**ON BEHALF OF REPUBLIC OF AZERBAIJAN**

**DECISION**

# OF THE PLENUM OF THE CONSTITUTIONAL COURT

**OF THE REPUBLIC OF AZERBAIJAN**

# *On Interpretation of some provisions of Article 92.12 of the Criminal Procedure Code*

# *of the Republic of Azerbaijan*

**20 May 2011 Baku city**

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

attended by the Court Clerk I.Ismayilov,

the legal representatives of interested parties: N.Jafarov, judge of the Surahan district court of Baku city, E.Askerov, senior adviser of department of the administrative and military legislation of Milli Meclis of the Republic of Azerbaijan,

the specialists - Sh.Yusifov, Head of Criminal Board of the Supreme Court of the Republic of Azerbaijan, V.Mursagulov, Judge of the Court of Appeal of Baku city of the Republic of Azerbaijan, G.Bayramli, deputy head of department of the General Prosecutor’s Office on public prosecution,

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 initiated Surahan district court of Baku city on 6 December 2010 N19952 concerning the interpretation of provision “…court shall admit the refusal to accept the defense counsel only if the suspect or the accused makes the application on his own initiative, voluntarily and with the participation of defence counsel or the lawyer to be appointed as defense counsel” of Article 92.12 of the Criminal Procedure Code of the Republic of Azerbaijan.

Having heard the report of Judge R. Ismaylov 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:**

Surahan district court of Baku city of being guided by a part of VI article 130 of the Constitution of the Republic of Azerbaijan (hereinafter referred to as Constitution) and article 33 of the Law of the Republic of Azerbaijan «On Constitutional Court» has applied to the Constitutional Court of the Republic of Azerbaijan (hereinafter referred to as the Constitutional Court) for interpretation of article 92.12 of the Criminal Procedure Code of the Republic of Azerbaijan(hereinafter referred to as CPC) “…court shall admit the refusal to accept the defense counsel only if the suspect or the accused makes the application on his own initiative, voluntarily and with the participation of defence counsel or the lawyer to be appointed as defense counsel”.

The Surahan district court by consideration of criminal case concerning R.Agaeva's charge on the basis of article 234.1 of the Criminal Code of the Republic of Azerbaijan, in connection with questions of realization of the right to a defense lawyer, has come to a conclusion on necessity of interpretation of the specified position of article 92.12 of CPC.

In inquiry is specified that according to existing judiciary practice if the accused has no defense lawyer, courts in all cases make the decision on appointment of the defense lawyer, and the order of the defense lawyer is filed and only after that in the presence of the defense lawyer the question on refusal of the accused person from the defense lawyer if the accused person refuses the defense lawyer in the presence of the defense lawyer it is considered puts it about in the statement.

According to a court conclusion, article 92.12 of CPC can be applied only in two cases. First - the accused person has a defense lawyer, but he wants to refuse the defense lawyer. And secondly - the accused person has no defense lawyer, however according to article 92.3 of CPC, participation of the defense lawyer in criminal trial should be provided.

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

According to article 130.VI of the Constitution the courts may request the Constitutional Court of the Republic of Azerbaijan to interpret the Constitution and laws of the Republic of Azerbaijan regarding enjoying human rights and freedoms. The question raised in inquiry is directly connected with realization of the right to legal assistance fixed in article 61 of the Constitution. According to given article of the Constitution, everyone has the right for obtaining qualified legal assistance; every citizen has the right for the lawyer’s advice from the moment of detention, arrest or accusation with crime by competent state bodies.

Public value of the right of obtaining by everyone the qualified legal assistance consists that the granted right inherently is a necessary guarantee of realization of the rights and freedom of the person and the citizen. Preventive function which is one of functions of this right, promotes not only to realization by the person of the rights and freedom according to the law, but also guarantees prevention of actions of public authorities and their officials directed on illegal restriction of the rights and freedom of the person and the citizen.

The right of each person for using the help of the defense lawyer which is a kind of the right to reception of the qualified legal assistance it is interconnected with other rights fixed in the Constitution (the right to protect in the ways not forbidden by the law and means the rights and freedom, the right to freedom, the right of judicial protection) and guarantees their realization. As continuation of it, a main objective of the right of use of the help of the defense lawyer as one of justice basic elements, the guarantee of real (valid) equality of the parties in criminal trial with maintenance of the suspected or accused person with the defense lawyer is.

