**ON BEHALF OF THE REPUBLIC OF AZERBAIJAN**

**DECISION**

**OF THE PLENUM OF CONSTITUTIONAL COURT**

**OF THE REPUBLIC OF AZERBAIJAN**

*On interpretation of Articles 21.3 and 78 of the Criminal Code*

*of the Republic of Azerbaijan in connection with the decision of the Criminal Board of the Supreme Court of the Republic of Azerbaijan of November 7, 2013*

**9 December 2014                                                                           Baku city**

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

attended by the Court Clerk Elmaddin Huseynov,

representatives of interested parties – Ilgar Jafarov, Head of Department for the Maintenance of State Prosecution of the Prosecutor’s Office of the Republic of Azerbaijan; Hafiz Nasibov, Judge of the Supreme Court of the Republic of Azerbaijan;

experts – prof. Firuddin Samandarov, Head of the Department of Criminal Law and Criminology of Baku State University, Doctor of Legal Sciences; Firuza Abbasova, Professor of the Criminal Procedure Board of Baku State University;

specialists – Eldar Askerov, Senior Advisor of the Department for Administrative and Military Legislation of Milli Majlis of the Republic of Azerbaijan; Hasan Ahmedov, Judge of the Court of Appeal of Baku city;

in accordance with the Article 130.3.4 of the Constitution of the Republic of Azerbaijan examined in open judicial session via special constitutional proceedings the case on request of Prosecutor’s Office of the Republic of Azerbaijan on verification of conformity of decision of the Criminal Board of the Supreme Court of the Republic of Azerbaijan as of November 7, 2013 on criminal case of Emin Kerimov with some provisions of the Constitution of the Republic of Azerbaijan and Criminal Code of the Republic of Azerbaijan.

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

**DETERMINED AS FOLLOWS:**

The Prosecutor’s Office of the Republic of Azerbaijan (hereinafter referred to as the Prosecutor’s Office) having applied to the Constitutional Court of the Republic of Azerbaijan (hereinafter referred to as the Constitutional Court) asks for verification of conformity of the decision of Criminal Board of the Supreme Court of the Republic of Azerbaijan (hereinafter referred to as the CB of the Supreme Court) dated November 7, 2013 on criminal case concerning accusation of Emin Kerimov under the Articles 206.2 and 234.4.3 of the Criminal Code of the Republic of Azerbaijan (hereinafter referred to as the Criminal Code) with the Constitution of the Republic of Azerbaijan (hereinafter referred to as the Constitution) and with the provisions of the relevant articles of material and procedural legislations.

In the request it is indicated that by the decision of the Court on Grave Crimes of Baku city dated February 18, 2013 E. Kerimov was exempted from punishment based on Article 78 of the Criminal Code as fell under action of Article 21.3 of the Criminal Code because after crime execution ached with a mental disease and according to Articles 93.1.2 and 95.0.3 of the Criminal Code compulsory medical measures were applied to him, the criminal proceeding was suspended, adopted decision on confiscation and destruction of material evidences.

By the decision of the Court of Appeal of Baku city of July 10, 2013 the appeal protest was partially satisfied, provisions concerning expenses on examination are excluded from the decision of the court of first instance, in other part the decision was affirmed.

The CB of the Supreme Court by its decision of November 7, 2013 uphold the decision of the court of appeal instance and did not satisfy the cassation protest.

In a request the prosecutor's office asks to verify whether there the correspond decisions of degrees of jurisdiction on release of the defendant from punishment, in case of not imposition of punishments and destructions of material evidences in case of suspension of criminal proceeding are in conformity with the parts I and V of Article 63, parts II, VII and IX of Article 127, part III of Article 129, part II of Article 148 of the Constitution, and also with the provisions of Articles 41.1 and 78 of the Criminal Code, Articles 7.0.4, 10, 28, 53, 54, 91.5.14, 91.5.25, 132, 323.1.4, 333.1, 486.1, 487.1 and 511 of the Criminal Procedure Code of the Republic of Azerbaijan (hereinafter referred to as the Criminal Procedure Code).

