**ON BEHALF OF THE REPUBLIC OF AZERBAIJAN**

**DECISION**

##### OF THE PLENUM OF THE CONSTITUTIONAL COURT

##### OF THE REPUBLIC OF AZERBAIJAN

*On interpretation of some provisions of Article 158.3, Articles 158.4 and 290.3 of the Criminal Procedure Code of the Republic of Azerbaijan*

# 10 October, 2011 Baku city

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

attended by the Court Clerk V.Zeynalov,

the legal representative of the subject interested in special constitutional proceedings: Eldar Askerov, senior advisor of the Department for Administrative and Military Legislation of Milli Majlis of the Republic of Azerbaijan, Zeki Babayev, Judge of the Court of Appeal of Shirvan district,

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

# 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 the basis of request of the Court of Appeal of Shirvan district on interpretation of some provisions of Article 158.3 (third sentence), Articles 158.4 and 290.3 of the Criminal procedure Code of the Republic of Azerbaijan from the point of view of Article 28.2 of the Constitution of the Republic of Azerbaijan and Article 5 of the Convention “On Protection of Human Rights and Freedoms”.

Having heard the report of Judge I.Najafov and statements of the representatives of the parties and opinion of expert, studied materials and examined the case, the Plenum of the Constitutional Court of the Republic of Azerbaijan

**DETERMINED AS FOLLOWS:**

By the punishment of the Court of the Republic of Azerbaijan on Grave Crimes of 6 December 2010 Imamaliyev Aflatun, Mamedov Mikail and Ragimov Zarkhan are condemned under Articles 206.3.2, 234.4.1 and 234.4.3 of the Criminal Code of the Republic of Azerbaijan (hereinafter referred to as CC), and Magerramov Mubariz under Articles 234.4.1 and 234.4.3 of the CC.

Concerning condemned, detained on 25 May 2010 as suspects, after indictment to them under the relevant articles of the Criminal Code, according to decisions of Sabail district court of the Baku city of 26 May 2010 the measure of restraint in the form of the imprisonment, estimated from the date of their detention on 25 May 2010, with establishment of term of the detention on remand of 3 months that is till 25 August 2010 was chosen.

Preliminary investigation on criminal case came to the end on 17 August 2010, and despite informing of counsels of accused by the investigator who is carrying out preliminary investigation that date of familiarization with case materials was appointed on 21 and 24 August 2010, time of familiarization was postponed until 26 August 2010 and subsequently till 31 August 2010 because of absence of counsel in this connection the corresponding references attached to case materials are made.

Due to the completion of familiarization of accused and their counsels with materials of criminal case on 31 August 2010 the management of the Baku pre-trial detention center where contained accused was informed by investigative body on restoration of calculation of term of the detention on remand.

The indictment made on criminal case on 2 September 2010 was sent to the Prosecutor General's Office of the Republic of Azerbaijan for approve. After approval by the Deputy General Prosecutor of the Republic of Azerbaijan on 7 September 2010 criminal case was brought to trial.

Thus, in spite of the fact that according to the decision adopted concerning accused, term of their detention expired on 25 August 2010, criminal case was directed to court on 7 September 2010. At preparatory court session on 27 September 2010 on criminal case questions of existence of the bases for imposing, change or cancellation of a measure of restraint in the form of imprisonment were considered.

According to Article 158.3 of the Criminal Procedure Code of the Republic of Azerbaijan (hereinafter referred to as CPC) at the pre-trial stage of the criminal case, the remand period, other than in cases of prolongation of the period as prescribed by Article 159 of this Code, may not exceed the above-mentioned periods. The remand period in respect of the suspect or accused shall be calculated by adding together all periods of detention on remand, house arrest and time spent at a medical establishment. The remand period at the pre-trial stage of the criminal case shall be suspended on the day when the case is sent to court or when detention on remand or house arrest as a restrictive measure is discontinued.

