**ON BEHALF OF THE REPUBLIC OF AZERBAIJAN**

**DECISION**

**OF THE PLENUM OF THE CONSTITUTIONAL COURT**

**OF THE REPUBLIC OF AZERBAIJAN**

*Commentary on Article 7 Para 2 and 3 of the Law of the Republic of Azerbaijan on Enactment and Enforcement of and Legal Regulation Related to the Code of Criminal Procedure of the Republic of Azerbaijan*

**6 January, 2004 Baku city**

The Plenum of the Constitutional Court of the Republic of Azerbaijan in attendance of:

Judges F.Abdullayev (Chairman), F.Babayev, B.Qaribov, R.Qvaladze, E.Mammadov (Reporting Judge), I.Najafov, S.Salmanova and A.Sultanov,

with participation of the Court Secretary I.Ismayilov,

in presence of the lawful representatives of the interested parties Chairperson of the Kapaz District Court Judge H.Ismayilov and S.Kerimov, Deputy Chief, Section of Adminsitrative and Military Legislation, Administration of the National Assembly (Milli Majlis) of the Republic of Azerbaijan

Candidate of Law A.Yusubov, Chair of Criminal Law and Criminal Process, Azerbaijan University in the expert capacity

has examined in the open session under the special constitutional procedure in accordance with Article 130 Section VI of the Constitution of the Republic of Azerbaijan the request of the Kapaz District Court of 28 November 2003 (ref.# 1-19) to officially interpret Article 7 Para 2 and 3 of the Law of the Republic of Azerbaijan on Enactment and Enforcement of and Legal Regulation Related to the Code of Criminal Procedure of the Republic of Azerbaijan.

Having heard a report of Judge E. Mammadov and statements from representatives of the parties Judge H.Ismayilov, S.Kerimov and expert A.Yusubov, studied materials and deliberated the case, the Plenum of the Constitutional Court of the Republic of Azerbaijan

**DETERMINED AS FOLLOWS:**

Article 7 Para 2 of the Law of the Republic of Azerbaijan on Enactment and Enforcement of and Legal Regulation Related to the Code of Criminal Procedure of the Republic of Azerbaijan states that decisions about selecting detention as a pre-trial restraint in all criminal cases commenced prior to the enforcement of the said Code retain effect within the terms stipulated in the Code of Criminal Procedure of the Republic of Azerbaijan effective to 1 September 2000.

Para 3 of the same Article determines that in order to conduct pre-trial (preliminary) investigation in the comprehensive, complete, objective and timely manner for all criminal cases commenced prior to the enforcement of the said Code an investigating agency, defined in accordance with provisions of the Code of Criminal Procedure of the Republic of Azerbaijan effective to 1 September 2000 related to investigation jurisdiction, shall conduct pre-trial investigation in consideration of the new Code of Criminal Procedure.

As application of the above-stated provisions caused disputes about validity of pre-trial restraint orders made prior to enforcement of the new Code of Criminal Procedure (henceforth “CCrP”), the Kapaz District Court requested the Constitutional Court of the Republic of Azerbaijan to comment on these provisions.

The official texts of Article 3 and Article 7 Para 2 and 3 of the Law of the Republic of Azerbaijan on Enactment and Enforcement of and Legal Regulation Related to the Code of Criminal Procedure of the Republic of Azerbaijan as well as Articles 4.1, 12.1, 12.4, 14.2 and .3, and 156.2 of the Code of Criminal Procedure (henceforth “CCrP”) as authenticated by the Administration of the National Assembly of the Republic of Azerbaijan were appended to the inquiry.

The Plenum of the Constitutional Court has noted the following in relation to the inquiry.

Enactment of the new CCrP in the framework of judicial and legal reforms in Azerbaijan established new rules of criminal prosecution and criminal judicial procedure. Compliance with human rights and basic freedoms and guarantees of protection of constitutional rights were important considerations in defining these rules. An important change in criminal process was introduction of new detention procedures. This provision, requiring a court to approve any detention decision in respect of any individual, was precipitated by international legal culture formed though a lengthy development process aimed at better protection of rights during criminal process.

Liberty is a natural and inalienable right of any individual from the moment of birth. It is included among fundamental human rights and freedoms by international legal instruments that the Republic of Azerbaijan has acceded to, e.g. Article 3 of the Universal Declaration of Human Rights, Article 9 of the International Pact of Civil and Political Rights, Article 5 of the European Convention on Protection of Human Rights and Basic Freedoms. These instruments do not simply proclaim the right to liberty but also stipulate certain guarantees for protection of this right. For example, Article 9 of the International Pact of Civil and Political Rights states that no one can be forced to imprisonment or jail or deprived of his/her liberty other than through due process of law based on legal grounds.