Due to the request the Plenum of the Constitutional Court once again considers necessary to note that according to point 4 of part III and part V of Article 130 of the Constitution the verification of conformity of the judicial acts adopted by the Supreme Court with the Constitution and laws is caused only by availability of the corresponding constitutional legal dispute between subjects of the constitutional justice.

The issue which is brought up in a request for verification of conformity of the judicial act with the Constitution and laws is actually not connected with constitutional legal dispute between subjects of the constitutional justice, however matters for court practice, therefore the Plenum of the Constitutional Court with respect to the foregoing request considers necessary to give interpretation of some legislative norms.

Concerning an essence of request the Plenum of the Constitutional Court notes that tasks of the Criminal Code are: providing of the peace and safety of mankind, protection of rights and freedom of the person and the citizen, of property, of economic activities, of social order and public safety, of environment, of constitutional building of the Republic of Azerbaijan from criminal encroachments, and also the prevention of crimes.

For implementation of the tasks, the Criminal Code of the Republic of Azerbaijan provides the grounds and principles of the criminal liability, defines what shall be dangerous to the person, societies and the states, by actions admitted as crimes and establishes kinds, limits and the sizes of punishments and another measures of criminal - legal nature for committing these crimes (Article 2 of the Criminal Code).

One of such measures found reflection in the Article 78 of the Criminal Code.

However before analyzing of types of impunity prescribed in the Article 78 of the Criminal Code it should be noted that we talk about the person who committed a crime in a condition of responsibility or culpability, that is about availability of the corpus delicti which is reason for criminal liability. For this reason, it is necessary to distinguish two different conditions:

- when a person has committed a crime in a condition of diminished responsibility and because a subject of the corpus delicti in his act is not revealed (Articles 21.1 and 21.2 of the Criminal Code);

- when a person has committed a crime in a condition of responsibility or of culpability, but in a consequence has got sick with mental or other disease (Articles 21.3 and 78 of the Criminal Code).

In connection with the second circumstance, the Plenum of the Constitutional Court notes that condemnation of the person brought to trial for the crime committed in a condition of responsibility or culpability, and realization in his relation of measures of punishment in the cases provided by the law is not refutable.

At the same time, in itself the fact of crime execution and involvement of the defendant to criminal liability does not lead surely to application and serving of sentence. In some cases the application even of the lightest punishment concerning the defendant accused actually or because of availability of criminal-legal circumstances is impossible or inexpedient.

These circumstances on criminal legal sense being equated with serving of sentence, act as its social and legal equivalent and for this reason eliminate application of punishment or its serving.

To these circumstances also belongs the application of compulsory measures of medical character to the person who has got sick with a mental disease after commission of crime in a condition of responsibility or culpability.

Release from punishment of the person who committed a crime, but before pronounce of a sentence by court concerning the patient with the sincere disease depriving him of an opportunity to realize the actions or to govern them is provided in the former Criminal Code (Article 11 of the former Criminal Code). This norm has been placed in the Chapter “About a crime”. There is no norm concerning release of a person in connection with a disease from the punishment imposed by the court verdict in the Chapter “Release from punishment”. Criminal procedure and corrective-labor legislations having undertaken elimination of this gap, which has arisen in the Criminal Code, have established the bases and rules of release from punishment imposed by a sentence.

However, release from punishment cannot perceived as procedural institute. First of all, the concept “release from punishment” point out not criminal trial but legal consequences of a crime. The essence of release from punishment consists in inexpediency or impossibility of appointment or serving sentence.

As it is specified in the decision of the Plenum of the Constitutional Court “On interpretation of the Articles 18 and 83.1 of the Criminal Code of the Republic of Azerbaijan” of September 6, 2010 the Criminal Procedure Code establishes procedural means for application of norms of criminal law. Norms of the Criminal Procedure Code have to be directed only on realization of norms of the Criminal Code.

Due to specified and with the purpose of elimination of the gap which arose between laws the legislator, having united in one criminal - legal institution – institute of a disease of the person after crime execution. The regulations containing in the former criminal, criminal procedure and corrective-labor legislations were given to this institute by independent legal nature. According to the legislative techniques and logic in the acting Criminal Code this institute is reflected in two independent norms: in Article 21.3 of Chapter 4 named “Persons who are subject of criminal liability” and in Article 78 of Chapter 12 named “Release from punishment”.