The right of defense and the right to obtain of legal assistance have found the reflexion as well in the international acts which party is the Republic of Azerbaijan. So, in the International Covenant on Civil and Political rights maintenance of the right of an effective legal assistance of each person is established. According to article 14 of Covenant everyone charged with a criminal offence has the right to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it.

In the subparagraph “c” of point 3 of article 6 of the Convention for the Protection

of Human Rights and Fundamental Freedoms (hereinafter referred to as Convention) the right to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require is fixed.

The purpose of the right fixed in the subparagraph “c” of point 3 of article 6 of the Convention is an adequate representation of the party of defense lawyer (Decision of the European Court on case of Mayzit v. Russia of 20 January, 2005, § 65). From the point of view of a principle of competitiveness the purpose of this position consists in granting to the accused person of reasonable opportunities for construction of the protection with the conditions which are not handicapping it in comparison with the opposite side (Decision of the European Court on case of Bulut v. Austria of 22 February, 1996, § 47; Decision of the European Court on case of Popov v. Russia of 13September, 2006, § 177).

The European Court on Human Rights (hereinafter referred to as European Court) in the Decision on case of Poitrimol v. France of 23 November, 1993 has noticed that the right of effective protection of each accused person with participation of the defense lawyer, is one of the basic features of justice (§ 34). The defense lawyer of the accused person can act also, as the guarantor of legality of criminal trial (definition of the European Commission of Human Rights on case Enslin, Baader and Raspe v. Germany of 8 July, 1978, 14 DR 64, p. 114).

The European Court in the Decision on case of Pakelli against Germany of 25 April, 1983 has noticed that Article 6 para. 3 (c) guarantees three rights to a person charged with a criminal offence: to defend himself in person, to defend himself through legal assistance of his own choosing and, on certain conditions, to be given legal assistance free. … Accordingly, a "person charged with a criminal offence" who does not wish to defend himself in person must be able to have recourse to legal assistance of his own choosing; if he does not have sufficient means to pay for such assistance, he is entitled under the Convention to be given it free when the interests of justice so require (§ 31).

The right to protect personally though directly is not provided in the articles 61of the Constitution, the granted right proceed from an essence of specified article. So, the carrier (subject) of the right of the defense lawyer in criminal trial is the suspected or accused person. For this reason if does not contradict interests of justice, such questions as use or non-use of the granted right by the suspected or accused person, realization of the protection personally, or by means of the chosen or appointed defense lawyer are characterized with expression of its will. By it the dignity of person and its right independently and freely affirms to make the decision is affirmed.

In connection with specified it is necessary to notice that the right to protection along with guarantees of legitimate interests of the person, also is a guarantee of interests of justice, social value. Since legal relationship arisen in connection with maintenance to everyone the rights to obtain the legal assistance, reflect in themselves public interests, they lean against execution of the constitutional obligations assigned in this area on the state. And it, if necessary, demands acceptance by the state of positive measures for protection of the rights of the person.

In this sense, necessity of maintenance of the right of the accused person on obtain of the qualified legal assistance serves for full, objective and comprehensive trial of facts of the case and as a result is directed on effective realization of justice. So, the right to obtain the qualified legal assistance along with maintenance of protection of the rights and freedom, and also legitimate interests of the person, is regarded, as the initial condition of realization of justice on the basis of principles of equality and competitiveness of the parties (parts IV and VII of article 127 of the Constitution).

At the same time it is necessary to consider that according to a legal position of the European Court in interests of justice, provide for defense lawyer of accused person even against his own wishes, does not contradict to the Convention (Decision of the European Court on case of Croissant v. Germany of 25 September, 1992, § 27, 29). In other words, the right to protect oneself, though takes an important place in system of human rights, does not carry a binding character. According to it if it is not demanded by interests of justice any compulsion in realization of the right of use by services of the defense lawyer is inadmissible.

Compulsory participation of the defense lawyer in criminal trial is provided in the legislation of many states (Germany, Bulgaria, France, Norway, Russian Federation and Serbia).

Legislative practice of the specified states shows that at the solving of this issue the two approaches are used. According to the first approach in the legislation have found the reflexion concrete cases at which participation of the defense lawyer in criminal trial directly should be provided. According to the second approach, the decision of a question on participation of the defense lawyer in criminal trial in some cases (as in Germany and Norway) is given to the discretion of courts.