The Constitution of the Republic of Azerbaijan also establishes the personal right to liberty. Article 28 Sections I and II of the Constitution states that the right to liberty can be restricted only through arrest, detention or imprisonment procedures performed in accordance with law.

Other constitution al provisions should taken into account in respect of the right to liberty, i.e. Article 24 Section I, Article 12 Sections I and 2, Article 60 Section I and Article 71 Sections I, II, VI and VII. These provisions establish, respectively, that human rights and freedoms:

are integral, inviolable and inalienable;

should be applied in conformity with international legal instruments that the Republic of Azerbaijan has acceded to;

are proclaimed as a supreme goal of the state to be upheld and protected by legislative, executive and judiciary powers as their duty;

may not be restricted;

have direct applicability throughout the territory of the Republic of Azerbaijan;

any disputes in respect of violation thereof are settled by courts; and

are afforded judicial protection.

Reiterating the constitutional provision on human rights and freedoms, the new CCrP also establishes in respect of the right to liberty that no one can arrested or detained without legal grounds prescribed by this Code and other laws of the Republic of Azerbaijan. Only a court can rule to keep a person in custody or compel him/her to be placed in specialised medical and correctional establishments (CCrP Article 14.2 and .3).

Authorities conducting criminal process must ensure compliance to constitutionally-guaranteed human and civil rights and freedoms in respect of all parties. A decision about restricting constitutionally-guaranteed rights and freedoms in relation to compulsory procedural actions may be undertaken only there is a clear need for that in cases and in the manner prescribed by the said Code (CCrP Article 12.1 and .4). CCrP Article 156.2 states that detention may be selected as a pre-trial restraintt only by a decision of a court on petition of an investigator and upon presentation of a prosecutor who implements procedural supervision of pre-trial investigation, or upon an own initiative of a court trying a criminal case.

In the new Code, determination of the level of legal restriction placed on personal liberty is done upon consideration of constitutional provisions related to human rights and freedoms such as inviolability of a person, equality before law, inviolability of home, protection of honour and dignity, the right of request, the right to receive legal advice, presumption of innocence, judicial protection of rights and freedoms, etc. Under the new Code, all matters related to temporary restriction of personal liberty during criminal process, including arrest and detention of a person, are resolved under the procedure of judicial oversight.

Judicial oversight exists in this or that manner in all forms of judicial authority but assumes special importance during pre-trial investigation. It is implemented through review of complaints about actions (or inaction) of officials of criminal prosecution agencies (including some pre-trial restraint decisions) as well as through obtaining judicial consent for the use of compulsory procedures restricting constitutional right and freedoms or conduct of compulsory investigation procedures or operative search actions.

The notion of judicial oversight consists of the following substantial elements:

restrictions of human rights and freedoms (including personal liberty) applied during pre-trial investigations shall be overseen by the judiciary as an authority independent of parties in the process;

there is clear division of functions between state authorities in criminal process (criminal prosecution agencies conduct pre-trial investigation and, if need be, initiate a decision about detention of an accused person; a court through due process examines charges brought against a person and during pre-trial investigation makes decision about restricting human rights and freedoms, including personal liberty);

anyone facing a threat of restriction of his/her constitutional right and freedoms (including personal liberty) shall have full recourse and speedy access to judicial protection.

Judicial examination of any motion to restrict liberty is an important element aimed at protecting personal liberty and preventing unfounded attempts to restrict it. Judicial oversight provides protection against arbitrary conduct of pre-trial investigation and is a key guarantee of effectiveness of and public confidence in fair trial.

A court decision about detention provides a limit to uncertainty of a suspect or an accused person, which is very important for the person in question and, generally, for the notion of legal certainty. Not accidentally, along with providing the definition of pre-trial restraint and listing its types, the new CCrP provides detailed regulation of application grounds, selection criteria and general provisions thereof, sets conditions and procedure of detention as a pre-trial restraint measure, detention terms, conditions and procedure for extending these terms (CCrP Articles 154 to 159).

The Constitutional Court stresses the importance of correct understanding of and serious and unqualified compliance with criminal law procedures related to arrest and detention.

In accordance with Article 3 of the Law of the Republic of Azerbaijan on Enactment and Enforcement of and Legal Regulation Related to the Code of Criminal Procedure of the Republic of Azerbaijan, the Code of Criminal Procedure is enforced from 1 September 2000, except for provisions of Article 2 of the same Law. Hence, all criminal procedure, except for provisions relating to jury trials and compensation for victims but including procedures for arrest and detention are effective since 1 September 2000. Along with that, the said Law stipulates certain provisional clauses that enable courts, prosecutorial and investigative agencies to gradually transit to requirements of the new CCrP.

