**ON BEHALF OF THE REPUBLIC OF AZERBAIJAN**

**DECISION**

**OF THE PLENUM OF CONSTITUTIONAL COURT**

**OF THE REPUBLIC OF AZERBAIJAN**

*On interpretation of some provisions of Articles 12.2, 87.2 and 106.1 of the Criminal Procedure Code of the Republic of Azerbaijan*

**15 April 2014                                                                                            Baku city**

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

attended by the Court Clerk Elmaddin Huseynov,

representatives of interested parties – Rashid Huseynov, Judge of Court on Grave Crimes of Sheki city; Fuad Mamedov, Senior Advisor of the Department for Administrative and Military Legislation of Milli Majlis of the Republic of Azerbaijan;

specialists – Shahin Yusifov, Chair of Criminal Board of Supreme Court of the Republic of Azerbaijan, Mahir Abbasov, Prosecutor of Department of protection of public prosecution in courts on grave crimes of Department on protection of public prosecution of the General Prosecutor’s Office of the Republic of Azerbaijan;

expert – Midhad Gafarov, docent of the Board of Criminal Procedure of Faculty of Law of the Baku State University, Doctor of Law;

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 on Grave Crimes of Sheki city on interpretation of Articles 12.2, 87.2 and 106.1 of the Criminal Procedure Code of the Republic of Azerbaijan.

having heard the report of Judge Isa Najafov, the reports of the legal representatives of the subjects interested in special constitutional proceedings and specialists, conclusions of expert, examined the materials of the case the Plenum of Constitutional Court of the Republic of Azerbaijan

**DETERMINED AS FOLLOWS:**

The Court on Grave Crimes of Sheki city having applied to the Constitutional Court of the Republic of Azerbaijan (hereinafter referred to as the Constitutional Court) with the purpose of determination of legal status of the victim (the injured person or the legal successor of the injured person) asked to give interpretation to the provisions “the person who suffered from act with essential elements of crime” of Article 12.2, “in case of death of victim who was injured as a result of the committed crime, his/her right, provided by this article, exercised by his/her close relatives” of the Article 87.2 and “as the legal successor of the victim who died as a result of incident is recognized the one of his/her close relatives who expressed desire to exercise the rights and the victim’s obligations during criminal proceeding” of the Article 106.1 of the Criminal Procedure Code of the Republic of Azerbaijan (hereinafter referred to as the CPC) from the point of view of the Articles 68 and 71 of the Constitution of the Republic of Azerbaijan (hereinafter referred to as the Constitution).

  In the inquiry it is specified that based on the decision of body of pretrial investigation as of August 30, 2013 on the criminal case which is in court proceeding concerning accusation of I. Guseyn's under Articles 222.2 and 222.3 of the Criminal Code of the Republic of Azerbaijan (hereinafter referred to as the CC), I. Isaev was recognized as the victim in a general sense, and his wife Z. Isaeva – as the legal successor of the victim and was interrogated as the witness.

At preliminary hearing of court Z. Isaeva has addressed to court with the petition for the termination of the status of legal successor of the victim and recognition of her as the victim. The petition has been grounded by the fact that according to Article 87.1 of the CPC, because of the death of the husband I. Isaev the moral and physical damage has been directly caused to her as a result of criminal act. Instead of recognition for this reason of Z. Isaeva as the victim in a procedural order, she has been recognized as the legal successor of the victim. Thereby, according to Article 106.6.1 of the CPC she could not use the right for reconciliation with the suspect or the accused person.

In the inquiry it was noted that there are an uncertainty in provisions “as the legal successor of the victim who died as a result of incident is recognized the one of his/her close relatives who expressed desire to exercise the rights and the victim’s obligations during criminal proceeding” of the Article 106.1 and “in case of death of victim who was injured as a result of the committed crime, his/her right, provided by this article, exercised by his/her close relatives” of Article 87.2 of the CPC. It is not clear, whether the victim recognized in a procedural order or the person who has died as a result of criminal act is provided in these provisions. The criminal procedure legislation in certain cases identifies the concept “victim” with “the dead person” (Article 119.4 of the CPC), sometimes not as the victim recognized in a procedural order, and in a general sense “the victim (who has get damage)” as a result of criminal act (Article 12.2 of the CPC), and a number of cases is refer the concept “victim” to “dead person” (Article 181.3 of the CPC). These circumstances create difficulties at establishment of the status of the victim, and legal successor of the victim, using by them of the rights and duties.