According to Court of Appeal of Shirvan district the provision of Article 158.4 of the CPC concerning not taking into consideration of the period during which the accused and his defence counsel acquaint with the case materials at calculation of term of detention as a measure of restraint leads to unreasonable restriction of the right of accused to freedom, fixed in Article 28.2 of the Constitution of the Republic of Azerbaijan (hereinafter referred to as Constitution).

In the request it is also noted that despite a providing in the Article 290.3 of the CPC of taking of one of procedural decisions under the indictment the prosecutor who is carrying out the procedural management of preliminary investigation, within 5 (five) days from the moment of receipt to it criminal case together with the indictment, the contents detention on remand of accused during this time leads to emergence in practice of uncertainty.

According to the above the Court of Appeal of Shirvan district asks to give interpretation to the third sentence of Article 158.3, Articles 158.4 and 290.3 of the CPC of the Republic of Azerbaijan from the point of view of Article 28.2 of the Constitution of the Republic of Azerbaijan and Article 5 of the Convention “On the protection of human rights and fundamental freedoms” (hereinafter referred to as Convention).

Plenum of the Constitutional Court of the Republic of Azerbaijan (hereinafter referred to as Plenum of the Constitutional Court) for the correct resolution of the questions specified in the request from the point of view of ensuring the right of accused on freedom considers necessary to open legal bases of term of detention its value and conditions of application.

First of all it is necessary to emphasize that term being an interval of time is the non-material phenomenon which is constantly expected, the observed, protected individual, the personality, mankind as a whole which approach in most cases is desired.

The terms established in the criminal procedure legislation play a special role in administration of justice. In the terms fixed by criminal legal proceedings the rights and duties of participants of process are formed, executed or stop. Term – the head ruling and subordinating to participants of process, subject to the implicit universal recognition which denial is impossible.

According to it the legislator fixed procedural terms for achievement of the objectives of criminal procedure activity. During these terms participants of criminal trial are obliged to make certain procedural actions or to refrain from their commission.

Non-compliance with the procedural terms provided in the CPC can lead to loss by one or another perfect procedural action of value, reliability of the obtained evidence and emergence of the right of receiving by the person of compensation for the caused damage. For this reason observance of procedural terms is a duty, first of all, of bodies which are carrying out criminal trial.

According to Article 48 of the CPC the criminal prosecution shall be started and finished by the preliminary investigator, investigator, prosecutor or court within the time-limits laid down in this Code in such a way as to: guarantee the collection and examination of evidence in good time; ensure that people do not wait too long before being charged, or having their cases heard or their rights restored.

Significance of procedural terms is shown not only by execution of procedural duties but also in ensuring sequence and a continuity of procedure on the criminal prosecution which is carried out by body of criminal trial. It should be noted that division of criminal trial into pre-judicial and legal procedure stages also led to division of the procedural terms provided in the CPC, into the same stages. So, criminal trial is carried out at a stage both legal proceedings and pre-judicial procedure in a concrete interval of time and this piece includes procedural terms.

To the terms directed on ensuring the rights of suspects and accused at a stage of pre-judicial procedure and the serving to effective carrying out of procedure on criminal prosecution, belong: terms of consideration of information concerning an offence committed or planned (Article 207 of the CPC); terms of preliminary investigation (Article 218 of the CPC); terms of consideration of petitions and complaints of the bodies which are carrying out criminal prosecution (Articles 122, 220, 287 of the CPC); time of familiarization with materials of criminal case (Article 284.3 of the CPC); terms of consideration by the prosecutor of the indictment and the transfer of case to court (Articles 290, 292 of the CPC).

According to Article 28 of the Constitution, everyone has the right to freedom. The right to freedom can be limited only in the order provided by the law by detention, arrest or imprisonment.

Recognition by the state of dignity of the person as social value provides inadmissibility of willful intervention in the right to freedom of everyone and creates conditions for a full development of the individual and also the democratic organization of society.

