**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 the Articles 137 and 445.2 of the Criminal Procedure Code of the Republic of Azerbaijan*

# 12 February, 2015 Baku city

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

attended by the Court Clerk Faraid Aliyev,

the legal representatives of the subjects interested in special constitutional proceedings: Vahid Sadigov, Chairman of Gabala Region Court, Fuad Mamedov, Head of Sector for Administrative Legislation of Milli Majlis of the Republic of Azerbaijan;

experts: Midhad Gafarov, acting Dean of Criminal Procedure Chair of Law Faculty and Ph.D. Aydin Yusubov, independent expert on legal science;

specialists: Shahin Yusifov, Chairman of Criminal Board of the Supreme Court of the Republic of Azerbaijan, Munis Abuzerli, senior prosecutor-methodologist of Department on Supervision for execution of laws by internal affairs bodies in investigative, inquisitive and operative-search activities of the Prosecutor Office of the Republic of Azerbaijan, Mahir Gaimov, Head of Department of Main Investigative Directorate of the Ministry of National Security of the Republic of Azerbaijan, Jeyhun Aliyev, police investigator of Central Directorate of Criminal Investigation Department of the Ministry of Internal Affairs of the Republic of Azerbaijan;

in accordance with the 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 Gabala Region Court concerning interpretation of some provisions of Articles 137 and 445.2 of the Criminal Procedure Code of the Republic of Azerbaijan.

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

**DETERMINED AS FOLLOWS:**

Gabala region court having appealed to the Constitutional Court of the Republic of Azerbaijan (hereinafter referred to as the Constitutional Court) asked for interpretation of some provisions of the Articles 137 and 445.2 of the Criminal Procedure Code of the Republic of Azerbaijan (hereinafter referred to as the CPC) for the purpose of ascertainment of powers of the court exercising judicial control concerning the materials extracted as a result of the operative-search activity.

In the inquiry it was specified that the resolution of July 8, 2014 “On carrying out of operative-search activity” and two protocols “On holding an inspection” in connection with the operative-search activity which are carried out on the same day on the basis of this resolution came to procedure of Gabala region court according to requirements of the Article 445.2 of the CPC from Gabala regional office of police.

According to the addressed, recognition and use in the form of evidence of materials seized during operative-search activities is allowed only if these materials are presented and examined according to requirements of the criminal procedure legislation (Article 137 of the CPC). According to the Article 445.2 of the CPC provides for not only submission of the resolution on carrying out of operative-search activity to court just for information, but also for power of court to examine legality of the relevant operative-search activity as a result of which the materials were obtained. Rules of granting and examination of operative-search materials in the criminal procedure legislation are not established.

Proceeding from the foregoing the Gabala region court came to a conclusion concerning necessity of interpretation of some provisions of Articles 137 and 445.2 of the CPC from the point of view of limits of judicial control over operative-search activity.

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

Judicial and legal reforms are one of the main directions of the reforms that are carried out in the Republic of Azerbaijan in the field of creation of the constitutional state. The role of courts is especially noted in the guarantee of the rights and freedoms of person and citizen which are supreme value of the state according to the Constitution of the Republic of Azerbaijan (hereinafter referred to as the Constitution). In the constitutional state restriction of human rights is possible only by law. Control of legality, proportionality and justice of restriction of human rights is carried out by courts.

Judicial control in the field of the criminal procedure legislation generally has functional duties at stage of pre-judicial procedure. Judicial control is one of independent forms of judicial activity within criminal trial that serves to prevention of illegal intervention in rights and freedoms of person and citizen, restoration of violated rights as a result of activity of the investigator or the prosecutor exercising control of preliminary investigation.

Legal value of judicial control is established by the Constitution and interstate contracts to which the Republic of Azerbaijan is a party.

According to Article 60 of the Constitution, legal protection of rights and liberties of every citizen is ensured. Everyone is entitled to appeal to court in connection with decisions and activity (or inactivity) of state bodies and state officials.

The legality of restriction of rights and freedoms of person and citizen by courts follows from the part VII of the Constitution. Thus, according to this norm of the Constitution the disputes connected with violation of rights and freedoms of person and citizen shall be resolved by courts. Everyone has to be sure that if any lawful prosecution by government bodies is carried out, over this activity there is a control from independent judicial authority.

