**ON BEHALF OF THE REPUBLIC OF AZERBAIJAN**

**DECISION**

**OF THE PLENUM OF CONSTITUTIONAL COURT**

**OF THE REPUBLIC OF AZERBAIJAN**

*On interpretation of Article 306.1 of the Criminal Code of the Republic of Azerbaijan*

**02 October, 2012 Baku city**

The Plenum of the Constitutional Court of the Republic of Azerbaijan composed of Farhad Abdullayev (Chairman), Fikret Babayev (Reporter-Judge), Rovshan Ismaylov, 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 Court of Appeal of Sumgait city, Fuad Mammadov, senior advisor of the Department for Administrative and Military Legislation of Milli Majlis of the Republic of Azerbaijan;

specialist: Elhan Kazimov, senior advisor of the Department of Generalization of Court Practice and Analysis of Judicial Statistics of the Supreme Court 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 Court of Appeal of Sumgait city.

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

**DETERMINED AS FOLLOWS:**

Court of Appeal of Sumgait city applied to the Constitutional Court of the Republic of Azerbaijan (hereinafter referred to as the Constitutional Court) in connection with interpretation of Article 306.1 of Criminal Code of the Republic of Azerbaijan (hereinafter referred to as Criminal Code) from the point of view of Article 313.1.1 of the Code of Administrative Offences of the Republic of Azerbaijan (hereinafter referred to as CAO).

In the inquiry it is specified that because of non-execution for unreasonable excuse by E. Gabibov and J. Veliyev of the decision of Guba District Court which entered into force of May 26, 2006 about payment to N. Mamedov of money for the sum of 13200 AZN and non-execution of legal requirements of the law enforcement officer on the basis of the decision of this court of April 9, 2010 they were found guilty under Article 313-1.1 of the CAO and in their relation the administrative penalty of 30 (thirty) AZN was applied. In spite of the fact that for execution of the decision the additional time were given, for malicious non-execution of the judicial act these persons were found guilty under Article 306.1 of CC and condemned by a sentence of Guba District Court of February 23, 2012.

The request consisted in the appeal complaint made about a sentence to justify condemned, on the basis of lack of evidence in their acts, an absence of proof of malicious non-execution and hindrance to execution of the decision of Guba District Court of May 26, 2006.

In the inquiry it is specified that according to Article 313-1.1 of CAO for non-execution of legal requirements of executive officials in connection with execution of decisions of judicial and other authorities or non-execution for the unreasonable excuse of the writ of execution obliging the debtor in the time established by the executive official to execute certain actions or to refuse of execution of certain actions, individuals, legal persons and officials are bringing to responsibility in administrative proceedings.

According to requirements of Article 306.1 of the Criminal Code malicious default of decision, verdict, definition or the decision of a court, entered in validity, as well as impending to their execution lead to criminal liability.

According to a conclusion of inquirer the bringing of accused to administrative responsibility under Article 313.1.1 of the CAO is not specified as a dispositive condition for emergence of the corpus delicti provided in the specified article of the Criminal Code.

From this point of view, official interpretation of Article 306.1 of the Criminal Code concerning Article 313.1.1 of the CAP will create implication for formation of uniform court practice concerning the specified issue.

Due to the inquiry, Plenum of the Constitutional Court considers necessary to note the following.

According to Article 125.1 of the Constitution of the Republic of Azerbaijan (hereinafter referred to as the Constitution), judicial power in the Republic of Azerbaijan is implemented by law courts.

According to Article 3 of the Law of the Republic of Azerbaijan “On Courts and Judges” (hereinafter referred to as the Law “On Courts and Judges”), activity of the courts of the Republic of Azerbaijan is aimed solely at the administration of justice and, in cases and order provided by legislation, at the enforcement of judicial supervision. While administering justice, courts protect rights and freedoms of person and citizen, rights and lawful interests of all enterprises, establishments and organizations irrespective of the form of property, political parties, civil associations, other legal persons, from any encroachments and law violations, fulfill other objectives provided for in Constitution of the Republic of Azerbaijan and this Law.

According to parts I and II of Article 129 of the Constitution law courts take decisions on behalf of the state and implementation of these decisions is obligatory. Failure to execute a court decisions entails liability prescribed by law.

Obligation of execution of judgments is reflected also in Article 5 of the Law “On Courts and Judges”. According to this article courts pass resolutions, verdicts, writs and decisions (hereafter judgments), on behalf of the Republic of Azerbaijan, on the cases that they consider. All judgments of the cassation and appeal instances should be published within one month upon the issue and disseminated by means of electronic carriers. Attached to these decisions should be the quashed or altered decisions of the lower instance courts. In the order provided by the legislation of the Republic of Azerbaijan, the effective court judgments should be implemented in an obligatory, timely and precise manner by all natural and legal persons on the territory of the Republic of Azerbaijan. Failure to fulfill judicial effective judgments entails liability provided by the legislation of the Republic of Azerbaijan.