In the inquiry it is also specified that according to Article 87.1 of the CPC if there are sufficient grounds to think that the individual suffered direct moral, physical or material damage as a result of the act provided for in criminal law, he/she is recognized as a victim. From the requirement of a regulation it is evident that: a) the live natural person is considered as the victim; b) this person shall suffer moral, physical, material damage; c) this damage shall result from criminal act. According to Article 119.4 of the CPC the close relative of the person who dead as a result of incident and who interested to become his/her legal successor, can require recognition him as the victim. According to Article 87.4 as soon as the decision is taken by the preliminary investigator, investigator, prosecutor or court, the person shall be referred to as the victim. If at the start of the criminal proceedings there are insufficient grounds to declare the person as a victim, that decision shall be taken as soon as sufficient grounds are determined. In Article 210.3 of the CPC it is specified that if by the time of initiation of legal proceedings the person who was injured from the committed crime is known, then along with initiation of legal proceedings this person is recognized as the victim. According to Article 12.2 of the CPC the victim of a criminal act have the right to demand criminal prosecution, to take part in it as a victim or as a victim bringing a private prosecution and to obtain compensation for moral, physical and material damage as required by this Code.

According to the inquirer, the concept “victim” does not imply that the “victim” recognized in a procedural order and carried to live, natural person is a dead. In view of the fact that the concepts “the person who suffered from act with essential elements of crime” of Article 12.2, “the victim as a result of the committed crime” of Article 87.2 and “the victim as a result of incident” of Article 106.1 of the CPC, create uncertainty and in a conflict with the concepts “victim” of Articles 87.1, 87.4, 119.4, 210.3 of the CPC. Finally, the uncertainty, taking place in Articles 12.2, 87.2 and 106.1 of the CPC, leads to violation of the rights of the victim and does not correspond to the legal position created in many decisions of the Plenum of the Constitutional Court on an essence and value of the principle of legal certainty.

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

The Constitution, having affirmed in itself basic human and citizen rights and freedoms also established the legal basis of criminal proceeding as important and necessary social value.

Establishment of special procedural position of the victim and need of protection of his/her violated rights is reflected in the Constitution.

According to Article 60 of the Constitution, the protection of his/her rights and freedoms in the administrative manner and in court is guaranteed to everyone. Everyone may appeal to court in the administrative manner against the actions and inaction of public authorities, political parties, legal entities, municipalities and their officials.

In the Article 68.1 of the Constitution, it is indicated that the law protects the rights of a person who has been a victim of a crime and abuse of power. A victim has the right to participate in court examination and to demand compensation for damage caused to him.

The legislative, executive and judicial powers shall observe and protect human rights and freedoms fixed in the Constitution. No one can curtail the implementation of the rights and freedoms of man and citizen. Everyone's rights and freedoms are subject to the restrictions provided for in the Constitution and the laws as well as to the limits resulting from the rights and freedoms of others.

According to Article 8 of the Universal Declaration of Human Rights - everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

In point 4 of the “Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power” adopted by General Assembly of UN on November 29, 1985 it is indicated that victims should be treated with compassion and respect for their dignity. They are entitled to access to the mechanisms of justice and to prompt redress, as provided for by national legislation, for the harm that they have suffered. “Victims” means persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws, including those laws proscribing criminal abuse of power.

Above mentioned provisions of the Constitution and international legal documents are imply not only prevention by the state of the criminal actions causing damage and causing moral shock to the person, but also an obligation of a possibility of protection of the rights and legitimate interests of whose persons who was injured as a result of criminal act by means and methods provided by the law.

In this context, it is necessary to distinguish the criminal-legal and criminal- procedure concepts of expression “injured person”.

In the criminal law under “injured person” is mean the person protected by the criminal law and who is acting as the subject of the public relations and suffered the physical, moral and other damage provided by the criminal law.

In the criminal procedure law, the concept “injured person” is mean as the participant of process who has presumably suffered damage as a result of criminal act.

In criminal-legal sense a concept the person who was injured from a crime, being wider than the concepts “injured person” of criminal procedure legal sense, means the person recognized as the victim in criminal procedure sense and the person who has died before recognition of him as the victim as a result of a crime or for other reason.

The rights and duties of the person injured as a result of a criminal act enshrined in the Constitution and international legal documents have also found the reflection in the CPC.