In Article 1 of the Universal Declaration of Human Rights it is specified that all human beings are born free and equal in dignity and rights. The right of each person to freedom and security of person is his basic natural right belonging to him since the birth. Restriction of these rights without the lawful basis and need is inadmissible.

According to with the point “c” of Article 5 of the Convention the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so.

As evident, restriction of the right to freedom and security of person is allowed only in the presence of the lawful bases and as a rule, by a court decision.

In article 9 of the International Covenant “On Civil and Political Rights” and in Article 5 of the Convention the right to judicial proceedings in “reasonable time” is provided. According to the first part of Article 6 of the Convention “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”.

The legislator having defined a legal order and the bases of restriction of the right to freedom and security of person resolved collision which can arise between protection of values of the state important for society by means of justice and ensuring the right of everyone to freedom.

In this sense, first of all, it should be noted that the arrest applied in the form of a measure of restraint on the severity, on volume and gravity of deprivations, leads to restriction of the rights accused to freedom and the security of person, fixed in Articles 28 and 32 of the Constitution. Therefore, the bodies which are carrying out criminal trial, choosing a measure of restraint in the form of imprisonment, along with observance of the process of law provided in the CPC are also obliged to prove need of isolation of accused from society.

In criminal legal proceedings arrest as a measure of restraint can be chosen only in the presence of the bases reflected in Articles 155.1.1-155.1.5 of the CPC. Along with it, it can become as one of the measures of procedural coercion applied to accused persons of result of violation by them of conditions of other measures of restraint, the chosen in their relation.

The arrest may be chosen at the request of the investigator, on a submission by the prosecutor in charge of the procedural aspects of the investigation or on the initiative of the court examining the criminal case, but only on the basis of a court decision (Article 156.2 of the CPC).

It should be noted that need of choosing of a measure of restraint in the form of arrest has to be proved both in the petition of the investigator and in representation of the prosecutor; justification should not have formal character, in it have to be really specified material and procedural legal grounds of isolation accused from society. At the same time the court, respectively, has to check the bases reflected in idea of election of a measure of restraint in the form of arrest and not choose a measure of restraint in the form of arrest concerning accused needlessly.

The European Court of Human Rights (hereinafter referred to as European Court) in the Decision on case of Belevitskiy v. Russia of 1 March 2007 notes that “by virtue of Article 5 § 4, an arrested or detained person is entitled to bring proceedings for the review by a court of the procedural and substantive conditions which are essential for the “lawfulness”, in the sense of Article 5 § 1, of his or her deprivation of liberty. This means that the competent court has to examine not only the compliance with the procedural requirements set out in domestic law but also the reasonableness of the suspicion grounding the arrest and the legitimacy of the purpose pursued by the arrest and the ensuing detention”.

In the Decision of Plenum of the Constitutional Court “On interpretation of Article 157.5 of the Criminal Procedure Code of the Republic of Azerbaijan” of 9 July 2010 it is specified that “…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”.

That is why the legislator, along with regulation of the bases and conditions of application of a measure of restraint in the form of imprisonment, also established terms of detention and prolongation of terms of detention during pre-judicial criminal prosecution proceeding and also rules of its calculation (Article 158-159 of the CPC).

According to Article 158.2 of the CPC the custody period shall begin at the time of actual arrest if the accused is detained or, if he is not held, at the time of the implementation of the court decision on arrest as a restrictive measure. According to the third sentence of Article 158.3 of this Code, the remand period at the pre-trial stage of the criminal case shall be suspended on the day when the case is sent to court or when detention on remand or house arrest as a restrictive measure is discontinued.

As evident, noted procedure norms is not included in time of detention of accused concerning which the measure of restraint in the form of arrest, at a stage of judicial proceedings is chosen and that causes uncertainty in calculation of this term.

According to Article 299.3.5 of the CPC, the grounds for choosing, altering or cancelling a restrictive measure in respect of the criminal case is considered at preparatory court session.