The Plenum of the Constitutional Court considers necessary to note that at application of Articles 21.3 and 78 of the Criminal Code the great value presents taking into consideration of the following circumstances.

In the decision of the Plenum of Constitutional Court dated April 15, 2011 “On interpretation of Articles 28.2, 28.3, 29.3 of the Law of the Republic of Azerbaijan and Articles 98.1, 99 of the Criminal Code of the Republic of Azerbaijan “On Psychiatric Support” some explanations concerning the issues specified in this request are made. Thus, in this decision the essence of Articles 21, 93-99 of the Criminal Code are reveals and it is noted that there are three forms of legal consequence of criminal liability are determined in connection with diminished responsibility. The first – commission by the person of a crime in a condition of diminished responsibility. The second – commission by the person of a crime in a condition of responsibility or of culpability, however who has ached a mental disease before adopting by court of a sentence. The third – a disease of the person of a mental disease after imposition of punishment for the crime committed by him.

Developing provisions of this decision the Plenum of the Constitutional Court considers important to analyze in interrelations with the issue of the relevant articles of the Criminal Code and Criminal Procedure Code.

According to the Article 21.3 of the Criminal Code to the person, who has committed a crime in a condition of responsibility or culpability, but before adopting by court of a decision, he has became emotionally diseased and depriving opportunity to realize actual nature and public danger of his acts (actions or inaction) or govern over them, court can appoint forced measures of medical nature as it provided by the present Code.

Apparently, in the Article 21.3 of the Criminal Code the question is that the person has got sick with a mental disease after commission of crime and before adopting of a sentence in his relation.

It can happen also at a stage of initiation of legal proceedings, at stage of pretrial investigation (implementation of pre-judicial proceeding is obligatory concerning the person which after the commitment of crime ached the mental disease depriving opportunity to realize actual nature and public danger of his acts (actions or inaction) or govern over them), at stage of appointment of judicial examination or at stage of judicial examination.

The Plenum of Constitutional Court considers that if at the person who has committed a crime a mental disorder has come before adopting sentence concerning him, then he cannot be punished, it would be unclear. The mental disease depriving the person of an opportunity to realize the act or to govern over the actions at the same time does not allow to realize the compulsory nature of influence on him by the state consisting of deprivation or restriction of the rights and freedoms. The court can apply to such persons only compulsory measures of medical character provided in the Article 95 of the Criminal Code. The issue of bringing of such person to criminal liability and imposition of punishments, shall be at least postponed until his recovery.

Plenum of the Constitutional Court having come to such conclusion takes into account the following requirements of the legislation.

Rules of application of compulsory measures of medical character concerning the person who has committed a crime, but before adoption by court of a sentence ached with a mental disease are provided in Articles 479-487 of Chapter LVI of the Criminal Procedure Code.

In this context in the mentioned decision of the Plenum of the Constitutional Court of April 15, 2011 it was noted that “bases of the compulsory treatment are determined by Articles 21, 93-99 of the Criminal Code, but the remedial rule are determined by Articles 468-487 of the Criminal Procedure Code of the Republic of Azerbaijan. Thus, in accordance with Articles 468 and 479 of the Criminal Procedure Code, proceeding on application of compulsory medical measures concerning the persons who have committed a crime in condition of irresponsibility or of absence of guilt, and the persons who have ached with a mental disease after commission of crime is carried out on the basis of the general rules of this Code taking into account the features provided by Articles 468-478 and 479-487 of this Code”.

According to Article 480.4.1 of the Criminal Procedure Code if during preliminary investigation on criminal case it is established that the person ached with a mental disease after crime execution, criminal proceeding suspends, and the case is direct to court for application of compulsory measures of medical character on proceeding provided in Chapter LVI of the Criminal Procedure Code.

On materials concerning susceptibility of the person of a mental disease subject to Article 21.3 of the Criminal Code, the court according to Article 485 of the Criminal Procedure Code has to verify whether act is made, whether there is a corpus delicti in act, whether this act is made by the defendant, is the person ached a mental disease, the nature of a disease and time when the disease has come, existence of need of application concerning the person of a compulsory measure of medical character and in this case what kind of measure there is a need of application. If with the studied proofs it is confirmed that the person who committed the criminal action has ached with a mental disease after commission of crime and there is a need of application of compulsory measures of medical character, the court adopts the decision on application in his relation of such measure.