At the same time, in separate constitutional norms the necessity of judicial control for restriction of rights and freedoms of person is especially noted. For example, according to the Article 33.2 of the Constitution, except cases specified by law or decision of law court, nobody has the right to enter private home against the will of its inhabitants.

The obligation of judicial control over a guarantee of right for freedom and inviolability is directly specified in the Article 5 of the Convention for Protection of Human Rights and Fundamental Freedoms.

Judicial control during pre-judicial production is a rather new institute in criminal procedure legislation of the Republic of Azerbaijan. In difference from public prosecutor's supervision, judicial control is directed on prevention of illegal intervention of subjects of preliminary investigation during pre-judicial procedure into rights and freedoms of person. While public prosecutor's supervision is generally directed to verification of respect of rule of law during activity of inquiry and operative-search bodies, judicial control shall verify validity, proportionality, expediency and urgency of restriction of person’s rights and freedoms by subjects of operative-search activity.

According to the Law of the Republic of Azerbaijan “On operative-search activity” as of October 28, 1999 (hereinafter referred to as the Law “On operative-search activity”) though judicial control of operative-search activity also differs from public prosecutor's supervision between them there are also similar features.

According to the Article 20.1 of the “Law on operative-search activity” supervision of execution of laws by subjects of operative-search activity is exercised by the Prosecutor-General of the Republic of Azerbaijan and prosecutors authorized by him. According to the parts IV and V of this article the information on organization, tactics, ways and means of operative-search activity are not subject to public prosecutor's supervision, and the Prosecutor-General of the Republic of Azerbaijan and prosecutors authorized by him exercising supervision of operative-search activity have to ensure confidentiality of data reflected in documents submitted to them.

Thus, in spite of the fact that distinction between judicial control and public prosecutor's supervision from point of view of a supervision subject is observed, considering specific features of operative-search activity, requirements of the parts IV and V of the Article 20 of the Law “On Operative Search Activity” can be attributed to activity of judicial supervision.

Being guided by the principle of division of procedural functions, the court does not have a complete duty of control of execution of legality in the field of activity of subjects of operative search or preliminary investigation. Thus, registration of information on a crime, resolution on beginning of preliminary investigation or procedural measures untied with restriction of other rights and freedoms of the person cannot be a subject of judicial control.

In the decision of Plenum of the Constitutional Court as of August 5, 2009 “On interpretation of the Article 449.2.3 of the Criminal Procedure Code of the Republic of Azerbaijan” it was noted that at implementation of judicial control the court generally carries out two tasks: ensuring of legality of various actions and decisions adopted by authorized bodies and officials; protection of rights and freedoms of participants of criminal procedure (excluding unreasonable and illegal restrictions, termination of violation of the rights and their restoration).

Thus, in contrast to public prosecutor's supervision, the subject of judicial control makes legality and validity of the decisions made by inquiry, investigation and prosecutor bodies in connection with a guarantee of the rights and freedoms of the person and citizen.

As it was noted, the judicial control is rather new institute in the criminal procedure legislation of the Republic of Azerbaijan. The Article 442.2 of the Criminal Procedure Code, acting since September 1, 2000, defining object of judicial control specifies that during a procedure of judicial control court considers the following: applications and submissions concerning the compulsory conduct of investigative procedures, the application of coercive procedural measures or the conduct of search operations which restrict individual freedom, the inviolability of premises, personal inviolability and the right to privacy (including that of family life, correspondence, telephone conversations, post, telegraph and other information) or which concern information containing state, professional and commercial secrets; complaints against the procedural acts or decisions of the prosecuting authorities.

The issues relating to area of judicial control and rules of their implementation are established by Articles 443-454 of the Criminal Procedure Code. These articles provide existence in criminal trial of the compulsorily performance of investigative action, application of a procedural coercive measure, and compulsorily existence of judicial control in case of carrying out of operative search action.

At the same time the bases of operative search activity are regulated by the Law “On Operative Search Activity”. This Law provides for any operative search action directed on restriction of constitutional rights and freedoms of people to be performed only according to court’s decision or for immediate informing of court on this measure right after it had been carried out.

The European Court of Human Rights (hereinafter referred to as the European Court) in a number of decisions noted the necessity of judicial control. Thus, the European Court in its decisions as of 26 October 2006 on the case of Khudobin v. Russia specified that clear and foreseeable procedure for authorization of investigative measures should be put into place in order to ensure the authorities’ good faith and compliance with the proper law-enforcement objectives, as well as their proper supervision. The identical legal position was also expressed in judgment as of 15 June 1992 (Lüdi v. Switzerland), and in judgment as of 6 September 1978 (Klass & Others v. Germany).

