**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 Article 332.1 of the Code of the Republic of Azerbaijan on Administrative Offences*

**5 March 2015 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 (Reporter-Judge), Rafael Gvaladze, Isa Najafov and Kamran Shafiyev;

attended by the Court Clerk Elmaddin Huseynov,

representatives of interested parties – Ramin Guliyev, Judge of Narimanov District Court of Baku city; Eldar Askerov, Senior Advisor of the Department for Administrative and Military Legislation of Milli Majlis of the Republic of Azerbaijan;

expert – Elshad Nasirov, Senior Lecturer of the Constitutional Law Board of Law Faculty of the Baku State University;

specialist – Ahmed Nurmamedov, Judge of the Supreme Court of the Republic of Azerbaijan;

in accordance with Article 130.6 of the Constitution of the Republic of Azerbaijan examined in open judicial session via special constitutional proceedings the case on inquiry of Narimanov District Court of Baku city on interpretation of some provisions of Article 332.1 of the Code on Administrative Offences 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 and specialist, conclusions of expert, examined the materials of the case the Plenum of Constitutional Court of the Republic of Azerbaijan

**DETERMINED AS FOLLOWS:**

The Narimanov District Court of Baku city (hereinafter referred to as the Narimanov District Court) city having applied to the Constitutional Court of the Republic of Azerbaijan (hereinafter referred to as the Constitutional Court) asks for interpretation of some provisions of Article 332.1 of the Code on Administrative Offences of the Republic of Azerbaijan (hereinafter referred to as the CAO).

In the inquiry it is mentioned that F. Alekperov, having appealed to the Narimanov District Court, asked to begin proceedings on administrative offense concerning the employee of private security firm “TRUST” who was performing his service in the Center of client services No. 1 of Open Joint Stock Company “BakiEletrikSebeke” (hereinafter referred to as the CCS No. 1 of JSC “BakiEletrikSebeke”), and to bring him to responsibility under Article 332.1 of the CAO.

F.Alekperov proved the claim by the fact that while visiting CCS No. 1 of JSC “BakiEletrikSebeke” for debt repayment for the used electric power, the employee of “TRUST” firm providing protection of the building demanded from him the identity certificate as pledge. F. Alekperov, though considered actions of the employee of security service as illegal, nevertheless, was forced to transfer to this person his identity certificate to enter the building and to pay off a debt for the used electric power. After that F.Alekperov, considering the actions of the employee of security service as illegal, applied with the claim to police agencies and prosecutor's offices with the purpose of bringing of this person to the administrative responsibility. After these bodies notified F.Alekperov that the cases connected with Article 332.1 of the CAO do not belong to their powers, the last appealed with the claim to Narimanov District Court.

In the inquiry, the Narimanov District Court specified that unlawful taking of the identity certificate or its acceptance as a deposit is qualified according to Article 332.1 of the CAO as an administrative offense and according to Article 360 of the CAO the hearing of cases on such administrative offenses is referred to power of district (city) courts. However in view of the fact that in the legislation on administrative offenses the competent authority drawing up the protocol and bringing charge for commitment of such offense is not established, the Narimanov District Court asked the Constitutional Court to clear up the following issues:

• a issue of a possibility of the direct address, according to requirements of Article 360 of the CAO, in district (city) court to start proceeding without creation of the protocol on administrative offense, in case of commitment of the administrative offense provided for in Article 332.1 of this Code;

• a issue of recognition of the subject of Article 332.1 of the CAO by the official (the special subject) from the point of view of Article 16 of the CAO, or physical person (the general subject), from the point of view of Article 15 of this Code;

• a issue, concerning of what body (official) has the rights of drawing up of the protocol on administrative offense, in case of commitment of the administrative offense provided for in Article 332.1 of the CAO.

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

Based on the Constitution of the Republic of Azerbaijan (hereinafter referred to as the Constitution) the rights and freedoms of the person are of top priority. According to Article 12 of the Constitution, the supreme objective of the State is to ensure human rights, civil liberties, and an adequate standard of living for the citizens of Azerbaijan.

Along with it, state bodies, by abstaining from illegal restriction of the rights and freedoms of the person, provide the respect of rule of law in society. The legislative, executive and judicial powers shall observe and protect human rights and freedoms fixed in the Constitution (Article 71.1 of the Constitution).

The specified constitutional norm, along with remedies of human rights and freedoms, as a guarantee of these rights, provides also availability of security regulations in criminal, administrative both other repressive and preventive legal spheres. Thus, each state body, within the powers, is obliged to provide legality, with a condition of protection of the human rights and freedoms.