In case then the person ached with a mental disease at a stage of legal proceeding, the court shall resolve also an issue of suspension of proceedings (Article 485.5 of the Criminal Procedure Code).

If the court considers that a person subject to a compulsory measure of medical character has recovered, it shall decide whether to annul the compulsory medical measure on the basis of a medical opinion and whether to refer the criminal case to the investigating authority for investigation or to the court for examination (Article 487 of the Criminal Procedure Code).

Apparently, neither in the Criminal Code nor in the Criminal Procedure Code the release from punishment of the person who after commission of crime and before passing of sentence has ached with a mental disease is provided.

The interconnected analysis of the above-stated norms of these Codes allows to come to such conclusion that the court with observance of requirements of Article 485 of the Criminal Procedure Code resolves an issue of application of compulsory measures of medical character concerning provided in Article 21.3 of the Criminal Code person who has committed a crime in a condition of responsibility or culpability but ached with a mental disease before adoption of a sentence by court.

The issue of suspension of proceeding on these cases is resolved by court according to the order specified in Article 485.5 of the Criminal Procedure Code.

Other circumstances of institute of exposure of the person of a mental disease after commission of crime are provided in Article 78 of the Criminal Code.

According to requirements of Article 78.1 of this Code the person, who after commitment of a crime was deceased by mental illness, depriving his opportunity to realize actual nature and public danger of the act (action or inaction) or to supervise over this act, shall be released from punishment or from its deserved part. Concerning such person by court can be applied forced measures of medical character, which are provided by the present Code.

According to Article 78.2 of given Code the person, who is deceased after commitment of a crime to other serious illness interfering serving of punishment, by the decision of court can be released from serving of punishment.

The Article 78.3 of the Criminal Code provides that the military personnel, serving maintenance in disciplinary military unit, shall be released from the further serving punishment in case of disease, which becomes a reason of their unsuitability for military service. In such cases a court can replace deserved part of punishment to mitigate a punishment.

Apparently, the Article 78 of the Criminal Code provides three independent bases for release of the person from punishment:

- the mental disease depriving the person of an opportunity to realize the acts or to supervise over the actions;

- other serious illness interfering serving sentence;

- the disease which is the reason of recognition of the military personnel as ineligible for military service.

The first and third bases specified in the noted norms have imperative character and act as an obligation of court. The second basis has facultative character and in this case releasing from punishment depends on discretion of court.

The Plenum of the Constitutional Court considers that unlike Article 21.3 of the Criminal Code the Article 78.1 of this Code provides release of persons who ached with a mental disease after commission of crime from the sentence imposed by the adjudication or from further serving of sentence.

It is also necessary to specify that according to sense of Article 78.1 of the Criminal Code in case if the mental disease has come after announcement of a sentence and before its execution, the person is exempted from the imposed sentence, and at serving of sentence from further serving of sentence.

Such conclusion follows from the following requirements of the legislation:

According to the Article 41.1 of the Criminal Code, punishment is the measure of criminal - legal nature appointed on a decision of court. Punishment shall apply to the person recognized as guilty in commitment of a crime and consists of the deprivations established by the present Code or restrictions of rights and freedom of this person.

Article 41.1 of the Criminal Code and the Article 349.1 of the Criminal Procedure Code establish the following essential elements of offense:

- punishment is applied to the person who found guilty of commission of crime;

- punishment is appointed by the court verdict on behalf of the state.

Types of release from punishment are provided in the twelfth Chapter of the Criminal Code and it is theoretically possible to note the following common signs for these types:

- the institution of release from punishment releases the person who found guilty of commission of crime from the penalty imposed by the court verdict;

- release from punishment is connected with a certain stage of criminal trial – adoption of a conviction. Release from punishment covers the period from the moment of the introduction of a sentence in a legal force till completion serving of sentence;

- with the exception of release from punishment by acts of pardon and amnesty, release from punishment is a special powers of court;

- as a result of release from punishment the conviction against the person is not exposed to change.