The European Court in its decisions specifies that judicial control over operative search activity controls prevention of abuse and provides for proportional use of force. The European Court in the decision as of 2 September 2010 (Uzun v. Germany) noted that because GPS (Global Positioning System) built in the car of suspects for the purpose of supervision was used under judicial control for crime’s prevention was carried out by adequate and effective guarantees. This is a favorable measure for prevention of abuse of power during operative search actions.

Existence of judicial control, first of all, expresses existence of control of impartial body over operative search activity. The European Court in its decision as of 28 June 2007 (Association for European Integration and Human Rights & Ekimdzhiev v. Bulgaria) specified that the assignment to law-enforcement bodies which are directly involved into carrying out of special means of general supervision for application of intelligent surveillance, in the final analysis indicates lack of supervision over operative search body by impartial body, and it specifies the violation of requirements of the Article 8 of the Convention.

According to the legislation of the Republic of Azerbaijan the results of operative search activity used in criminal trial can be received by two ways: 1) as a result of actions which are carried out with consent of court; 2) as a result of actions which are carried out without prior consent of court, but under a condition of subsequent notification of court concerning the specified measures.

In first case, in practice the problem of volume (limits) of judicial control over operative search activity via preliminarily received judgment does not create any disputes. According to the Article 446.4 of the CPC documents corroborating the need for compulsory investigative procedure, coercive procedural measure or the search operation shall be attached to the application. If these documents are not sufficient, the prosecutor in charge of the procedural aspects of the investigation or the judge exercising judicial supervision have the right to require them.

The legislator for substantiation of petition of the head of body carrying out operative search activity makes a number of demands. For example, in a petition have to be proved necessity of implementation of operative search action, and specified which objectives have to be achieved as a result of implementation of operative search actions and why it is impossible to reach these results in other ways and means, for what term, what place and what way implementation of operative search action is provided and other important information.

The provisions specified in the petition of the body that is carrying out operative search activity, being proved, are presented to the prosecutor. The prosecutor, in turn, having seen materials concerning implementation of operative search actions, adopts the relevant resolution, that is issues the reasonable decree on refusal of protection of the petition, or having put the materials confirming need of carrying out actions to the petition directs to court representation for pronouncement of the relevant decision.

Thus, the powers of the judge exercising judicial control of the events held with the consent of court, established by the legislation are rather wide. First, the materials confirming necessity of compulsory carrying out investigative action, application of a measure of procedural coercion or implementation of operative search action have to be attached to the petition that is put forward for receiving consent of court. At insufficiency of these materials, the judge has the right to demand their supplementation.

Apparently, when carrying out the operative search actions, consideration in a judicial proceeding of materials on restriction of constitutional rights and freedoms of everyone concerning security of person, secret of correspondence, phone negotiations, other data transferred by mail, telegraph and networks of a mail service, and also immunity of residence is provided by the Criminal Procedure Code. In court are created the conditions for ensuring privacy of the data specified in the operative search, documents that received as judicial control.

According to the Article 448 of the CPC subsequent to the results of court session, concerning issues of implementation of operative search action, the judge authorize the carrying out the relevant operative search activity or refuses its carrying out and makes based decision concerning it. Given decision is provided to the initiator of carrying out of operative search action, and the presented materials come back. At the same time, the decision made by court as judicial control has to be completely based by the judge.

During consideration of inquiry of the court of Gabala area by Plenum of the Constitutional Court it was established that after carrying out of urgent measures the order of notification of court on measures carried out under judicial control is put into practice differently. The reason of it, first of all, is completely formalistic approach to requirements of a norm by law applying subjects. Thus, according to requirements of the Article 445.2 of the CPC in cases provided for in the Article 10, paragraph 4 of the Law of the Republic of Azerbaijan “On Operative Search Activity”, the search operations provided for in the Article 445.1 of this Code may be carried out without a court decision, on the basis of a reasoned decision of authorized official of a body carrying out search operation. In this case an authorized official of a body conducting search operation should within 48 hours of carrying out of the search submit the reasoned decision on conduct of the search operation to court exercising judicial supervision.

The specified norm of the CPC demands from the body which is carrying out the operative search action as judicial control, after carrying out of the appropriate measure, within 48 hours formally to submit only the motivated resolution on carrying out an operative search measure, to the court exercising judicial control.

