**ON BEHALF OF THE REPUBLIC OF AZERBAIJAN**

**DECISION**

**OF THE PLENUM OF CONSTITUTIONAL COURT**

**OF THE REPUBLIC OF AZERBAIJAN**

*On interpretation of notion “official” provided in part “The Note” of Article 308 of the Criminal Code of the Republic of Azerbaijan*

**19 July 2013                                                                            Baku city**

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

attended by the Court Clerk Ismail Ismaylov,

representative of interested party: Ilgar Jafarov, Head of Department for the Support of State Prosecution of the Prosecutor’s Office of the Republic of Azerbaijan;

specialists: Farhad Karimov, Judge of the Supreme Court of the Republic of Azerbaijan, Gail Mamadov, Judge of the Court of Appeal of Baku city;

expert – Rafig Guliyev, Associate Professor of the Department of Criminal Law and Criminalistics of the Baku State University,

in accordance with the Article 130.4 of the Constitution of the Republic of Azerbaijan examined in open judicial session via special constitutional proceedings the case on inquiry of Office of Public Prosecutor of the Republic of Azerbaijan.

having heard the report of Judge Rafael Gvaladze, the reports of the legal representative of the subject interested in special constitutional proceedings, expert and specialists, examined the materials of the case the Plenum of Constitutional Court of the Republic of Azerbaijan

**DETERMINED AS FOLLOWS:**

Office of Public Prosecutor of the Republic of Azerbaijan having applied to the Constitutional Court of the Republic of Azerbaijan (hereinafter referred to as the Constitutional Court) asked to interpret whether or not the notion “official” covers provided in a part “The Note” of Article 308 of Criminal Code of the Republic of Azerbaijan (hereinafter referred to as the Criminal Code), all government employees, members of the municipalities and local government officers, military personnel being officers, ensigns or warrant officers, persons involved into business activity without establishment of legal entity, employees of public local government offices, entities and organizations, other commercial and non-profit organizations irrespective of whether they perform organizational or administrative functions.

In the inquiry it is noted that the correct determination of the special subject of corruption crimes and other crimes against interests of service, noted as “official”, is important for qualification of these crimes and involvement of relevant persons into criminal liability. However, there are ambiguous approach in investigative and court practice to the notion “official” provided in a part “The Note” of Article 308 of the Criminal Code.

Proceeding from the above mentioned the inquirer asks to give interpretation to the notion “official” provided in the part named “The Note” of Article 308 of the Criminal Code.

For the purpose of correct solution of the issue brought up in the inquiry, the Plenum of the Constitutional Court considers necessary to reveal an essence of the notion “official”, components of crime against the government, interests of public service and service in local government bodies, and also in other commercial and non-profit organizations.

Public danger of the specified crimes consists in that the person, using the office powers, contrary to interests of service, does harm to the rights and legitimate interests of legal entities and individuals, and also the protected legitimate interests of society and state, violates constitutional rights and freedoms of citizens, discredits authorities among the population.

During any period, the state, irrespective of management and a structure, imposes special requirements with respect to its officers and officials connected with execution by them of their service duties. Violation of these requirements by these persons results in a certain responsibility. It is quite clear and the government is entitled to do this.

Normal regulation of the public relations causes need of participation of the state for various spheres of life of society, implementation of the organization of the most various aspects of activity of the population and control over them. Thereby caused a variety of the relations arising at implementation of the public power by the state by means of authorities.

In addition, constant improvement of the state institutes, development of independent aspects of public administration in certain cases lead to fundamental change of state policy, including policy in the field of criminal law. In such cases, the need for formation of new approach to already approved relations is openly shown.

Modern approach proves radical change of state policy, views of the state of an essence of the notion “official”.

The existing penal legislation distinguishes responsibility of the persons that are directly fulfil functions of the government and participating in accomplishment of the tasks facing the state from managers of all other categories.

In the Convention “On Criminal Liability for Corruption” approved by the Law of the Republic of Azerbaijan dated December 30, 2003 and in the Convention of the United Nations “Against Corruption”, approved by the Law of the Republic of Azerbaijan dated December 30, 2005 the notion “official” is given.

The Article 148.2 of the Constitution of the Republic of Azerbaijan (hereinafter referred to as the Constitution) determines international treaties, to which the Republic of Azerbaijan is a party as an integral component of legislative system of the Republic of Azerbaijan.

Considering requirements of international conventions and for increasing efficiency of fight against corruption, on June 24, 2011 the Law of the Republic of Azerbaijan “On Introduction of Amendments to the Criminal Code of the Republic of Azerbaijan” was adopted. According to this Law, a part “The Note” of Article 308 of the Criminal Code was given in the new edition and the content of the notion “official” was expanded.