It is not accident that Article 78 of the Criminal Code meeting to above-mentioned common signs, as well as other types of release from the sentence imposed by the court verdict, is placed in the Code in the Chapter “Release from punishment”.

In case when the proceeding concerning the mental disease of person which came after commission of crime and before adoption of a sentence by court is regulated by the Articles 479-487 of Chapter LVI of the Criminal Procedure Code, the rule of release from punishment due to illness provided in the Article 78 of the Criminal Code is stipulated in Article 511 of Chapter LVIII of the Criminal Procedure Code which is named “Proceeding concerning the enforcement of judgments and other final court decisions”.

According to the Article 511.1 of the Criminal Procedure Code which is named “Release from serving of sentence due to illness” if a sentenced person ached a serious illness which prevents him/her from serving sentence, court of first instance in district where sentence is being served may, on the basis of opinion of a panel of doctors and in accordance with the provisions of criminal law, release a person from serving a sentence.

If a person who is mentally ill is released from serving of sentence, the court shall have the right to apply compulsory medical measures to him or place him under the supervision of the health authorities or his relatives (the Article 511.3 of the Criminal Procedure Code).

Apparently, in Article 511 of the Criminal Procedure Code in case of release of the convict from punishment, that is of the person concerning whom took legal effect the court verdict, which imposed criminal sanction, provided the possibility of application concerning him of compulsory medical measures in case if this person ached with a mental disease.

In view of specified, the Plenum of the Constitutional Court considers that Article 78 of the Criminal Code provides release from punishment or further serving of sentence or a possibility of release in case the diseases specified in this article have come respectively after announcement of a conviction and before of its execution or during serving of sentence.

Concerning of issue of destruction of material evidences based on the decision the Plenum of the Constitutional Court notes that concepts and types of evidences are given in Chapter XIV of the Criminal Procedure Code, the order of their storage and protection, ensuring their safety during proceeding on criminal prosecution, the decisions made concerning evidences and other issues are abundantly clear regulated.

According to the Article 132 of the Criminal Procedure Code when the court gives a judgment or the prosecuting authority gives a decision to discontinue the prosecution, the following rules shall be observed in connection with the solution of matters relating to the material evidence the instruments used to commit the offence and belonging to the convicted person, as well as items which are prohibited from circulation, shall be confiscated and given to the appropriate organizations; if they are not of any value they shall be destroyed.

Destruction of material evidences on the basis of the judgment concerning application of compulsory measures of medical character along with what it is does not meet the requirements of the legislation, depriving in the future of the defendant of a possibility of a research of material evidences, conducting of repeated examinations, to their contest by other methods established by the criminal procedure legislation, can lead to violation of the right of this person for fair trial.

The Plenum of the Constitutional Court in connection with the request comes to the following conclusions:

- As for the person, provided in Article 21.3 of the Criminal Code, who has committed a crime in a condition of responsibility or culpability, but before adoption of a sentence ached with a mental disease the court shall resolve an issue of application of compulsory measures of medical character with observance of requirements of Article 485 of the Criminal Procedure Code.

The issue of suspension by court of proceedings on such cases shall be resolved according to the order specified in Article 485.5 of the Criminal Procedure Code.

- Article 78 of the Criminal Code provides release from punishment or release from further serving of sentence or a possibility of release in case if the diseases specified in this article have come respectively after announcement of a conviction and before of its execution or during serving of sentence.

Being guided by the Article 130.4 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. As for the person, provided in the Article 21.3 of the Criminal Code of the Republic of Azerbaijan, who has committed a crime in a condition of responsibility or of culpability, but before adoption of a sentence ached with a mental disease the court shall resolve an issue of application of compulsory measures of medical character with observance of requirements of the Article 485 of the Criminal Procedure Code of the Republic of Azerbaijan.

The issue of suspension by court of proceedings on such cases shall be resolved according to the order specified in the Article 485.5 of the Criminal Procedure Code of the Republic of Azerbaijan.

2. The Article 78 of the Criminal Code of the Republic of Azerbaijan provides release from punishment or release from further serving of sentence or a possibility of release in case if the diseases specified in this article have come respectively after announcement of a conviction and before of its execution or during serving of sentence.

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.