Also in Azerbaijan Republic, for the purpose of maintenance of interests of justice, cases of compulsory participation of the lawyer in criminal trial are provided. So, in article 92.3 of CPC cases at which participation of the defense lawyer in criminal trial should be provided are specified. In the presence of any of these circumstances the body which is carrying out criminal trial, should provide with the defense lawyer of the suspected or accused person.

Apparently, the legislator at regulation of rules and conditions of realization of a constitutional law of obtain the defense lawyer, having connected the realization of the granted right on the basis of article 92.3 of CPC, with will of the suspected (accused) person or with presence of concrete circumstances which demand interests of justice has established that its realization does not depend on the conclusion of the body which is carrying out criminal trial.

So, according to article 92.3.1 of CPC the suspected or accused person can demand participation of the defense lawyer. In this case to this person should be created conditions for a choice of the defense lawyer and if it does not have means for legal assistance payment it should be provided by the defense lawyer free of charge, at the expense of the state. And in the cases specified in article 92.3.2-92.3.13 of CPC participation of the defense lawyer should be provided, whether in independence of that the suspected or accused person has demanded it or not.

In the Decision of Plenum of the Constitutional Court in connection with the complaint of R.Agalarov of 26 September, 2007 it has been specified that the legislation can not fully embrace the changes and general diversity of civil relations in society. Even if the legislators attempt to adopt the legal norms that embrace all the cases and regulate permanently developing legal relations, sometimes it is objectively impossible ... As a result, certain cases to be regulated are left aside from the legal regulation due to the absence of a relevant norm.

According to this legal position and considering meaning of article 61.3 of the Constitution, and also the subparagraph “c” of article 6.3 of the Convention Plenum of the Constitutional Court considers that bodies carrying out criminal trial can provide participation of the defense lawyer in criminal trial also in cases not provided in article 92.3 of CPC. Between maintenance of the suspected or accused person with the defense lawyer in the cases provided in article 92.3 of CPC and maintenance by the defense lawyer on the basis of the conclusion of bodies, carrying out criminal trial following the results of legal result there is no distinction. In both cases at realization of protection of the suspected or accused person, the defense lawyer should observe requirements and the rules established in the criminal procedure legislation.

Such decision of the bodies which are carrying out criminal trial should be objective and reasonable, and also should be equitable to interests of justice. The European Court in its decision on case Lagerblom v. Sweden of 14 January, 2003 has specified that in determining whether the interests of justice require that an accused be given free legal assistance, regard must be had to the seriousness of the offence and the severity of the possible penalty as well as the complexity of the case (§ 51). Thus, the bodies which are carrying out criminal trial, at appointment on the basis of the conclusions, the defense lawyer to the suspected or accused person, should consider concrete circumstances of case.

The legislator also has fixed the right of the suspected or accused person to refuse the defense lawyer. So, according to article 92.12 of CPC a refusal of the suspect or the accused to accept defence counsel shall be mentioned in the record. The preliminary investigator, investigator, prosecutor or court shall admit the refusal to accept the defence counsel only if the suspect or the accused makes the application on his own initiative, voluntarily and with the participation of defence counsel or the lawyer to be appointed as defence counsel. Refusal to accept defence counsel shall not be admitted if the suspect or the accused is unable to pay for legal aid or in the cases provided for in Articles 92.3.2-92.3.5, 92.3.8, 92.3.12 and 92.3.13 of this Code; defence counsel shall then be appointed for him compulsorily, or the lawyer appointed as defence counsel shall retain his authority.

According to, to articles 92.3 and 92.12 of CPC, being in system interrelation and character standard unity, refusal of the defense lawyer, carried out on the basis of rules provided in article 92.12 of the given Code, is possible only in certain cases, specified in article 92.3. The last sentence of article 92.12 of CPC indicates on corresponding connection between noted articles. In the given norm the legislator, listing cases in which is not accepted refusal of the defense lawyer, refers to article 92.3 of CPC. These cases are provided in articles 92.3.2-92.3.5, 92.3.8, 92.3.12, 92.3.13 and are connected with personal qualities of the suspected or accused person. And in all other cases specified in article 92.3 of CPC (articles 92.3.1, 92.3.6, 92.3.7, 92.3.9-92.3.11) refusal of the defense lawyer can be accepted, but its realization should meet the requirements of the second sentence of article 92.12 of CPC. Refusal of the defense lawyer appointed on the basis of the conclusion of bodies carrying out criminal trial also should be carried out according to identical requirements. As, it is specified above, bodies carrying out criminal trial, at appointment of the defense lawyer on the basis of the conclusions, should consider not personal qualities of the person but concrete features of case.