Although, in Article 7 that determine the basic concepts of CPC the concepts of the legal representative and the representative of victim are given, nevertheless there are no normative-legal concept of it. However it is specified that the preliminary investigator, investigator, prosecutor, victim, victim bringing a private prosecution and civil party are the party of accusation of the injured person (Article 7.0.21 of the CPC). Besides, in Article 7.0.36 of the same Code it is specified that “damage” is moral, physical or material harm to the victim due to a criminal act.

In Article 12.1 of the CPC it is specified that the judicial authorities shall observe the human and civil rights and liberties affirmed by the Constitution to all participants of criminal proceedings.

At the same time, the victim of a criminal act shall have the right to demand criminal prosecution, to take part in it as a victim or as a victim bringing a private prosecution and to obtain compensation for moral, physical and material damage as required by this Code (Article 12.2 of the CPC).

Article 12.3 of the CPC provides that during criminal proceedings everyone have the right to defend their rights and liberties as set down by the Constitution in any manner not prohibited by law.

The rights of the injured person specified in Article 12.2 of the CPC are concretized in Article 87 of this Code and the liabilities of the injured person are established.

Article 87.1 of the CPC provides that if there are sufficient grounds to think that the individual suffered direct moral, physical or material damage as a result of the act provided for in criminal law, he/she is recognized as a victim. The moral damage is understood as humiliation of honor and dignity of the person, drawing to him a moral shock, as physical damage – damage caused to life, health, other corporal inviolability of the person, and as material damage - the damage expressed in monetary unit.

The Plenum of the Constitutional Court notes that participation of the person in criminal procedure as the victim demands, according to Article 87.4 of the CPC, making by the preliminary investigator, investigator, prosecutor or court of the resolution on it.

The CPC provides two forms (two cases) of recognition of the person as the victim during criminal legal proceedings. In the first case if by the time of initiation of legal proceedings the person which was injured from the committed crime is known, then along with initiation of legal proceedings this person admits as the victims (Article 210.3 of the CPC). In the second case, at absence by the time of initiation of legal proceedings of the sufficient bases for recognition of the person as victim such resolution is accepted immediately after establishment of the sufficient bases (Article 87.4 of the CPC).

The person, from the moment of decision concerning his/her recognition as the victim, has rights and obligations provided by the criminal procedure legislation. These rights of the victim fulfilled directly by him/her or by means of the legal representative (Articles 85, 101, 102 of the CPC).

If the person has died as a result of a crime or for other reasons, then there is a issue of protection of his/her rights.

In Article 49 of the CPC, acting till September 1, 2000, the person to whom the crime has caused moral, physical or property damage is admitted as the victim. In criminal cases from the death of the victim, his/her close relatives have rights provided by this article, however the order of their participation in criminal procedure and other issues are not established.

But in Article 87.2 of the acting CPC it is provided that in case of death of victim due to committed crime, then his/her right, which was provided by this article, is fulfilled by his/her close relatives. Apparently from content of this regulation even if the person who died in a consequence of the committed crime won't be acknowledged by the decision of the preliminary investigator, investigating officer, prosecutor or court as the “victim” in a criminal procedure sense, he/she nevertheless is the victim, and in connection with his/her death the rights, provided by the law are fulfilled by the close relatives (legal successors).

In case of victim’s death in the criminal procedure legislation has founded the solution of the issue of protection of his/her rights by close relatives, on the basis of the principle of continuity in the law, appointments of the assignee of the victim and his/her rights and a duty are defined during criminal legal proceedings (Article 106 of the CPC).

If victim died as a result of incident, a close relative of victim who expresses the wish to exercise the rights and fulfill the duties of a deceased person during the criminal proceedings shall be considered as his/her legal successor (Article 106.1of the CPC). A close relative who has caused the victim non-material, physical or material damage through a criminal act may not be considered as the legal successor of this victim (Article 106.2 of the CPC).

In the criminal procedure legislation, close relatives are meant as grandfathers, grandmas, parents, adopters, the family and stepbrothers and sisters, spouses, children, adoptive and grandsons (Article 7.0.32 of the CPC).

The decision on recognition of the close relative as the legal successor of the injured person is made on the basis of a request of his/her relative by body that carrying-out the criminal procedure.