However it is necessary to consider that the referral of criminal case to court does not influence in any way on condition of accused and proceeding term of the custody that is the passing of term of detention actually does not stop.

Along with it, it should be noted that according to the third sentence of Article 158.3 of the CPC suspending of a passing of term of detention by the moment of the referral of criminal case to court causes damage of legality of the detention on remand of the person from that time and till consideration at preparatory court session of a question of validity of the chosen measure of restraint in the form of arrest.

The European Court as in the Decision on case Esius v. Lithuania of 31 July 2000, and in the Decision on case Belevitskiy v. Russia of 1 March 2007 estimated the detention on remand of accused only upon the referral of criminal case together with the indictment to court as the practice inappropriate to Article 5.1 of the Convention. Lack of the concrete legal grounds regulating a legal status of accused, or being in custody, based on not clear rules of law, will lead to the custody of him without the judicial decision for an indefinite term. This practice contradicts the principles of legal certainty, the rule of law and protection against arbitrariness.

On a case law of the European Court in view of the fact that the detention on remand of accused after the expiration of the arrest specified in the taken-out decision of pre-judicial proceeding before adoption of the relevant judicial decision does not meet the requirement of the lawful basis of arrest (concrete rule of law and the decision taken out according to it) it is estimated as violation of Article 5.1 of the Convention.

It should be noted that despite of definition in the third sentence of Article 158.3 of the CPC suspending of a passing of term of detention from the moment of the referral of criminal case to court, subsequently legal grounds of the detention on remand of accused before preparatory court session are not settled, as leads to restriction of the right of the person on freedom and the security of person, fixed in the Constitution and the international acts supported by the Republic of Azerbaijan.

According to stated, Plenum of the Constitutional Court considers that it has to be recommended to Milli Mejlis to settle as promptly as practicable establishments of legal grounds of the detention on remand of accused from the date of the referral of criminal case to court.

Due to other question specified in the request of Court of Appeal of Shirvan district, Plenum of the Constitutional Court notes that legal grounds and an order of application of a measure of restraint in the form of the imprisonment, provided by the legislation, should not contradict to principles following from the Constitution and the international acts which the Republic of Azerbaijan is party.

According to Article 158.4 of the CPC when the period of detention on remand as a restrictive measure is calculated, the period during which the accused and his defence counsel acquaint themselves with the case file shall not be taken into consideration.

According to the first sentence of Article 218.4 of the CPC the time necessary for the accused and his defence counsel to take familiarization of the case file shall not be included in the period of the investigation.

As evident, mentioned article in an imperative order establishes that term of familiarization with materials of criminal case is not set off by accused and his defender in time detention and this rule actually leads to suspending of a passing of term of the detention on remand of accused. The passing of term of detention renews only after familiarization with materials of criminal case. In the legislation this circumstance is not provided in separate norm. On the contrary, the including of term of the contents detention on remand of accused is fixed during pre-judicial and judicial proceeding together (Article 158.6 of the CPC).

Due to the violation of Article 5.1 of the Convention in the Decision of the European Court on case Svipsta v. Latvia of 9 March 2006 the Article 77 of the criminal procedure law of this country, regulating a question similar to sense to Article 158.4 of the CPC, became a subject of trial of the European Court. The European Court in the called decision specified that the rule of not inclusions of term of familiarization with materials of criminal case in time of the detention, provided by Article 77 of the Criminal Procedure Code of Latvia, creates uncertainty and the specified legal norm opens a course to various approaches. The court also noted that the maintenance of the person under guards on the called bases contradicts the requirement of Article 5.1 of the Convention.

The legislator set a system of legal supports that the accused knew an essence of the charge brought against him in pre-judicial proceeding and, according to it, could protect the rights. Most important of this providing is the institute of familiarization by accused and his defender with materials of criminal case. So, accused before familiarization with materials of criminal case has no sufficient data on all made investigative actions and collected proofs on the charge brought against him. Familiarization of accused and his defender with materials of criminal case acts as means of check of full, comprehensive and objective implementation of preliminary investigation.