Plenum of the Constitutional Court considers necessary to note that it is necessary to distinguish disclaimer of reception of a legal assistance and refusal of the defense lawyer. In the first case the suspected or accused person refusing realization of the right to defense lawyer, shows desire to realize other right - the right to protect personally. And in the second case the suspected or accused person refuses already appointed defense lawyer or the defense lawyer by who should be provided on the basis of article 92.3 of CPC.

Because of those articles 92.3 and 92.12 of CPC make unity, an order of refusal of the defense lawyer, provided in article 92.12 of CPC, concerns to the second case.

From positions of article 92.12 of CPC it is obvious that refusal of the defense lawyer is accepted by corresponding body with a recognition of their validity and a reality in case of observance of several conditions. If the suspect or the accused makes the application on his own initiative, voluntarily and with the participation of defense lawyer or the lawyer to be appointed as defense lawyer. At the same time, according to the maintenance of last sentence of article 92.12 of CPC conscious refusal is supposed only. On the other hand, according to positions of article 19.4.2 of CPC the body which is carrying out criminal trial is obliged to explain to suspected or accused persons of their right. So, supposed only the conscious refusal that is the person refusing the right should clearly realize its maintenance.

The European Court has come to such conclusion that neither the letter nor the spirit of Article 6 of the Convention prevents a person from waiving of his own free will, either expressly or tacitly, the entitlement to the guarantees of a fair trial (Decision of the Grand Chamber of the European Court on case of Hermi v. Italy of 18 October, 2006, § 73). However, in order to such refusal was valid from the point of view of the Convention purposes, refusal should be established and its necessity should be accompanied by corresponding minimum guarantees (Decision of the European Court on case of Poitrimol v. France of 23 November, 1993, § 31). Besides, refusal should not contradict to any important public interests (Decision of the European Court on case of Håkansson and Sturesson v. Sweden of 21 February, 1990, § 66; Decision of the Grand Chamber of the European Court on case of Sejdovic v. Italy of 1 March, 2006, § 86). A waiver of the right, must not only be voluntary, but must also constitute a knowing and intelligent relinquishment of a right. The right to counsel, being a fundamental right among those which constitute the notion of fair trial and ensuring the effectiveness of the rest of the foreseen guarantees of Article 6 of the Convention, is a prime example of those rights which require the special protection of the knowing and intelligent waiver standard. (Decision of the European Court on case Pishchalnikov v. Russia of 24 September, 2009, § 77, 78).

Plenum of the Constitutional Court in connection with conditions of refusal of the defense lawyer marks the following.

According to the criminal procedure legislation, refusal of the defense lawyer it should be carried out by the suspected or accused person “voluntary and by own initiative”. The words making this expression are interconnected with each other and form a single whole. That is, anyway the refusal initiative should proceed from the suspected or accused person (depends on will). In other words, any offer concerning refusal of the defense lawyer, to the suspected or accused person of the bodies which are carrying out criminal trial is inadmissible. Besides, any influence (psychological or physical) on voluntariness of the decision of the suspected or accused person is illegal.

At the same time, voluntariness means inadmissibility of compulsory refusal. The body which is carrying out criminal trial by examination of a question concerning refusal of the defense lawyer should establish that refusal of the defense lawyer or the right to legal assistance reception was not compulsory.

According to requirements of article 92.12 of CPC the will of the suspected or accused person, should be expressed by application. The application is understood as the document, written and signed by the suspected or accused person. Hereby the legislator has specified in such cases on inadmissibility of silent refusal. At the same time, the presence of this application should be recognized, as a guarantee of prevention of compulsion to refusal of the defense lawyer. And other guarantee of voluntariness is participation in procedure of refusal of the defense lawyer or the lawyer which should be appointed as the defense lawyer.

Considering value of the right fixed in article 61.3 of the Constitution for efficiency of justice, Plenum of the Constitutional Court considers that the fact of realization of the right to possession the defense lawyer, the suspected or accused person, demands from the bodies which are carrying out criminal trial of fulfillment of some remedial actions. So, according to article 19.4.2 of CPC the body which is carrying out criminal trial is obliged to explain to suspected or accused persons of their right.