In the previous edition, in part “The Note” of this article the notion “official” was defined as follows:

1. Officials in articles of this chapter are understood as persons, permanently, temporary or on special power fulfilling functions of public agent or fulfilling organizational and administrative functions in state bodies, local government bodies, public and local government offices, enterprises and the organizations, and also other persons who are considered as officials for providing the purposes of the Law of the Republic of Azerbaijan “On Fight Against Corruption”.

2. In the cases that are specially provided by the relevant articles, the government employees not included into category of officials and employees of local self-government bodies, and also other commercial and non-profit organizations bear criminal liability under articles of this chapter.

In the new edition, according to the part named “The Note” of the Article 308 of the Criminal Code in the articles of Chapter 33 (corruption crimes and other crimes against interests of service) of this Code the term “official” covers the following persons:

- public agents, including the persons chosen or appointed in state bodies in the order established by the Constitution and laws of the Republic of Azerbaijan or the representing state bodies or local government bodies on special power, the military personnel being officers, ensigns or warrant officers, government employees (including persons who are engaged in a special type of public service), members of municipalities and local government officers;

- persons whose candidate for elective offices in state bodies is registered in the order established by the law;

- heads and employees of the public and local government offices, enterprises and organizations, other commercial and non-profit organizations;

- persons fulfilling special organizational and administrative functions in the public and local government offices, the enterprises and the organizations, other commercial and non-profit organizations;

- persons involved in business activity without creation of legal entity;

- officials of state bodies of foreign countries, members of elected state bodies of foreign countries, officials and other employees of the international organizations, members of the international parliamentary assemblies;

- judges and other officials of the International Courts of Justice, foreign or local arbitrators of arbitration, foreign or local jurors.

Crime against interests of service can be committed only through abuse by a person of his/her powers in office. From this point of view, disclosure of crime components of abuse of powers of office represents a large value.

Into the term “authority” are included normal activities of state bodies, local government bodies, commercial and non-profit organizations. Law and state protect rights and legitimate interests of individuals or legal entities as well as the interests of society.

From the objective point of view, abuse of powers of office characterized by set of the following necessary signs:

- act in the form of use by the official of the office powers contrary to interests of service;

- coming of the consequence consisting of causing of considerable harm to the rights and legitimate interests of individuals or legal entities or to the interests of society or state protected by the law;

- existence of a causal relationship between act and a consequence.

Abuse of office powers may be expressed in the actions proceeding from office powers of the official and connected with implementation of the rights and obligations given to relevant person according to his/her position. However, the corpus delicti arises in case of deliberate implementation of such actions contrary to interests of service.

Owing to a wide range of activities of officials, the specific forms of abuse of office powers can also be various. Abuse can be fulfilled both through action, and through inaction.

According to contents of Article 308 of the Criminal Code, the action and inaction entering in objective line of abuse of office powers shall proceed from warrants of law of official. Office powers that the official used contrary to interests of service are established by the corresponding regulations and volume of the obligations reflected in the employment contract signed with the public and local government offices acting according to the legislation, the entities and the organizations, commercial and non-profit organizations.

One of the necessary signs of objective line of abuse of office powers is the coming of socially dangerous consequence expressed in causing of considerable harm to the rights and legitimate interests of society and state.

Abuse of office powers from the subjective point of view is intentionally committed crime. The person understands that used the office powers contrary to interests of service, expects the consequences expressed in causing considerable harm to the rights and legitimate interests of legal entities and individuals and also to the interests of society and state protected by the law, wishes coming of these consequences (direct intention) or consciously (indirect intent) allows coming of such consequences.

The motive of a crime is one more of necessary signs of subjective line of a crime of abuse of office powers. In Article 308 of the Criminal Code the motive of this crime is established as acquisition by official an illegal superiority for himself or for the third parties.

The subject of abuse of office powers can be only official.

There are features that unite the notion “official” from the point of view of the subject in the previous and new editions of part “The Note” of Article 308 of the Criminal Code.

According to these features, officials can be divided into three categories:

- persons, permanently or on special power fulfilling functions of public agent;

- persons fulfilling organizational and administrative functions in the public and local government offices, the entities and the organizations, and also in other commercial and non-profit organizations;

- persons fulfilling administrative functions in the public and local government offices, the entities and the organizations, and also in other commercial and non-profit organizations.

The nature of functions and activity of the authority defined by the tasks facing body that he represents. Activity of the authority is based on the relationship with an uncertain circle of people who being and not being under his administrative supervision.

