**ON BEHALF OF THE REPUBLIC OF AZERBAIJAN**

**DECISION**

**OF THE PLENUM OF CONSTITUTIONAL COURT**

**OF THE REPUBLIC OF AZERBAIJAN**

*On interpretation of Articles 512.2 and 519.0.4 of the Criminal Procedure Code*

*of the Republic of Azerbaijan*

**10 February, 2012 Baku city**

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

attended by the Court Clerk Ismail Ismaylov,

the legal representatives of the subjects interested in special constitutional proceedings: Mubariz Zeynalov, Judge of the Court of Appeal of Sumgait city, Muzaffar Aghazade, Chief of Staff of the Court of Appeal of Sumgayit city, Eldar Askerov, senior advisor of the Department for Administrative and Military Legislation of Milli Mejlis of the Republic of Azerbaijan;

expert: Rauf Rustamov, associate professor of Department of Criminal Procedure of the Baku State University;

specialist: Murvat Hasanov, Deputy Head of Directorate for Maintenance of Public Prosecution, Head of Department of the Maintenance of Public Prosecution in the Courts of Appeal and Cassation instance of the Republic of Azerbaijan,

in accordance with Article 130.6 of the Constitution of the Republic of Azerbaijan examined in open judicial session via special constitutional proceedings the case on inquiry of the Court of Appeal of Sumgait city on interpretation of Articles 512.2 and 519.0.4 of the Criminal Procedure Code of the Republic of Azerbaijan.

having heard the report of Judge Fiktet Babayev, the reports of the legal representatives of the subjects interested in special constitutional proceedings, specialist and expert, examined the materials of the case the Plenum of Constitutional Court of the Republic of Azerbaijan

**DETERMINED AS FOLLOWS:**

In its inquiry addressed to the Constitutional Court of the Republic of Azerbaijan (hereinafter referred to as Constitutional Court), the Court of Appeal of Sumgait city noted that according to a decision of the Court for Grave Crimes of the Republic of Azerbaijan as of 21 August 2008, R. Salimova was found guilty under Article 120.2.9 of the Criminal Code of the Republic of Azerbaijan (hereinafter referred to as the CC) and, based on Article 62 of this Code, was sentenced to punishment in the form of imprisonment for a period of 5 years. According to Article 79.1 of the CC serving of this punishment was postponed before reaching by the son of the condemned (born on 5 January 2003) of eight-year age. Implementation of supervision over condemned person was commissioned to the Department of Judicial Supervisors and Judicial Executors of the Devechi (Shabran) region (at present the Executive group of the Shabran region).

On January 18, 2011 the Head of Executive Group of the Shabran region gave to Shabran district court a submission in connection with reaching by the child of the age of eight years to cancel the postponement of serving of punishment and send the condemned R. Salimova for serving of punishment.

By the decision of Shabran district court as of February 2, 2011 the materials of case were sent for examination to the Court for Grave Crimes of Baku city which adopted a decision. The decision provides that that according to Article 512.2 of the Criminal Procedure Code of the Republic of Azerbaijan (hereinafter referred to as the CPC), the cancellation of the postponement of sentence enforcement and the committal of the sentenced person to serve a prison sentence should be carried out by the court which adopted the judgment.

By the decision of Court of Appeal of Sumgait city as of June 3, 2011 the appeal protest against a judgment was not satisfied.

The public prosecutor considering a judgment of appeal instance as unreasonable challenged it via cassation procedure. By the decision of Criminal Board of the Supreme Court of the Republic of Azerbaijan as of August 16, 2011 the decision of court of appeal instance was cancelled and returned for new appeal examination.

At re-examining the case the Court of Appeal of Sumgait city came to conclusion that between Articles 512.2 and 519.0.4 of the CPC concerning territorial jurisdiction there is an ambiguity as to issue of annulment of the postponement of sentence enforcement and committal of the sentenced person to serve prison sentence: should such decision be adopted by the court that had adopted the previous decision on this case or by the court of domiciliary of condemned person? Such situation creates uncertainty in judicial practice.

For this reason, the Court of Appeal of Sumgait city, having addressed the Constitutional Court, asks for interpretation of Articles 512.2 and 519.0.4 of the CPC.

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

On sense of Article 9 of the CC, the criminal law, along with protection of the personality, the rights of the victim, interests of society, also has to take a humane position concerning guilty, encroaching by his actions on the listed values.