The explanation in this sense does not consist only of informing of the suspected or accused person on its rights, it also disclosing of the maintenance of concrete procedural rights, the prevention of possible consequences of the decision which should accept the suspected or accused person. These actions of the specified bodies should be reflected in the report. According to the formed legal position of the European Court the person, silently, by means of the acts (act or omission), refusing the rights provided by article 6 of the Convention, should reasonably have foreseen what the consequences of his conduct would be (Decision of the European Court on case of Talat Tunc v. Turkey of 27 March, 2007, § 59; Decision of the European Court on case of Panovits v. Cyprus of 11 December, 2008, § 68; (Decision of the European Court on case Pishchalnikov v. Russia of 24 September, 2009, § 77).

It is necessary to especially note that not providing for the rights of the accused person to defence during pretrial procedure, and in cases of refusal of the defense lawyer realization in the contradiction with requirements of article 92.12 of CPC and a legal position established in this Decision of the Constitutional Court concerning conditions of such refusal, being regarded by court as infringement of the right of the accused person on defence according to article 303.3.1 of CPC, should be taken out the decision concerning the termination of examination of criminal case or materials of the simplified pretrial procedure and concerning returning of case to public prosecutor.

On the basis of the aforesaid, Plenum of the Constitutional Court comes to such conclusion:

- Compulsory ensuring of the suspected or accused person with the defense lawyer on the basis of article 92.3 of CPC, does not depend on the discretion of the bodies which are carrying out criminal trial. Compulsory participation of the defense lawyer according to article 92.3.1 of CPC in a case when the suspected or accused person has demanded it, whether and in cases specified in articles 92.3.2-92.3.13 of Code in independent of that has demanded the suspected or accused person or not, should be provided by the bodies which are carrying out criminal trial.

- In cases when it is demanded by interests of justice the bodies which are carrying out criminal trial, considering concrete circumstances of criminal case or materials of the simplified pretrial procedure (character of a crime and degree of social danger, weight of punishment which can be appointed, complexity has put, etc.) even in the cases which have been not provided in article 92.3 of CPC, can appoint the defense lawyer to the suspected or accused person.

- The order of refusal of the defense lawyer, provided in article 92.12 of CPC, concerns cases of refusal of the defense lawyer, appointed to the suspected or accused person according to articles 92.3.1, 92.3.6, 92.3.7, 92.3.9-92.3.11 of Code, and also if it is demanded by interests of justice to cases of refusal of the defense lawyer appointed at the discretion of body, carrying out criminal trial.

Being guided by part VI of article 130 of the Constitution of the Republic of Azerbaijan, articles 60, 62, 63, 65-67 and 69 Law of the Republic of Azerbaijan «On the Constitutional Court», Plenum of the Constitutional Court of the Republic of Azerbaijan

**DECIDED:**

1. Compulsory ensuring of the suspected or accused person with the defense lawyer on the basis of article 92.3 of Criminal Procedure Code of the Republic of Azerbaijan, does not depend on the discretion of the bodies which are carrying out criminal trial. Compulsory participation of the defense lawyer according to article 92.3.1 of CPC in a case when the suspected or accused person has demanded it, whether and in cases specified in articles 92.3.2-92.3.13 of Code in independent of that has demanded the suspected or accused person or not, should be provided by the bodies which are carrying out criminal trial.

2. In cases when it is demanded by interests of justice the bodies which are carrying out criminal trial, considering concrete circumstances of criminal case or materials of the simplified pretrial procedure (character of a crime and degree of social danger, weight of punishment which can be appointed, complexity has put, etc.) even in the cases which have been not provided in article 92.3 of Criminal Procedure Code of the Republic of Azerbaijan, can appoint the defense lawyer to the suspected or accused person.

3. The order of refusal of the defense lawyer, provided in article 92.12 of CPC, concerns cases of refusal of the defense lawyer, appointed to the suspected or accused person according to articles 92.3.1, 92.3.6, 92.3.7, 92.3.9-92.3.11 of Code, and also if it is demanded by interests of justice to cases of refusal of the defense lawyer appointed at the discretion of body, carrying out criminal trial.

1. The decision shall come into force from the date of its publication.
2. 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”.
3. The decision is final, and may not be cancelled, changed or officially interpreted by any body or official.