The person fulfilling organizational and administrative function is manages the activity of the public and local government offices, entities and organizations, and also in others commercial and non-profit organizations. Accomplishment of such function connected with a management over people (selection, placement of a personnel, employment and dismissal, the organization of work, etc.).

The management over people is optional for administrative function. In this case, the main thing is control and management of material values, the organization of their distribution, obtaining, safe custody, implementation, etc.

The Constitution, the law, the charter, the instruction, the order or other legal act concerning position assignment in which formulated the rights and obligations of the person holding a specific position, acts as a legal basis of investment of the person with the corresponding functions.

According to a part “The Note” of Article 308 of the Criminal Code the persons who are not appointed to a specific position, but actually fulfilling organizational and administrative functions, and also representing bodies of the state or self-government for special power can be considered as officials. The authorized body confers special powers, by the official, labor collective. The law, the regulation, the order, the solution of labor collective, etc arrange special powers. These functions can be fulfilled during the certain period or together with the main work.

Accessory of those bodies, organizations in which the official works acts as an independent sign. Under the law, it can be state bodies, local government bodies, the government or municipal institutions, commercial and non-profit organizations.

Officials also have to possess the general signs of the subject of a crime (sanity, an age limit).

It is obvious from inquiry that there are no dispute in connection with officials, belonging to three categories specified in practice.

At the same time, it was noted that a circle of the subjects falling under the notion “official” provided in the part “The Note” of Article 308 of the Criminal Code is wider than subjects provided in the previous edition.

Thus, the government and local government officers, members of municipality, such military personnel as the officers, ensigns or warrant officers, persons which are engaged in business activity without creation of the legal entity and also employees of the public and local government offices, entities and organizations, other commercial and non-profit organizations are carried to officials.

In regard of this issue, the next moment can be of interest: what status possess, from the point of view of the criminal legislation, the persons who considered in legislations of other countries as officials.

The person, who considered as official in public and legal value of this term, acts as the representative of a will of the state fulfilling the managerial function. Confirmation of it, first of all, are the names of such subjects – “the public employee”, “the public official”, “the person fulfilling the state function or powers”, “official”, “public employee”.

It is possible to establish similarity of a circle of officials in the legislation of these countries with the officials specified in the Criminal Code of the Republic of Azerbaijan. In this sense, from the point of view of establishment of such subjects, the concept given to the official in the Criminal Code of the Federal Republic of Germany (hereinafter referred to as the Criminal Code of FRG) is closer to the criminal legislation of the Republic of Azerbaijan.

According to §11 of the Criminal Code of the FRG a public official is whoever: (a) is a civil servant or judge; (b) otherwise has an official relationship with public law functions or; (c) has been appointed to a public authority or other agency or has been commissioned to perform duties of public administration without prejudice to the organizational form chosen to fulfill such duties.

In the criminal legislation of many countries, the criminal and legal theory and adjacent areas of the right (administrative, criminal procedure, criminal and executive) along with the term “official” as the synonym is also used the term “functionary”. In the legislation of the Republic of Poland, the preference given not to category “civil servant”, but to category “functionary”.

It should be noted that from the point of view of the criminal legislation of the Republic of Azerbaijan it is impossible to equate the concepts “civil servant” and “official”.

In spite of the fact that the concepts “civil servant” and “official” partially coincide, they have a different essence. Thus, there is such official who is not a civil servant, and there is such civil servant who has not an official.

The notion “civil servant” from the point of view of criminal law should be considered as the collective definition uniting in itself all persons that are in public service on the professional bases or on the special power that is carrying out such function. The persons possessing various statuses and official positions covered by this category.

According to Article 10.1 of the Law of the Republic of Azerbaijan “On Civil Service” positions in state bodies shall be classified as administrative and auxiliary depending on the subject of their functions, sources of authorities and manner of holding a position.

According to the Article 10.5 of the given Law, the administrative positions are positions of heads of offices and departments of state bodies of the highest 5th category, their deputies, as well as positions of specialists recruited to civil service.

In the Article 10.6 of the specified Law, the positions of the government employees fulfilling technical works in state bodies of the highest 5th category (clerk, typist, courier, archivist, lift operator, driver and other employees) are established as auxiliary positions.

Legal status of the persons holding managerial and auxiliary positions is established by the legal acts determining powers of relevant organ and also job descriptions.