The security regulations of the administrative relations in the sphere of managerial control are reflected in the CAO. Material regulations of the CAO, establishing an offense type, provide legal and legitimate interests of each subject in the sphere of managerial control. The legislation on administrative offenses (administrative delicts) regulates the disputes arising between competent authority, natural persons and legal entities in connection with administrative offenses and in these relations the competent state body acts as the main subject.

The legislation of the Republic of Azerbaijan on administrative offences has objectives on protection of rights and freedom of people and citizens, protection of health, sanitary-epidemiology welfare of population, public moral, property, economic interest of persons, public order and public security, environment, management rules, strengthening legalities and preventing administrative offences (Article 2 of the CAO).

The relations arising in the sphere of administrative offenses by the nature bear in themselves repressive and preventive nature. First of all because the competent authority (official), in case of application of measures of responsibility concerning the subject who made offense has powers of coercion of administrative nature.

The legislation on administrative offenses (administrative law of torts) by the nature is closer to the criminal legislation. These legal spheres differ on the degree of public danger of violations of the law determined by them. Difference of administrative and torts norms from norms of the criminal legislation is connected with the fact that the former forbid relatively light socially dangerous acts.

The European Court of Human Rights (hereinafter referred to as the European Court) identifies the certain types of punishment applied in connection with administrative offense or violation of discipline on degree of their seriousness with criminal liability.

The European Court, in the decision on case of Engel and others vs. Netherlands dated June 8, 1976 established requirements of three elements of approach for recognition of any punishment as criminal punishment. In the decision on case of Lutz vs. Germany as of August 25, 1987, it is noted that proceeding from nature (grave) and a type of punishment, the court can establish whether it is lead to criminal responsibility. European Court, showing in the decisions what - administrative or criminal responsibility proceeding from grave of punishment notes the similarity of offense and a crime.

The competent authorities, which are carrying out the prosecution in connection with a crime or administrative offense in the appropriate order, are considered as the accusatory party on cases of crimes and administrative offenses.

Competent authorities, by bringing to the administrative responsibility of the persons who made administrative offense are serves for protection of public interests. The ensuring of public interests is means the protection of the rights and freedoms of other persons. From this point of view, competent authorities, with the purpose of protection of public interests are authorized to take legal measures and to apply administrative punishment.

Bodies (officials), authorized to consider cases on administrative offenses are specified in Article 357 of the CAO. According to this article, cases of administrative offenses are considered by district (city) courts, the commissions (joint bodies) for minors and protection of their rights, and also the relevant bodies of the executive authority (officials), the Central Bank, Service of financial monitoring at the Central Bank of the Republic of Azerbaijan.

Unlike the bodies and officials specified in this article of the CAO, district (city) courts consider cases of the administrative offenses leading to rather serious sanction (penalty). In Article 360.1 of the CAO the norms providing cases of administrative offenses, which are considered by district (city) courts are specified. In the cases provided by this article if consideration of cases on administrative offenses is competence not only of competent bodies (officials) and if the competent body (official) submitted the case on administrative offenses for consideration by court, such cases are considered by courts (Article 360.2). In case of solution in court of the issues connected with decisions on cases of administrative offenses the application of administrative punishment or recognition of requirements of any protocol as unreasonable, the termination of administrative proceeding and a justification of the person charged administratively is possible.

Proceeding on cases of administrative offenses is conducted in a general order by separate stages. Such stages are:

• the beginning of proceeding on cases of administrative offenses;

• administrative proceedings;

• consideration of the protocol (resolution of the prosecutor);

• hearing of cases on administrative offenses in an appeal order;

• execution of the decision (proceeding on application of administrative punishment).

It must be kept in mind that the listed classification has general character, and these stages do not extend in an obligatory (complete) order to the simplified proceeding.

The reasons and the bases for initiation of cases on administrative offenses are established in Article 409 of the CAO. Among these reasons also the information submitted by the natural person is provided (Article 409.1.3 of the CAO). In Article 409.3 it is noted that availability in these statements of the actual information and signs specifying availability of administrative offense, and lack of the circumstances excluding proceedings on administrative offense is the basis for initiation of proceedings on administrative offense.

Article 409.4 of the CAO determines following compulsory provisions for initiation of proceedings on administrative offense:

• drawing up of the initial protocol on application of measures, stipulated in Article 396 of the CAO;

• drawing up of the protocol on administrative offense, or adoption by the prosecutor of the decision on initiation of proceedings on administrative offense;

• incases of recognition of necessary administrative investigation in proceedings on administrative offense, acceptance of ruling on initiation of proceedings on administrative offense.