Plenum of the Constitutional Court also notes that Article 158.4 and also the provision “the time necessary for the accused and his defence counsel to take familiarization of the case file shall not be included in the period of the investigation” of Article 218.4 of the CPC leads to bigger restriction of the right on freedom of the person concerning which the measure of restraint in the form of imprisonment is chosen. So, not inclusion of term of familiarization with materials of criminal case in time measures of restraint in the form of imprisonment is an obstacle for familiarization by accused and his defender with these materials and this circumstance adjusts them at familiarization with these materials.

So not providing in Article 158.4 and the first sentence of Article 218.4 of the CPC of term of familiarization with materials of criminal case makes discrepancy with requirements of the principle of possibility of restriction of the right of freedom only on the lawful bases, reflected in Article 28 of the Constitution and Article 5 of the Convention, familiarization of the parties with materials of criminal case cannot be considered as the lawful basis for suspending of a passing of term of a measure of restraint in the form of imprisonment. By pre-judicial proceeding term of the detention on remand of accused under no circumstances cannot last more long than the term specified in the decision of court.

According to stated, Plenum of the Constitutional Court in connection with the question raised in the request, having established discrepancy of Article 158.4 of the CPC and also the provision “the time necessary for the accused and his defence counsel to take familiarization of the case file shall not be included in the period of the investigation” of Article 218.4 of this Code to Article 28 of the Constitution and Article 5 of the Convention came to a conclusion concerning loss of force of mentioned Articles of CPC.

Plenum of the Constitutional Court considers that as the bases of the detention on remand of accused during familiarization by accused and his defender with materials of criminal case are not regulated in the CPC and according to Article 94.1.6 of the Constitution the resolution of the matter belongs to powers of body of legislative power then to the Milli Majlis of the Republic of Azerbaijan has to be recommended as soon as possible to settle the bases of the detention on remand of person during familiarization by accused and his defender of materials of criminal case.

Nevertheless, for the correct solution of the question specified in the request, it is important to define the moment of the beginning and end of a passing of term of familiarization with case materials.

As familiarization with materials of criminal case has special value the legislator established an order of execution of this procedural action in the Chapter 38 of the CPC.

According to Article 285.3 of the CPC, the accused and his defender shall take familiarize of the case file before the other parties to the criminal proceedings and shall have the right to do so together or separately.

If counsel for the accused or the representatives of the victim, civil party or defendant to the civil claim cannot attend at the appointed time, the investigator shall extend the arrangements for taking cognizance of the case file for 5 (five) days. If defence counsel or the representative fails to attend within this period, the accused shall be offered the opportunity to appoint, or reach an agreement with, another defence counsel, and the victim, civil party or defendant to the civil claim shall be given the opportunity to appoint another representative (Article 284.3 of the CPC).

Along with it, in Article 285.4 of the CPC it is noted that the investigator may not impose a time limit for taking familiarization of the materials of criminal case.

At the same time, for the purpose of the prevention of artificial extension of this term participants of criminal trial the legislator allocated the investigator with power to make the list taking into account the volume of criminal case and in the second sentence of Article 218.4 of the CPC of the prosecutor who is carrying out the procedural management of preliminary investigation, to limit term of familiarization with case papers according to the petition of the investigator in case of an assumption to accused and his defender of similar circumstance.

The investigator shall draw up a record of the presentation of the case file, stating the date, hour and minute of the start and end of the presentation for each day concerned (Articles 286.1 and 286.4 of the CPC).

Plenum of the Constitutional Court considers that a passing of term of familiarization with materials of criminal case, designating time and an announcement place the body which is carrying out criminal trial, about completion of preliminary investigation or familiarization with materials of criminal case by the parties, begins not with the moment of their invitation but with direct representation of materials of criminal case to him for familiarization. The passing of this term has to be considered finished at the time of signing by the parties of the protocol on familiarization with materials of criminal case. Therefore, adjournment of term of familiarization with materials of criminal case for 5 (five) days at absence of the defender of accused in due time does not cover the time of familiarization with materials of criminal case.