The new, rather expanded and changed regulatory base of public service is created. According to the legislation of the Republic of Azerbaijan, the institute of civil service can be conditionally divided into three categories:

1) the civil service is a professional office activity of citizens in spheres of public service of the state;

2) the military service is a professional activity of citizens at military positions in the Armed Forces of the Republic of Azerbaijan, other military formation created according to the legislation of the Republic of Azerbaijan which fulfill function on protection and safety of the state;

3) the law-enforcement service is a professional office activity of citizens at positions of law-enforcement service in the state bodies, organizations and the organizations fulfilling function on fight against crime, safety, legality and law and order in the field of protection of the rights and freedoms of the individual and the citizen.

Special laws are devoted to certain types of civil service.

The civil service is activities of the citizen of the Republic of Azerbaijan who undertook the liability on passing of civil service. The civil servant, according to the act of position assignment and the office agreement fulfill the professional office activity at a position of civil service and receives material security at the expense of the government budget.

The service is a paid activity of the persons working in the public and local government offices, commercial and non-profit organizations that, as a rule, not connected directly with production of material benefits. This concept belongs also to military service that is one of forms of public service.

According to Article 15.1 of the Law of the Republic of Azerbaijan of July 2, 1999 “On Status of Municipalities” (hereinafter referred to as the Law “On Status of Municipalities”), a municipal member is a person who is elected at the municipal elections and whose mandate is approved by the Territorial Election Commission.

According to Article 25.1 of the given Law, the persons occupying positions in municipal bodies are municipal employees.

In the Article 2.2 of the Law of the Republic of Azerbaijan “On Municipal Service” dated November 30, 1999 it is specified that the worker appointed to a position and serving in local government bodies on a paid basis is considered as the local government officer.

According to Article 3.2 of the Labor Code of the Republic of Azerbaijan, the worker is an individual who has entered into an employment agreement (contract) with an employer and who works in an appropriate workplace for pay.

According to Article 33.3 of the Tax Code of the Republic of Azerbaijan, the registration of legal person as taxpayer with the tax authority or the natural person who fulfill its entrepreneurial activity without the establishment of legal person (individual entrepreneurs) conducted independently from presence of circumstances established by this Code for the obligation on tax payments.

The physical person who is engaged in business activity without creation of the legal entity shall submit the application to tax authority before the beginning of business activity.

According to a part “The Note” of the Article 308 of the Criminal Code the public servants among the above-mentioned persons, members of municipalities and municipal employees, military personnel (officers), ensigns or warrant officers are considered as officials.

With respect to the aforementioned, there is a need of disclosure of the notion “public agents”.

Public agents are implied as persons fulfilling legislative, executive and judicial authority, and also the persons who vested in the order established by the law by administrative authority concerning the persons which are or not being under their supervision or the right to make the decisions obligatory for execution by legal entities and individuals.

Such functions are fulfilled by the deputies, members of the government, judges of courts, employees of control for implementation of laws, protection of public order, fight against crime, providing fire-proof, anti-epidemic and so forth safety (police, security service, customs service, the state forest control, etc.), heads of the ministries and other central executive bodies, municipal structures, their deputies, heads of structural divisions and others.

For example, powers of the military personnel who is officers, ensigns or warrant officers are established by the Law of the Republic of Azerbaijan “On a Universal Obligation and Military Service” of December 23, 2011, “The Charter of Internal Service of Armed Forces of the Republic of Azerbaijan” approved by the Law of the Republic of Azerbaijan of September 23, 1994.

According to requirements of these laws the officers, ensigns or warrant officers have rights to give orders, obligatory for execution, by the serviceman who is under their supervision on an office position or a military rank.

Many authorities have no persons in the submission, however they have rights to give instructions, obligatory for execution, to apply coercive measures and so forth to the persons who are not under their supervision (police, security service, etc.).

The persons who are a part of collegial bodies can also be public agents. For example, according to Article 145 of the Constitution and the Article 48 of the Law “On Status of Municipalities” the decision of municipality are made by members of municipality. All legal entities and individuals that are in the territory of municipality shall surely implement the decisions of municipality. In other words, execution of the decisions made by members of municipalities is obligatory.

Thus, government employees, members of municipalities and local government officers, the officers, ensigns or warrant officers who vested in the order established by the law the administrative authority concerning the persons which are or not being under their supervision or the right to make the decisions obligatory for execution by legal entities and individuals as public agents are considered as officials.

As for the issue of entering of workers of public and local government offices, entities and the organizations, other commercial and non-profit organizations, the persons which are engaged in business activity without creation of the legal entity in number of officials the Plenum of the Constitutional Court notes that specified persons can be considered as officials only when making the actions having the legal importance.