The concept of humanity provides observance of the requirement of the principle of justice in criminalizations of act and differentiation of responsibility, recognition of corpus delicti as the only legal ground of responsibility, a responsibility individualization depending on degree of fault, reduction of measures of criminal and legal influence, release of the persons who made the acts which are not constituting a big social danger from responsibility and punishment in the presence of the bases established by the law. In criminal law, the humanity expresses the benevolent relation at purpose of punishment concerning the persons who committed a crime, and application of institutes of conditional and not conditional release from different types of punishments.

A number of institutes of criminal law of the Republic of Azerbaijan based on these principles. The delay of serving of punishment by the pregnant women or women having the child who did not reach eight years age, and also the men who alone are bringing up the child who did not reach eight years age is one of implementers of the principle of the humanity which found reflection in the criminal legislation. The purpose of the state in a punishment delay on these bases is the care of juvenile children, preservation of a family and ensuring necessary parental care and education to juvenile children.

Application of a delay of serving of punishment has two purposes. On the one hand, as it was noted above, this embodiment of humanity, and on the other hand, possibility of reaching of the objectives of punishment without real serving of punishment.

The criminal law caused a delay of serving of punishment by several bases:

- this institute is applied only to the pregnant women or women having the child who did not reach eight years age, and also to the men who alone are bringing up the child who did not reach eight years age;

- it is not applied to persons for whom term of sentence in the form of the imprisonment imposed for commission of grave or especially serious crime against the person is established more than five years;

- the person has to be engaged in education of the child.

At the same time, it should be noted that at the solution of an issue of a delay of serving of punishment, the court has to consider also some other circumstances. The personality of condemned, behavior during serving of punishment, the relation to work, possibility of providing to the child of necessary conditions, the relation to education of the child before commission of crime, etc. are among these circumstances. All these of circumstances have to confirm possibility of reaching of the purpose of a delay, that is, providing the child with parental care. Since the delay of serving of punishment is not a duty, but power of court, in the absence of such circumstances even if there are bases necessary for a delay, the court cannot delay the serving of punishment.

According to the legal position created by Plenum of the Constitutional Court in this regard, Article 79.1 of the CC providing possibility of a delay of serving of punishment of some condemned, having the child who did not reach eight years age, has dispositive character and on this matter establishes not a duty but the power of court (decision of Plenum of the Constitutional Court on conformity of Article 79 of the Criminal Code of the Republic of Azerbaijan to Articles 25.1, 25.2, 25.3, 26.2, 28.1, 147, and 149.1, 149.3 of the Constitution of Republic of Azerbaijan).

Issues of a delay of serving of punishment by the pregnant women and persons having the juvenile child are regulated by Article 79 of the CC. According to this article, to condemned pregnant women and women having children in the age up to eight years, except condemned who is imprisoned for the term from above five years for minor serious and serious crimes against the individual, a court can defer serving of punishment before reaching by the child of eight years age.

The order of a delay of serving of the punishment prescribed in the criminal law is provided in the Criminal Procedure Code, in the section of procedure as execution of sentences and other final judgments. According to Article 510.1 of the CPC, in the cases provided by the criminal law concerning the pregnant woman or the woman having the juvenile child, and also the man who alone is bringing up the child who did not reach eight years age, the court which pronounced a sentence can delay serving of punishment before reaching by the child of eight-year age.

It should be noted that the issue of a delay of serving of punishment by these persons can be resolved both through adjudgement and through serving of punishment by them in institutions of serving of punishment.

The issue of a delay of serving of punishment by the persons serving sentence in institutions of serving of punishment is regulated by Article 172 of the Code of the Republic of Azerbaijan “On Execution of Punishments” (hereinafter referred to as theCEP). According to this article, serving of punishment by the condemned pregnant women and the condemned women having juvenile children, and also the men who alone are bringing up the child who did not reach eight years age, serving sentence in institutions of serving of punishment can be delayed by court before reaching by the child of eight-year age. The condemned pregnant woman or the condemned woman having the child who did not reach eight years age and also the man who alone is bringing up the child who did not reach eight years age can appeal to court with the statement for a delay of punishment serving.

As evident, the legislator, without differentiating time of adjudgement and time after adjudgement, at both stages conferred power of a delay of serving of punishment to court.

In Article 79 of the CC along with application of institute of a delay of serving of punishment, some other the issues following from its application is also regulated. So, the legislator in Articles 79.2 and 79.3 of the CC speaking about cancellation of a delay of serving of punishment and the expiration of a delay of serving of punishment, differentiated them, and also established their legal consequences.