The legal successor of the victim participates in proceeding on criminal prosecution instead of the victim. At the same time he has the victim's right to evidence and other his/her rights, except the inalienable rights of the personality, and fulfills the victim's duties. The legal successor of the victim can have the rights and fulfill duties of the private prosecutor on the same bases as the victim (Article 106.5 of the CPC).

While protection of the rights of the victim is provided in the criminal procedure legislation along with the victim also by means of the legal representative, and protection of the rights of the died victim - by means of the legal successor (Articles 101.1, 102.1, 106.1 of the CPC), nevertheless, participation of these persons in criminal procedure, is limited in certain limits, determined the implementation by the representative and legal representative during criminal procedure of the rights provided in the CPC, excepting the inalienable rights of the personality.

Unlike the legal representative and the representative, the victim's legal successor during participation in process, in addition to specified, cannot give evidences instead of the victim and has no right to be reconciled with the defendant, to refuse, as the special prosecutor, criminal prosecution and the claim brought to the victims (Articles 106.5-106.6.3 of the CPC).

It should be noted that by the Law of the Republic of Azerbaijan “On amendments into the Criminal Procedure Code of the Republic of Azerbaijan” dated December 11, 2012 (hereinafter referred to as the Law of December 11, 2012) amendments were made to the Article 119.4 of the CPC determining the provision “close relative of the person who dead as a result of incident, the person interested to become his/her legal successor, can require recognition of him as the victim” to which is made a reference in the inquiry. The first sentence of this article is given as “close relative of the died charged (suspected) person or the person who made the act provided by the criminal law, but died before its recognition as accused (suspect), and also the victim who died as a result of incident can demand recognition of him as the legal successor”. After these amendments the discrepancy between this regulation and Articles 12.2, 87.2 and 106.1 of the CPC was eliminated.

The Law of December 11, 2012, developing the principle of a legal succession of the criminal procedure legislation, established also institute of the legal successor of the charged (suspected) person. Thus, the legislator, even more developed the provision “with death of the person who came after making of the act provided by the criminal law (except for circumstances under which rehabilitation of the dead is necessary)” provided in Article 39.1.5 of the CPC as one of the circumstances excluding criminal prosecution and supplement the CPC with Article 106.1.

In this article it is specified that as the legal successor of accused (suspect) is recognized one of his/her close relatives who expressed desire to fulfill the rights and obligations of died accused (suspect) during criminal proceeding. If the person died before his/her recognition as accused (suspect), then his/her close relatives also have the right to recognition them as his/her legal successor, and a provision of this Code connected with the legal successor of accused (suspect) extend also to them.

As a rule, in case of the death of the person who was injured from a crime and as a result of a crime the material moral-damage is caused to several of his/her close relatives then some of them or all of them have the right to be recognized as the legal successor. Recognition of one of these close relatives as the injured person would limit the right of others to use this right.

According to Article 106.3 of the CPC if there is a dispute on the subject among several relatives who make the appropriate requests, the matter is decided by the court. At the same time, the legal successor of the victim has the right to disclaim the appropriate authority at any moment of criminal proceeding (Article 106.4 of the CPC).

In certain cases, the positions of the person recognized as the legal successor and persons, having rights of recognition as the legal successor, do not coincide. Transfer of rights, provided in Article 106.6 of the CPC, to legal successor, could become the cause of the certain difficulties connected with use of these rights during preliminary and judicial trials.

According to legal position of the Plenum of the Constitutional Court created in the decision of July 15, 2011, “On interpretation of the Articles 37.4, 39.9, 40.2 and 41.7 of the Criminal Procedure Code of the Republic of Azerbaijan” the institute of exemption from criminal liability in connection with conciliation with the victim provided in Article 73 of the Criminal Code of the Republic of Azerbaijan differs from institute of the procedural conciliation provided in Article 37.2 of the CPC.

In case of termination of criminal case at conciliation of the defendant with the victim on criminal cases as private prosecution, in the order specified in the Article 37.2 of the CPC, in case of the implementation of criminal prosecution in the order of public private prosecution specified in Article 37.3 of the CPC, the basis for exempt of the person from criminal liability according to Article 73 of the CC there can be conciliation (in the presence of other conditions specified in Article 73 of the CC) of accused (suspected) person with the victim not on all cases of such nature, but on the crimes which are not constituting a major public danger.