According to a position of the European Court of Human Rights (hereinafter referred to as the European Court) concerning execution of the judicial acts which entered into force, the right for judicial proceedings would be illusory if a Contracting State’s domestic legal system allowed a final, binding judicial decision to remain inoperative to the detriment of one party. It would be inconceivable that Article 6.1 should describe in detail procedural guarantees afforded to litigants - proceedings that are fair, public and expeditious - without protecting the implementation of judicial decisions; to construe Article 6 as being concerned exclusively with access to a court and the conduct of proceedings would be likely to lead to situations incompatible with the principle of the rule of law which the Contracting States undertook to respect when they ratified the Convention. Execution of a judgment given by any court must therefore be regarded as an integral part of the "trial" for the purposes of Article 6 (decision of March 19, 1997 on case of Hornsbyv. Greece, §40).

European Court also mentioned that a delay in the execution of a judgment may be justified in particular circumstances. But the delay may not be such as to impair the essence of the right protected under Article 6.1 (decision of May 7, 2002 on case of Burdov v. Russia, §35).

Compulsory execution of decisions of the courts and other bodies in the Republic of Azerbaijan is carried out by executive officials. The requirements of the executive official connected with execution of decisions of the courts and other bodies are obligatory in the territory of the Republic of Azerbaijan for all bodies, legal entities, their officials and individuals. The persons who are not fulfilling the requirements of executive officials connected with execution of decisions of the courts and other bodies interfere with execution of the duties assigned to them, bear responsibility in the order provided by the legislation of the Republic of Azerbaijan (Articles 2 and 3 of the Law of the Republic of Azerbaijan “On execution” (hereinafter referred to as the Law “On execution”)).

According to Article 12 of the Law “On execution” the executive official within two months from the date of obtaining the writ of execution has to carry out executive actions and provide execution of the requirements specified in the writ of execution. In exceptional cases, execution of the requirements specified in the writ of execution can be prolonged for up to one month by the head of executive service (the chief executive official) on the basis of representation of the head of executive structure.

After the beginning of procedure according to the writ of execution obliging the debtor to execute certain actions or to refuse performance of certain actions, the executive official establishes term for voluntary execution by the debtor of the actions specified in the writ of execution.

Thus, according to Article 8.2 of the Law “On Execution” the executive official has to within three days from the moment of obtaining the writ of execution to adopt the resolution on the beginning of procedure. The executive official in this resolution establishes for voluntary execution by the debtor of the requirements containing in the writ of execution a maximum ten-day term from the moment of the beginning of procedure if in a judgment other date of execution is not established, and notifies the debtor on it. It is specified in the notice that after the expiration of this term the specified requirements will be executed forcibly.

In case of non-execution by the debtor in a voluntary order of the judicial act during the established ten-day term the executive official has to take the measures reflected in Article 43.1 of this Law as – the address of collecting on property of the debtor by seizure of property and its sale; the address of collecting on a salary, pension, a grant and other income of the debtor; the address of collecting on money and other property of the debtor which is at the third parties; withdrawal at the debtor and transfer to the execution creditor of the certain subjects specified in the writ of execution or according to other acts of the Republic of Azerbaijan, to other measures of compulsory execution providing execution of the writ of execution.

If the condition of property, financial position of the debtor and other circumstances, do impossible execution of the writ of execution, even by means of measures of compulsory execution from the executive official that according to Article 231 of the Code of Civil Procedure of the Republic of Azerbaijan filing by the persons participating in case of application on a postponement or delay of execution of the decision, change of a way and order of execution of the decision has not to be is excluded (Article 15 of the Law “On Execution”).

The legislator in Article 82 of the Law “On Execution” also established a special order of bringing to administrative and criminal liability in case of not execution of the writ of execution.

Thus, according to Article 82.1 of the Law “On Execution” if the writ of execution obliging the debtor to execute certain actions or to refuse of execution of certain actions is not executed on the unreasonable excuse in the time established by the executive official, the executive official makes the protocol on administrative offense for involvement of the debtor to administrative responsibility as it should be the provided by legislation of the Republic of Azerbaijan and sends it together with other case materials to the relevant court. Besides, the executive official appoints to the debtor the new term for execution.

According to Article 82.3 of the Law “On Execution” continuing these provisions if the writ of execution is not executed is malicious, the executive official sends to the body which is carrying out preliminary investigation on cases of the corresponding crimes submission approved by the head of executive service (the chief executive official), about bringing of the person obliged to execute the judgment to criminal liability in the order provided by the legislation of the Republic of Azerbaijan.