Cancellation of a delay of serving of punishment is provided by Article 79.2 of the CC, and establishes two of its bases - refusal of the child and evasion from education of the child after the prevention of the appropriate government body exercising control of behavior of the condemned persons. In the presence of the specified bases the court can, upon submission of the body exercising control of behavior of the condemned, to cancel a delay of serving of punishment and to send the condemned for serving of punishment to the place established by a sentence of court.

As in the criminal law cancellation of a delay of serving of punishment and the expiration of cancellation of a delay of serving of punishment are differentiated, also in the current legislation the various procedural order is established.

The issue of cancellation of a delay of serving of punishment and the sending of the condemned for serving punishment in the form of imprisonment is regulated by Article 512 of the CPC where it is told about release from serving of punishment because the lapse of time of execution of a conviction, and also cancellation of a delay of serving of punishment. Thus, according to Article 512.2 of the CPC, cancellation of a delay of serving of punishment and committal of the sentenced person to serve his prison sentence is effected by the court which gave the judgment, on the basis of submissions from the institution or authority responsible for sentence enforcement and in accordance with the provisions of criminal law. As evident, according to the title and the contents, this article establishes an order of regulation of issue of cancellation of a delay of serving of punishment.

The Article 79.3 of the CC reads on expiration of time of delay (on reaching by the child of eight-years age), and its legal consequences. According to this article, to condemned pregnant women and women having children in the age up to eight years old, except condemned who is imprisoned for the term from above five years for minor serious and serious crimes against the individual, a court can defer serving of punishment before reaching by the child of eight-years age. As appears from Article 79.3 of the CC, at this stage the court can adopt three kinds of resolutions:

• considering reformation of the condemned court can completely exempt him/her from punishment which execution was delayed;

• court can replace punishment which execution is delayed or which unserved term is delayed, by the lenient punishment;

• court can send the condemned person to a place of serving of punishment for serving of punishment which execution was delayed.

Consideration of the specified issues connected with the expiration of delay of serving of punishment regulated by Article 519 of the CPC in which it is told about settlement of other issues relating to enforcement of the judgment or other final court decision on the basis of submissions by the institution or authority enforcing the sentence. The legislator among of “other issues relating to enforcement of the judgment or other final court decision”, provided in this article, included the release of a sentenced person in respect of whom sentence enforcement has been postponed, and also cancellation of a delay of sentence enforcement and the transfer of the sentenced person to serve a sentence involving deprivation of liberty (Article 519.0.3-519.0.4 of the CPC).

Thus, the procedural order of release from the punishment of condemned which serving of punishment is delayed, after delay term, provided in Article 79.3 of the CC, is regulated by Article 519.0.3 of the CPC. According to this article, the court at place of residence of condemned on the basis of submission institution or authority enforcing the sentence, considers an issue of release from the punishment of condemned which punishment serving is delayed.

Along with it, should be noted that the procedural order of the replacement of punishment by lenient type of punishment after the term of a delay of serving by condemned of punishments, provided in Article 79.3 of the CC is not provided in the CPC. Lack of this issue in the criminal procedure legislation, can lead to emergence of certain difficulties in law-enforcement practice.

In this sense, considering that “release from punishment” is a broader right granted by the legislator to court in comparison with “replacement with lenient type of punishment”, Plenum of the Constitutional Court considers that Article 519.0.3 of this Code has to also extend on a procedural order of issue of replacement of punishment of specified persons with lenient type of punishment.

Besides, based on Article 79.3 of the CC, after the expiration of term of a delay of serving of punishment by condemned the court can direct the condemned for serving punishment in the form of imprisonment on submission of institution or authority enforcing the sentence.

The procedural order of the direction of the condemned for serving the punishment in the form of imprisonment after expiration of delay term (on reaching by child of eight-year age) is regulated by Article 519.0.4 of the CPC. Thus, according to Article 519.0.4 of the CPC, the court at place of residence of condemned on the basis of the petition of institution or authority enforcing the sentence can cancel a delay of serving of punishment and direct the condemned for serving of punishment in the form of imprisonment. As appears from contents of article, the legislator in this case assigned to court a duty on cancellation of a delay of serving of punishment in connection with the direction of the condemned for serving of punishment in the form of imprisonment.