Thus, the main condition for initiation of proceeding of administrative offense is drawing up of the protocol by competent authority or acceptance of the resolution by the prosecutor. In Article 410.1 of the CAO, it is directly marked that the protocol on commitment of administrative offense is drawing up in all cases, with exception stipulated in Article 368 of this Code. According to Article 368.2 of the CAO the prosecutor has the right to initiate proceedings on cases of administrative offenses; to participate in consideration of cases on administrative offenses; to draw the conclusions, to declare petitions on the issues arising at case consideration; to protest the resolution and the decision according to the claim on case of administrative offense.

According to Article 414 of the CAO the protocol (prosecutor resolution) on administrative offense shall be directed to the judge, authorized body (official) within 48 hours from the moment of execution. The protocol (prosecutor resolution) on administrative offense that stipulates the administrate punishment in the form of arrest shall be directed to judge immediately after execution.

Thus, a basic element of confirming the initiation of proceeding on cases of administrative offenses and conducting of administrative investigation is existence of the administrative report. According to Article 410 of the CAO the protocol of administrative violation shall include: date and venue of execution; position, first/middle/last name of the person who had executed the protocol; information on person, the administrative violation case is initiated against; place, time of content of administrative violation; relevant article of this Code that stipulates the liability for such administrative violation; first/middle/last names and resident addresses of victims and witnesses; explanations of natural person or representative of legal person the administrative violation case is initiated against and other information. The administrative report (resolution of the prosecutor) is the important procedural document in the course of proceeding on cases of administrative offenses. Thus, charge concerning administrative prosecution in connection with commission of offense arises on the basis of the administrative report (resolution of the prosecutor). In the absence of this procedural document, transition to the following proceeding phase on cases of administrative offenses is impossible, i.e., it is not possible to consideration of the case on administrative offense.

Proceeding phases on cases of administrative offenses belong to process of attraction of the subject to administrative responsibility on each offense. Being guided by it, it should be noted that in case of commission of the administrative offense provided in Article 332.1 of the CAO, the address according to requirements of Article 360 of the same Code, directly to district (city) court for initiation of proceeding without drawing up the protocol on administrative offense it is impossible.

According to Article 332.1 of the CAO the unjustified refusal of issue to citizens of identity cards, passports or identity card of a seaman, demand of documents for their release, which are not envisaged by legislation either admission of red tape at issue (replacement) of identity card or passport as well, as its illegal requisitioning or acceptance on security entails imposition of penalty in amount of 85-90 manats.

From content of noted article of the CAO it becomes clear that the objective party of offense is expressed in unreasonable refusal in issue to citizens of the identity card or passports, the requirement for their issue of the additional, not provided by the legislation documents or a red tape assumption in their issue (replacement), and also replacement of information on the electronic media of the identity card of the citizen, their illegal withdrawal or their acceptance as a deposit. The subjective party of this offense is expressed in deliberate commission of act. From a disposition of this article it becomes clear that responsibility arises only in case of commission of noted action or inaction by the official. On the basis of it the subject of Article 332.1 of the CAO, being a special subject, admits from the point of view of Article 16 of this Code as the official.

For example, regarding Article 3 of the Law of the Republic of Azerbaijan “On Passports” of June 14, 1994 it is noted that the passport is a property of the Republic of Azerbaijan and withdrawal of it from the citizen or taking as a security is absolutely forbidden except cases envisaged by the legislation of the Republic of Azerbaijan.

In Article 16 of this Law, the general conditions of responsibility are established, for protection of passports and it is noted that for the entering false information into the passport, its loss, intentional damage, theft, forgery, selling, illegal manufacturing or usage, or for violation of entry-exit rules specified by the present Law a culprits bear administrative or criminal responsibility in accordance with the legislation of the Republic of Azerbaijan. This requirement concerns to the general subject and provided with the relevant legislation.

In the Criminal Code of the Republic of Azerbaijan (hereinafter referred to as the CC) and in the CAO are exist the types of administrative offenses and crimes meaning the general subject respectively in connection with the loss, intended damage, remand on bail, withdrawal and theft of the identity card, passport or other official document confirming the personality or commission of other illegal actions connected with documents. For example, the legal responsibility for the illegal acts provided by Articles 144-3.4 and 326.2 of the CC and Article 331 of the CAO bears the sane general subject who reached a certain age limit. The disposition of these types of administrative offenses and crimes at commission of illegal acts means the general subject, and the public authorities (officials) authorized to consider cases on them are regulated by the relevant legislation.

