CPC two cases of application of arrest and a measure of restriction alternative to it are established.

The first of these cases consists that for act of which fulfillment the person charged with an offence punishable by deprivation of liberty for a period of more than two years (Article 155.3.1 of CPC) should be provided. And in the second case the purpose consists in stopping of illegal actions of the person charged with an offence punishable by deprivation of liberty for a period of more than two years.

Speaking about illegal actions, the following cases specified in Articles 155.1.1-155.1.3 of CPC are provided: hidden from the prosecuting authority; obstructed the normal course of the investigation or court proceedings by illegally influencing parties to the criminal proceedings, hiding material significant to the prosecution or engaging in falsification; committed a further act provided for in criminal law or created a public threat.

Except the specified cases in what or other case application of arrest and a measure of restriction alternative to it is inadmissible.

As the measure of restriction in the form of arrest, is the latest enforcement measure and in comparison with other measures of restriction even more limits constitutional rights and freedom of the person, at application of this measure of restriction plays an important role strict observance of requirements of the legislation. First of all it concern serious observance of requirements of a principle of a presumption of innocence.

According to requirements of Article 157.1 of CPC the measure of restriction in the form of arrest can be applied only in that case when there are serious grounds proving participation of the person to commitment of act to which refer in the charge put forward against it.

The criminal-procedure legislation also has established that by consideration in court of a question connected with arrest with observance of requirements of a principle of competitiveness possibility to motivate the reference is given to the petitioning person, and to the protection party to state the position concerning the reference and to deny arguments of the party of charge (Article 447.7.2, 447.7.3 of CPC).

As evident from sense of the specified norms, by consideration in court of the petition concerning application of a measure of restriction in the form of arrest participants of judicial session have the right to express first of all at judicial session the relation to the petition. And the court according to legislation requirements takes out the decision on satisfaction or a deviation of the petition and immediately proclaims its participating (Articles 447.7.5, 448.1.3 of CPC).

Thus, according to requirements of the criminal-procedure legislation the court by consideration of a question on choice of arrest in the form of a measure of restriction, should consider each separate case of the petition, submitted in this connection, to pass the decision on satisfaction or a deviation of this petition. After acceptance of such decision according to order provided in the law the house arrest and bail may be alternatives to arrest being a measure of restriction may be selected (Article 154.4 of CPC).

The analysis of some norms of the criminal-procedure legislation is necessary, for the permission of the question lifted in appeal is a rather right vessel in choice in the form of a measure of restriction of house arrest instead of arrest or replacement in the form of an arrest measure of restriction a house arrest.

In Article 156 of CPC the general order of choice of measures of restrictions is established. According to this order, house arrest or bail may be chosen by the court instead of arrest at the request of the defense (Article 156.2 of CPC). Apparently from Article content, the legislator has established a special order of choice of house arrest and bail in the form of a measure of restriction. According to this order house arrest or bail can be selected instead of arrest only at the request of the defense.

As well as in the general order of choice of measures of restrictions, in Article 163 of CPC called «house arrest» as it is provided that the choice of house arrest as a restrictive measure may be considered only at the request of the defense instead of the decision taken for the person’s arrest (Article 163.2 of CPC).

Specified Articles have established only one order of application of house arrest instead of arrest in the form of a measure of restriction - request of the defense.

On the basis of requirements of Articles 92.9.6, 156.2 and 163.2 of CPC the request of defense for application of house arrest instead of arrest in the form of a measure of restriction may be submitted when examining the question of arrest as a restrictive measure, and also after making decision on choice of arrest in the form of a measure of restriction.

In case of a substantiation in the request of defense of absence of need to isolate the accused from society by detaining him on remand, and also presence of possibility of application in its relation of house arrest and achievement of the purposes of measures of restrictions specified in Article 154.1 of CPC with application of house arrest, according to Article 157.5 of CPC if the court decides that there is no need to isolate the accused from society by detaining him on remand, it have the right to substitute house arrest for arrest.

Making of such decision, the court should be assured that the person subject to house arrest in the form of a measure of restriction, in the conditions of house arrest will not make actions provided in Articles 155.1.1-155.1.3 of CPC and to solve a question which measure of restriction listed in Article 163.3 of CPC and in what maintenance, should be applied against this person.

Considering the above-stated Plenum of the Constitutional Court considers that that Article 157.5 of CPC should be applied with observance of requirements of Articles 154.4, 156.2 and 163.2 of same Code, court by consideration of a question on choice of arrest in the form of a measure of restriction, has the right to replace arrest by house arrest, in the presence of the request of defense and if will come to a conclusion that there are no need to isolate the accused from society by detaining him on remand.

Along with it, Plenum of the Constitutional Court notices also that according to Article 156.2 of CPC, the court considering criminal case in essence, by own initiative may accept the decision of choice of arrest as a measure of restriction.

Being guided by Article 130.6 of the Constitution of the Republic of Azerbaijan, Articles 60, 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. Article 157.5 of the Criminal Procedure Code of the Republic of Azerbaijan must be applied with observance of requirements of Articles 154.4, 156.2 and 163.2 of the same Code.

The court by consideration of a question on choice of arrest in the form of a measure of restriction has the right to replace arrest by house arrest, in the presence of the request of defense and if comes to conclusion that there is no need to isolate the accused from society by detaining him on remand.

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 can not be cancelled, changed or officially interpreted by any body or official.