But the legislator did not differentiate the institutions of cancellation of the delay specified in Article 512.2 of the CPC and cancellations of the delay specified in Article 519.0.4 of this Code. It, in turn, creates uncertainty in jurisprudence at application of these norms.

Proceeding from norms of the acting legislation, Plenum of the Constitutional Court comes to a conclusion that the legislator connected the cancellation of a delay of serving of punishment provided in Article 512.2 of the CPC with Article 79.2 of the CC and the cancellation of a delay of serving of punishment provided in Article 519.0.4 of the CPC only with the direction of the condemned for serving punishment in the form of imprisonment provided in Article 79.3 of the CC. For prevention of emergence of uncertainty in the given issue, “cancellation of a delay of serving of punishment” has to be recognized as the procedural need causing “the direction for serving of punishment in the form of imprisonment”.

Thus, at occurrence of the circumstance provided in Article 79.3 of the CC (reaching of eight-year age by the child), the court at place of residence of condemned considers issues of release from serving of the punishment by condemned, serving of punishment which is delayed, replacements of not served part of punishment with lenient type of punishment, or cancellation of a delay of punishment with the direction of the condemned for serving punishment in the form of imprisonment on submission of institution or authority enforcing the sentence according to Articles 519.0.3 and 519.0.4 of the CPC.

Considering the above, Plenum of the Constitutional Court notes that after expiration of delay term (on reaching by the child of eight-year age) court at place of residence of condemned, in view of submission of institution or authority enforcing the sentence, the personality of the condemned, character and degree of public danger of the committed crime, behavior of the condemned serving punishment in the period of a delay and his reformation and also the relation to education of the child during the specified period, can make the decision on release of condemned from punishment or replacement of not served part of punishment with lenient type of punishment (Article 519.0.3 of the CPC), or to cancel a delay of serving of punishment, having directed to the condemned for serving punishment in the form of imprisonment (Article 519.0.4 of the CPC).

Plenum of the Constitutional Court also considers important to note the following.

Jurisdiction of materials in the order of execution of a sentence or other final judgment to courts of the first instance is regulated by special norms of the criminal procedure legislation. The rules established by Articles 66-77 of the CPC are also sent for fast, comprehensive and objective consideration of criminal case. According to Article 74.9 of the CPC regulating an issue of territorial jurisdiction, consideration of materials in a procedure of judicial supervision and also in the order of execution of sentences or other final judgments in courts of the first instance is determined by jurisdiction by Articles 442.1, 510.1, 511.1, 512.1, 513.1, 514.1, 515.2, 516-519 of the present Code.

As evident, the indicated Article 512.2 of the CPC regulating an issue of cancellation of a delay of serving of punishment in connection with hearing of cases in the order of execution of a sentence or other final judgments is not included in number of the listed articles.

Plenum of the Constitutional Court considers that considering regulation by Article 512.2 of the CPC of an issue of cancellation of a delay of serving of punishment in connection with hearing of cases in the order of execution of a sentence or other final judgments and therefore, its reflection in the corresponding chapter of the Criminal Procedure Code, not listing of this article in Article 74.9 of the CPC does not exclude its application in law-enforcement practice. Nevertheless, elimination of this shortcoming would serve for the principle of legal definiteness.

Besides, in Article 173.3 of the CEP it is established that in case if a convicted rejects the child and continues to avoid upbringing the child after the caution, the officer of the court applies to the court due to the convicted place of residence about the cancellation of the delay of serving a sentence and sending him/her off to the place of punishment execution, specified by the adjudgement. The copy of the court decision on postponement of serving a sentence is attached to the application.

As evident, for the solution of the given matter in the called article provided the introduction by the executive official of idea of cancellation of a delay of serving of punishment and the direction of condemned to the place of an execution of the punishment established by a sentence of court at place of residence of condemned.

It in turn, as it is stated above, is not accord to Article 512.2 of the CPC regulating at present the procedural order of an issue. Thus, the principle of establishment of jurisdiction only in the criminal procedure legislation is enshrined in Article 29.2 of the CPC. According to this norm, change of the jurisdiction provided in this Code is forbidden.

From this point of view, Plenum of the Constitutional Court emphasizes that to the issue raised in the inquiry of Court of Appeal of Sumgait city that interpretation on the basis of relevant provisions of legislations criminal, criminal procedure and on execution of punishments is given. Nevertheless, as it follows from the noted that incompleteness of procedural rules of replacement of punishment with lenient type of punishment, the direction of the condemned for serving punishment in the form of imprisonment after the expiration of the term of delay, and also Article 74.9 of the CPC, and discrepancy of provisions of CEP with the procedural legislation, creating gaps and contradictions in the legislation, results in uncertainty in jurisprudence.