In point 3.54 of the Decree of the President of the Republic of Azerbaijan “On application of the Law of the Republic of Azerbaijan “On approval, entering into force of the Code of the Republic of Azerbaijan on Administrative Offenses and the issues of legal regulation connected with it”” of August 29, 2000, differentiation of powers is carried out and established that cases on administrative offenses, provided in Article331 of the CAO, within the powers consider the Ministry of Internal Affairs of the Republic of Azerbaijan (in part concerning the identity card, the passport and the certificate on return to the Republic of Azerbaijan), the Ministry of Foreign Affairs of the Republic of Azerbaijan (in part concerning the passport and the certificate on return to the Republic of Azerbaijan), the State Migration Service of the Republic of Azerbaijan (in part concerning decision on extension of term of temporary stay in the Republic of Azerbaijan and documents for temporary or full-time residence in the territory of the Republic of Azerbaijan) and the State Sea Administration of the Republic of Azerbaijan (in part concerning the document of the seaman proving the identity).

In point 2.5-1 of the Decree of the President of the Republic of Azerbaijan “On approval of the list of officials authorized to consider cases on administrative offence” as of September 28, 2007 it is noted that the cases on administrative offenses, provided in Article 331 of the CAO considers - chiefs of city, regional departments of police and territorial offices, their deputies, chiefs of groups, the senior inspectors and inspectors of departments of passports, to registration and identity cards and offices of police.

As evident, in the noted Decrees of the President of the Republic of Azerbaijanis the circle of the public authorities and officials authorized to consider cases on administrative offenses provided in the CAO are established. No differentiation of powers is provided in one of Decrees concerning Article 332 of the CAO. Only in Article 360.1 of the CAO, among the cases on administrative offenses considered by district (city) courts Article 332 of the CAO is provided.

As it has been already noted, on the basis of Article 368.2 of the CAO the prosecutor has the right: to initiate proceeding on cases of administrative offenses; to participate in consideration of cases on administrative offenses; to draw the conclusions, to declare petitions on the issues arising at consideration of cases; to protest the resolution and the decision on the complaint on the case of administrative offense. The resolution on initiation by the prosecutor of proceeding on cases of administrative offenses accepted in the time established by Article 411 of the CAO. The resolution shall include information indicated in Article 410 of this Code. (Article 368.3 of the CAO). Thereby, by Article 368.3 of the CAO, the requirements imposed to the protocol on administrative offense according to Articles 410 and 411 of the CAO and periods of drawing up of this protocol extend to the resolution of the prosecutor on initiation of proceeding on cases of administrative offenses.

Thus, the Plenum of the Constitutional Court, being guided by the legislation on administrative offenses notes that initiation of proceeding on cases of administrative offenses under Article 332.1 of the CAO belongs to powers of the prosecutor. In view of above-noted, the Plenum of the Constitutional Court comes to the following conclusions:

- according to contents and meaning of Article 332.1 of the CAO, the subject of the administrative offense provided in this article is an official;

- initiation of proceeding on the basis of the complaint on cases of the administrative offenses provided in Article 332.1 of the CAO belongs to powers of the prosecutor;

- in case of commitment of administrative offense provided in Article 332.1 of the CAO, the submission of the complaint directly to district (city) court according to requirements of Article 360 of this Code without resolution of the prosecutor on administrative offense is impossible.

Being guided by Article 130.6 of the Constitution of the Republic of Azerbaijan and Articles 60, 62, 63, 65-67 and 69 of the Law of the Republic of Azerbaijan “On Constitutional Court”, Plenum of the Constitutional Court of the Republic of Azerbaijan

**DECIDED:**

1. According to contents and meaning of Article 332.1 of the Code on Administrative Offences of the Republic of Azerbaijan, the subject of the administrative offense provided in this article is an official.

2. Initiation of proceeding on the basis of the complaint on cases of the administrative offenses provided in Article 332.1 of the Code on Administrative Offences of the Republic of Azerbaijan belongs to powers of the prosecutor.

3. In case of commitment of administrative offense provided in Article 332.1 of the Code on Administrative Offences of the Republic of Azerbaijan, the submission of the complaint directly to district (city) court according to requirements of Article 360 of this Code without resolution of the prosecutor on administrative offense is impossible.

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

5. 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”.

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