In case of a formalistic approach to issue the court has to adopt the relevant decision, having only checked necessity of the carried-out operative search action and carrying out it according to the law. The copy of this decision goes to the body that is carrying out operative search activity and to the prosecutor implementing management of preliminary investigation. In the future, at trial on the merits, results of this operative measure are considered in the general order. That is, as well as other proofs, results of operative search actions also checked and estimated.

The formality of judicial control can assimilate function of judicial control of activity of “passive legitimization”. The comprehensive explanation of this term is made in the decision of Plenum of the Constitutional Court as of May 19, 2014 “On interpretation of the Article 2.1 of the Law of the Republic of Azerbaijan “On State Register of Real Estate” and the Articles 2.2 and 2.2.1 of the Administrative Procedural Code of the Republic of Azerbaijan”. However, the court put a special procedural duty concerning control during pre-judicial stage - a duty of prevention of illegal intervention into rights and freedoms of persons and citizens.

It is necessary to consider that the object of judicial control consists of two basic elements: 1) protection of constitutional rights and freedoms, 2) legality and validity of resolutions adopted by inquiry bodies, investigation and prosecutor's office connected with protection of the given rights and freedoms. For ensuring of control of these elements, courts have to have enough powers for implementation of functions of judicial control.

In the Article 143.2 of the CPC it is noted that during the process of collecting of evidences, courts have the right, at the request of parties to the criminal proceedings or on their own initiative, to require presentation of documents and other items of significance to the prosecution by individuals, legal entities, officials and authorities which carry out search operations, and to require checking and inspections by authorized authorities and officials.

These powers of court belong to process of collecting of proofs. Carrying out of operative search actions under judicial control gives the grounds of use of results of this measure as the proof in a criminal procedure order. Thus, in the future for the purpose of ensuring of effective and objective use of proofs, courts on pre-judicial stage have to be authorized in comprehensive carrying out of function of judicial control.

Plenum of the Constitutional Court considers that the judge at a pre-judicial stage at implementation of judicial control possesses the following powers:

- to authorize the carrying out of operative search action and to provide or reject the petition which is put forward concerning carrying out action;

- to extend the term of validity of the resolution on lawful restriction of constitutional rights and freedoms of the person;

- to reclaim the additional materials concerning the bases of carrying out of operative search actions;

- to listen to person whose right and freedom are limited and in case of need (depending on hidden or open carrying out of operative search actions) to inform the applicant on the reasons of the operative search events held against him;

- to take other measures to guarantee constitutional rights and freedoms of a person.

It is necessary to take into account that limits of judicial control over operative search actions are invariable notwithstanding of, whether results of these actions were obtained, as provided by legislation, as a result of events held with consent of court, without prior consent of court (but with the subsequent notification of court concerning that). In its turn, courts make relevant decisions after inspection carried out in the framework of judicial control. From this point of view, after carrying out of operative search actions courts as judicial control having verified the legality, validity, proportionality, expediency and urgency of carrying out of this action from the point of view of a guarantee of rights and freedoms of a person have to make decision according to the Article 448 of the CPC.

Considering the foregoing, Plenum of the Constitutional Court has come to the following conclusions:

- at receipt in court of the resolution on carrying out of operative search action according to Article 445.2 of the CPC as the judicial control its legality and validity from the point of view of ensuring the rights and freedoms of the person has to be verified also in case of necessity with ensuring of privacy the materials extracted as a result of operative search activity can be demanded;

- if the materials extracted on the basis of the resolution on carrying out of operative search action are extracted according to the Law “On Operative Search Activity” and presented according to requirements of the Criminal Procedure Code and comprehensively verified as judicial control, according to requirements of Article 137 of this Code they can be recognized, as proofs on criminal prosecution.

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. At receipt in court of resolution on carrying out of operative search action according to the Article 445.2 of the CPC, its legality and validity from the point of view of ensuring the rights and freedoms of person has to be verified by court, which also can demand materials extracted as a result of operative search activity (keeping their confidential).

2. If materials obtained on the basis of resolution on carrying out of operative search action are received according to the Law “On Operative Search Activity” and presented according to requirements of the Criminal Procedure Code and comprehensively inspected by court, according to requirements of the Article 137 of this Code they can be recognized as proofs on criminal prosecution.

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.