In the request it is also noted that despite a providing in Article 290.3 of the CPC of adopting of one of procedural resolutions under the indictment the prosecutor who is carrying out the procedural management of preliminary investigation within 5 (five) days from the moment of receipt of criminal case together with the indictment, the detention on remand of accused during this time brings in emergence in practice of uncertainty.

In this regard it should be noted that the legislator fixed in the CPC, along with uniform term of preliminary investigation by pre-judicial proceeding, also term of a measure of restraint in the form of the imprisonment, resulting from procedural need for its limits.

So, according to requirements of the criminal procedure legislation, the passing of term of detention by pre-judicial criminal case proceeding stops in day of the referral of criminal case to court or the terminations of a measure of restraint in the form of arrest or house arrest. According to Article 218.3 of the CPC, the period of the investigation shall be calculated from the date on which proceedings commence to the date on which the case is sent to the court or a decision is made to discontinue it.

After accomplishment of the procedural actions provided in Articles 290.3.1, 290.3.2 and 292.1 of the CPC, within 5 (five) days, the prosecutor directs case to court and from this point the passing of noted terms stops. Therefore, the detention on remand of accused within 5 (five) days determined by the legislator is lawful and reasonable.

According to the above stated the Plenum of the Constitutional Court comes to the following conclusions:

Article 158.4 of the CPC and also the provision “the time necessary for the accused and his defence counsel to take familiarization of the case file shall not be included in the period of the investigation” of Article 218.4 of this Code have to be considered become invalid since 1 March 2012 in view of discrepancy to Article 28 of the Constitution and Article 5 of the Convention.

To the Milli Majlis of the Republic of Azerbaijan has to be recommended to settle the bases of the detention on remand of person during familiarization by accused and his defender of materials of criminal case.

- To the Milli Majlis has to be recommended to establish of legal grounds of the detention on remand of accused from the date of the referral of criminal case to court and before preparatory court session.

- 5 (five) days provided in Article 290.3 of the CPC for adopting by the prosecutor who is carrying out the procedural management of preliminary investigation, one of procedural resolutions under the indictment from the moment of receipt to it criminal case together with the indictment, have to be included in time of detention.

Plenum of the Constitutional Court, having come to a conclusion that Article 158.4 of the CPC and also the provision “the time necessary for the accused and his defence counsel to take familiarization of the case file shall not be included in the period of the investigation” of Article 218.4 of this Code does not correspond to Article 28 of the Constitution and Article 5 of the Convention also considers that regulation of this matter with ensuring the right accused on freedom is possible only in a legislative order.

Thus, entering by the legislator into an existing criminal procedure order of the corresponding changes providing not including of term of familiarization by accused and his defender of materials of criminal case in time of his detention and not inclusion in time of a consequence, or application of new legal institute will act as an effective remedy from the point of view of providing a constitutional and legal essence of criminal proceeding procedures.

Along with specified, Plenum of the Constitutional Court comes to such conclusion that as introduction of corresponding changes for the purpose of reduction of an acting criminal procedure order in compliance with the Constitution taking into account the legal positions reflected in this Decision, demands the certain time, the specified norms have to be considered become as null and void since 1 March 2012.

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 158.4 of the CPC as well as provision “the time necessary for the accused and his defence counsel to take familiarization of the case file shall not be included in the period of the investigation” of Article 218.4 of this Code shall be considered as null and void from 01 March 2012 in the view of discrepancy to Article 28 of the Constitution and Article 5 of the Convention.

2. To recommend to Milli Majlis of the Republic of Azerbaijan to settle the bases of the detention on remand of person during familiarization by accused and his defender of materials of criminal case.

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

4. 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’.

5. The decision is final and can not be cancelled, changed or officially interpreted by any body or official.