Thus, Article 59 of the CC that provide the circumstances commuting a penalty “delivering of medical and other care to the victim directly after commission of crime, voluntary compensation or the elimination of material and moral harm caused as a result of a crime, attempt to reach agreement with the victim and other actions directed to atone for the harm done to the victim” (Article 59.1.10 of the CC) are also provided as the circumstances mitigating a punishment.

The circumstances provided in Article 106.6 of the CPC do not influence on use of this right and implementation of these actions by the defendant. The defendant can make these actions at any stage of process and there are no restrictions provided by the legislation.

The Plenum of the Constitutional Court considers also necessary to note that in case of the death of the person recognized or able to be recognized as the victim on criminal prosecution, it is not allowed to his/her legal successor to participate in criminal trial. At the same time, has no value has been recognized the death person as the victim or not. In this case, a major factor is that the dyed person was the person able to be the recognized as victim in the order provided by Article 87 of the CPC.

The cause of death of the victim does not matter for participation of the legal successor of the victim in criminal procedure. In case of death of the person directly in connection with a criminal offense, or as a result of a disease after the criminal offense and so forth, and also in case of the announcement as the dead on the bases, stipulated in Article 41 of the Civil Code of the Republic of Azerbaijan, the participation of his/her legal successor in criminal procedure is possible. Therefore, in case of implementation of any kind of criminal prosecution (public, public-private, in the order of private prosecution) participation of the legal successor of died injured person in criminal procedure is possible.

The Plenum of the Constitutional Court also notes that from the point of view of requirements of Article 68.1 of the Constitution the provisions “the person who suffered from act with essential elements of crime” of Article 12.2, “in case of death of victim who was injured as a result of the committed crime, his/her right, provided by this article, exercised by his/her close relatives” of Article 87.2 and “as the legal successor of the victim who died as a result of incident is recognized the one of his/her close relatives who expressed desire to exercise the rights and the victim’s obligations during criminal proceeding” of Article 106.1 of the CPC have an identical value and content and there are no discrepancies between these provisions.

In view of noted, the Plenum of the Constitutional Court comes to conclusion that:

According to Article 68.1 of the Constitution the provisions “the person who suffered from act with essential elements of crime” of the Article 12.2 and “if there are sufficient grounds to think that the individual suffered direct moral, physical or material damage as a result of the act provided for in criminal law, he is recognized as a victim” of Article 87.1 of the CPC are imply the causing to the person of moral, physical or material damage as a result of the act provided by the criminal law and recognition or a possibility of recognition of the person in the corresponding order as a victim.

By the provisions “in case of death of victim who was injured as a result of the committed crime, his/her right, provided by this article, exercised by his/her close relatives” of Article 87.2 and “as the legal successor of the victim who died as a result of incident is recognized the one of his/her close relatives who expressed desire to exercise the rights and the victim’s obligations during criminal proceeding” of Article 106.1 of the CPC are provided the legal successor participating in proceeding on criminal prosecution instead of the victim who died as a result of the act provided by criminal law or for other reason after that or announced as the dead judicially and fulfilling the rights and obligations with the exception of rights that stipulated in Article 106.6 of the given Code.

Being guided by the 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. According to the Article 68.1 of the Constitution of the Republic of Azerbaijan the provisions “a person who suffered as a result of essential elements of crime” of the Article 12.2 and “if there are sufficient grounds to think that an individual suffered direct moral, physical or material damage as a result of the act provided for in criminal law, he/she shall be recognized as a victim” of the Article 87.1 of the Criminal Procedure Code of the Republic of Azerbaijan imply the causing to a person moral, physical or material damage as a result of the act provided by the criminal law and recognition or a possibility of recognition of the person in the corresponding order as a victim.

2. By the provisions “in case of death of victim who was injured as a result of the committed crime, his/her right, provided by this article, shall be exercised by his/her close relatives” of the Article 87.2 and “as a legal successor of a victim who died as a result of incident shall be recognized one of his/her close relatives who expressed desire to exercise rights and victim’s obligations during criminal proceeding” of the Article 106.1 of the Criminal Procedure Code of the Republic of Azerbaijan provide for legal successor participating in proceeding on criminal prosecution instead of victim who died as a result of act provided by criminal law or for other reason after that or announced as dead judicially and fulfilling the rights and obligations with the exception of rights that stipulated in the Article 106.6 of the given Code.

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 may not be cancelled, changed or officially interpreted by any institution or official.