As evident from contents of the specified articles in case of non-execution of the writ of execution made for execution of the judgment the possibility of bringing of the debtor at first to administrative responsibility and if it did not yield necessary results – to criminal liability on the basis of submission of the head of executive service in appropriate authority in the order provided by the legislation of the Republic of Azerbaijan is established.

It should be noted that the specified legal settlement is reflected also in the Decision of Plenum of the Constitutional Court of February 15, 2008 “On interpretation of Article 265.5 of the Code of Civil Procedure of the Republic of Azerbaijan and Article 82.3 of the Law of the Republic of Azerbaijan “On Execution of Judgments””. In the decision it was specified that by the legislator in the content of Article 82 of the Law of the Republic of Azerbaijan “On execution of judgments” has been used the notion of administrative prejudice. After administrative responsibility in case of continuation by the obliged person of illegal behavior possibility of its bringing to a criminal liability, on the basis of submission of the head of structure of law enforcement officers in corresponding body according to the order, established by the legislation of the Republic of Azerbaijan is provided.

In Article 306.1 of the Criminal Code for malicious default of decision, verdict, definition or the decision of a court, entered in validity, as well as impending to their execution lead to the criminal liability.

This article provides two types of non-execution of decision, sentence, definition or the resolution of court, entered into force:

(i) malicious default of decision;

(ii) impending of execution of judicial acts.

Both specified kinds possess specific signs that play big role at classification of the act provided by Article 306 of the Criminal Code.

In the first case, as a rule, the crime is committed as a result of inaction. The debtor does not make certain actions for execution of the judgment. At the same time non-execution can be carried out and at commission by the debtor of certain actions. For example, the subject in a written or oral form notifies that will not execute the judgment or expresses lack of intention at it to execute the judgment.

From specified it is possible to come to such conclusion that non-execution of the decision, sentence, resolution or other act of court, is meant as non-execution of any actions in the time established by the law by the person obliged to make these actions for implementation of execution of the decision, sentence, definition or the resolution of the court received for execution.

Only malicious non-execution of judicial acts creates corpus delicti provided in Article 306 of the Criminal Code. Non-execution becomes malicious in case when even after the written notice of the offender, he does not execute the requirement of the judicial act or continues the actions directed on impossibility of execution of judicial acts.

Malicious non-execution of judicial acts can be established on the basis of the below-specified:

- non-execution of the requirements provided in the judgment during the term established in this decision;

- the numerous official notice to the debtor made concerning of non-execution of the judgment;

- bringing of the debtor to administrative responsibility for non-execution of the judgment;

- non assumption by the debtor of sufficient measures for execution of the judgment;

- existence at the debtor of the actual opportunities for execution of the judgment.

In case of malicious non-execution by the debtor of the writ of execution as a result of such actions, the executive official has to send the submission approved by the head of executive service (the chief executive official), to the body which is carrying out preliminary investigation on criminal cases concerning the corresponding crimes on bringing of the person obliged to execute the judgment to criminal liability as it should be provided by the legislation of the Republic of Azerbaijan (Article 82.3 of the Law “On Execution”).

Malicious hindrance to execution of the judicial act has to be understood as deliberate hindrance of the person to timely execution of the judicial act by government body, local government, public and municipal authority, commercial or other organization. Such hindrance can be carried out in the different ways:

- instructions, orders and directions of the person on non-execution of the judgment to the persons who are under his supervision;

- hindrance to execution of the judgment by the executive official or person the possessing power to execute the judgment;

- failure to provide necessary documents for execution of the judgment;

- failure to provide to the persons obliged to execute the judgment of information, including information on location of the organization and bank accounts;

- taking measures interfering execution of the judgment or doing its execution impossible.

Noted actions can be made not only by the person having power to execute the judgment but also by other subjects interested in non-execution of the judgment.

At the same time, it is necessary to consider that as the provision “malicious” defined in Article 306.1 of Criminal Code is the estimating (qualifying) sign and the body which is carrying out preliminary investigation or court has to establish existence of this sign only according to circumstances of concrete case.

On the basis of the above Plenum of the Constitutional Court considers that the corpus delicti provided by Article 306 of Criminal Code, arises in cases of repeated malicious non-execution by the person of the writ of execution after bringing to administrative responsibility under Article 313.1.1 of CAP for non-execution of the judicial act.

Being guided by Article 130.6 of the Constitution of the Republic of Azerbaijan and Articles 60, 62, 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. Corpus delicti provided by Article 306 of Criminal Code, arises in cases of repeated malicious non-execution by the person of the writ of execution after bringing to administrative responsibility under Article 313.1.1 of CAP for non-execution of the judicial act.

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

3. The decision shall be published in “Azerbaijan”, “Respublika”, “Xalq Qazeti” and “Bakinskiy Rabochiy” newspapers, and “Bulletin of the Constitutional Court of the Republic of Azerbaijan”.

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