It should be noted that such actions which commission can lead to such consequences as emergence, change or the termination of legal relations, are considered as the actions having legal value.

According to this concept, the actions having the legal importance are implied as actions of the persons having power to make them. Availability of this sign provides regular or temporary occupation the person of a certain position (accomplishment of a certain work) at the entity, in organization and the organization and in connection therewith making under certain circumstances of the actions having the legal importance.

Thus, persons, authorized to make the actions having the legal importance in the order established according to contents of the penal statute are persons, temporarily either constantly holding positions or fulfilling according to the special order the obligations assigned to them at the entities in organizations and the organizations (irrespective of pattern of ownership), making actions which lead or can lead to origin, change or the termination of legal relations for other persons.

In the inquiry it is specified that the issue of entering of workers (teachers, doctors, etc.) the public and local government offices, the entities and the organizations, other commercial and non-profit organizations of not fulfilling organizational and administrative or administrative functions, or the government employees holding auxiliary positions (clerk, typist, courier, archivist, lift operator, driver and other employees) in the notion “official” is causes a controversy.

In this regard, the Plenum of the Constitutional Court notes that it is possible to carry to number of the persons authorized for commission of the actions having the legal importance, for example, not only teachers who are members of qualification or examination committee, but also the teachers holding exams at students or other studying persons.

The assessment given by the teacher at examinations which is reflected in official documents and also positive or negative estimation of knowledge of students during the examination, in one case becomes the direct and immediate basis for emergence of the result having the legal importance, that is, emergence, change or the termination of legal relations. In other case, such actions are one of major cases for coming of the specified consequences, that is, in total with other circumstances influence on emergence, change or the termination of legal relations.

Emergence of the rights of students or other studying persons to education in the relevant educational institution in the future, receipt of a grant, the honors degree are the basis for pay rise of graduates of some educational institutions during employment, a low fare for training in non-state educational institutions, etc. depends on the estimates given to their knowledge at examinations.

Specified does not exclude inclusion to a number of the officials not only persons who are carrying out the duties in the field of education but also the persons occupied in other spheres of service and having powers on commission of the actions having the legal importance.

Along with it, the Plenum of the Constitutional Court notes that criminal prosecution of these persons for crimes against interests of service shall realized at considering of all circumstances influencing on question of whether act according to availability of other compound signs of the specified crime for each case, assessment of degree of public danger and nature of act, including with the requirement of Article 14.2 of the Criminal Code has a little significance.

Support personnel in the state or municipal authorities (clerk, typist, courier, archivist, lift operator, driver and others) are employees who perform auxiliary material operations to ensure activities of officials. They do not participate directly in activities for implementation of powers of relevant organs, are engaged in providing a material and information process of activities of offices of the state or municipal authorities.

If such persons, fulfill organizational and administrative functions only in compliance with law, other regulatory legal act, the order or instruction, and also make the actions having the legal importance on special power, then they can be considered as officials.

The Plenum of the Constitutional Court considers that such solution of an issue does not contradict to the Constitution, the Conventions “On Criminal Liability for Corruption” and “Against Corruption” and to laws. On the contrary, broad interpretation of the notion “official” can lead to not accounting of characteristics of corruption crimes and other crimes against interests of service, to unreasonable excessive expansion of a circle of special subjects of these crimes.

Considering the above, the Plenum of the Constitutional Court concludes that according to essence of the part “The Note” of the Article 308 of the Criminal Code:

- the government employees, members of municipalities and local government officers, the military personnel (officers), ensigns or warrant officers, in the order established by the law vested by administrative authority concerning the persons which are or are not under their supervision or with the right to make binding decisions for execution by legal entities and individuals as public agents are considered officials;

- the employees of the public and local government offices, entities and organizations, and also other commercial and non-profit organizations, persons who are engaged in business activity without creation of legal entity are considered officials only when taking actions having legal importance, that is actions, which lead or can lead to emergence, modification and/or termination of legal relations for other persons.

Being guided by the Article 130.4 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 essence of the part “The Note” of the Article 308 of the Criminal Code of the Republic of Azerbaijan:

- the government employees, members of municipalities and local government officers, the military personnel (officers), ensigns or warrant officers, in the order established by the law vested by administrative authority concerning the persons, which are or are not under their supervision or with the right to make binding decisions for execution by legal entities and individuals as public agents are considered officials;

- the employees of the public and local government offices, entities and organizations, and also other commercial and non-profit organizations, persons engaged into business activity without creation of legal entity are considered officials only when taking actions having legal importance, that is, actions, which lead or can lead to emergence, modification and/or termination of legal relations for other persons.

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 institution or official.