In this regard, Plenum of the Constitutional Court considers that it has to be accurately and unambiguously specified in legislation by which court the delay of serving of punishment and issues following from it have to be considered. This requirement follows from the principles of protection of the rights and freedoms of the person and citizen enshrined in the Constitution of the Republic of Azerbaijan (hereinafter referred to as the Constitution) judicial authorities, and also the principles of a judicial guarantee of the rights and freedoms (Articles 60 and 71 of the Constitution). According to Article 62 of the Constitution, everyone has the right for consideration of his/her case in the law court specified by the legislation.

These norms of the Constitution are based as on international treaties and Article 6 of the Convention “On Protection of Human Rights and Fundamental Freedoms”. According to a legal position of the European Court of Human Rights in connection with this norm, “the court established by law” reflects the principle of the rule of law peculiar to the system of protection established by the Convention and Protocols to it. On sense of Article 6.1 of the Convention, “law” includes creation of judicial authorities and the legislation concerning their powers. Respectively, if the court is not authorized to consider case accused according to the applied provisions on the basis of the domestic legislation, such court cannot be considered as “established by law” on Article 6.1 of the Convention (Coëme and others v. Belgium, 32492/96, etc., on July 22, 2000, §§ 99 and 107-108).

Proceeding from it, it should be noted that as in the democratic constitutional state jurisdiction of criminal cases is one of the institutes guaranteeing procedural ensuring of rights and legitimate interests of individual in criminal legal proceedings, criteria of jurisdiction of courts have to be accurately defined in the criminal procedure legislation, otherwise court, the parties and other participants of process can face uncertainty in a question, in which court the case has to be considered. Such uncertainty can delay consideration of the case and by that to violate the right of the person for consideration of his case by court in reasonable terms. Non-compliance with an order of jurisdiction of cases can violate the requirement of hearing of cases by authorized courts, and the right for judicial protection.

From this point of view, Plenum of the Constitutional Court considers necessary to note that for implementation of criminal trial the legislator has to define accurately such procedural order of jurisdiction that would meet the requirements of procedural efficiency. Reference of the issues analyzed above to powers of court at place of residence of condemned, correspond to the principle of procedural efficiency, would serve for comfort and efficiency of legal proceedings, that is, to achievement of good results by the minimum means.

Considering the above, Plenum of the Constitutional Court comes to the following conclusion:

– According to provisions of Article 512.2 of the CPC, in the cases specified in Article 79.2 of the CC, cancellation of a delay of serving of punishment and the direction of the condemned for serving of punishment in the form of imprisonment is carried out on submission of institution or body of execution of punishments, by the court which pronounced a sentence;

– According to Articles 519.0.3 and 519.0.4 of the CPC, in the case specified in Article 79.3 of the CC that is, on reaching the child of eight-year age, release of the condemned from serving of punishment or replacement to not served part of punishment with lenient type of punishment, or cancellation of a delay of punishment with the direction of the condemned for serving of punishment in the form of imprisonment is carried out by court at place of residence of condemned on submission of institution or body of execution of punishments;

– Before improvement of noted articles of the Criminal Procedural Code in a legislative order, these provisions have to be applied according to the legal position created by Plenum of the Constitutional Court in the present decision.

Being guided by 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 provisions of Article 512.2 of the CPC, in the cases specified in Article 79.2 of the CC, cancellation of a delay of serving of punishment and the direction of the condemned for serving of punishment in the form of imprisonment is carried out by the court which pronounced a sentence, on submission of institution or body of execution of punishments.

2. According to Articles 519.0.3 and 519.0.4 of the CPC, in the case specified in Article 79.3 of the CC that is, on reaching by child of eight-year age, release of the condemned from serving of punishment or replacement of not served part of punishment with lenient type of punishment, or cancellation of a delay of punishment with the direction of the condemned for serving of punishment in the form of imprisonment is carried out by court at place of residence of condemned on submission of institution or body of execution of punishments.

3. Before improvement of noted articles of the Criminal Procedural Code in a legislative order, these provisions have to be applied according to the legal position created by Plenum of the Constitutional Court in the present decision.

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

5. 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”.

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