Specifically, Article 7 Para 2 of the Law states that decisions about selecting detention as a pre-trial restraint in all criminal cases commenced prior to the enforcement of the Code retain effect within the terms stipulated in the Code of Criminal Procedure of the Republic of Azerbaijan effective to 1 September 2000.

This provisional clause specifies an exception to rules of criminal procedure effected by the new CCrP about judicial oversight of detention orders. The law-makers allowed this exception only in respect of detention orders made by prosecutors and investigators prior to the enforcement of the new CCrP. This clause is provisional because pre-existing detention orders remain in force only within the terms specified by the old CCrP. The purpose of this clause is to ensure legal continuity and avoid review of all detention orders made by prosecutorial and investigative agencies in line with requirements of the old CCrP in criminal cases commenced between enactment and enforcement of the new CCrP.

At the same time, other provisional clauses in the Law (Article 7) shall be examined to clarify the extent and the effective terms of the above-described decisions.

Article 7 Para 3 of the same Law determines that in order to conduct pre-trial investigation in the comprehensive, complete, objective and timely manner for all criminal cases commenced prior to the enforcement of the said Code an investigating agency, defined in accordance with provisions of the Code of Criminal Procedure of the Republic of Azerbaijan effective to 1 September 2000 related to investigation jurisdiction, shall conduct pre-trial investigation in consideration of the new Code of Criminal Procedure.

As seem from the latter provisional clause, the Law, in order to conduct pre-trial investigation in the comprehensive, complete, objective and timely manner for all criminal cases commenced prior to the enforcement of the new CCrP, prescribes investigative agencies to continue those investigations in accordance with rules about investigation jurisdiction set by the old CCrP and conduct investigations in consideration of the new CCrP.

Therefore, on the one hand the Law stipulated a provisional clause about continuation of legal effect of pre-existing detention orders adopted in the extra-judicial manner, but on the other hand required of investigative agencies to conduct pre-trial investigations in consideration of the new Code of Criminal Procedure in consideration of the new CCrP.

For better understanding of the foregoing it is important to take into account provisions of Article 7 Para 4. It directly states that legality and substantiation of investigative and other procedural actions undertaken prior to the enforcement of the new CCrP in respect of criminal cases in procedure by courts after the enforcement of the new CCrP shall be determined by provisions of the Code of Criminal Procedure of the Republic of Azerbaijan effective to 1 September 2000.

A conclusion drawn from the above discussion is that upon enforcement of the new CCrP legality and substantiation of investigative and other procedural actions undertaken prior to the enforcement of the new Code is determined within requirements of the old CCrP. This exception relates only to legality and substantiation of all procedural actions undertaken by investigative agencies prior to the enforcement of the new CCrP. Legality and substantiation of all procedural actions undertaken after the enforcement of the new CCrP are assessed on its basis.

It should be stated here that Article 4.1 of the new CCrP establishes that conduct of criminal procedural actions, adoption and implementation of criminal procedural decisions should be done in accordance with provisions of criminal procedure legislation of the Republic of Azerbaijan in force at the time. Therefore, the provision of Article 7 Para 2 of the Law in question that detention orders used as a pre-trial restraintt retain effect within the terms stipulated in the old CCrP should not pose contradiction either with Para 3 and 4 of the same Article or with the provision of Article 4.1 of the new CCrP.

It is crucial to take into consideration that except for detention terms set in Article 92, the old CCrP did not provide for specific terms in relation to a decision about detention as a pre-trial restraint. According to Article 98 of the old CCrP, procedural terms, including detention terms, were counted in days from the day a respective procedural action had been taken. Hence, detention term was counted from the day a person had been arrested or detained.

In consideration of the foregoing, the Plenum of the Constitutional Court has come to a conclusion that the provision of Article 7 Para 2 of the Law in question shall be applied to decisions about selecting detention as a pre-trial restraint in criminal cases commenced prior to the enforcement of the new CCrP for persons arrested and detained before that time within detention terms stipulated in Article 92 of the old CCrP.

Retention of effect of other decisions about selection of detention as a pre-trial restraint made by prosecutorial and investigative agencies prior to enforcement of the new CCrP can not be subject to the provisional clause of Article 7 Para 2 of the Law in question. Retention of effect of such decisions contravenes the legal stance taken by the Constitution of the Republic of Azerbaijan.

Any form of extra-judicial restriction of liberty is conditioned by the afore-mentioned Article 24 Section I, Article 12 Sections I and 2, Article 60 Section I and Article 71 Sections I, II, VI and VII of the Constitution of the Republic of Azerbaijan and should be considered as violating constitutional guarantees of human rights and freedoms.

Guided by Article 130 Sections VI and IX of the Constitution of the Republic of Azerbaijan and Articles 75, 76, 78, 81, 83 and 85 of the Law of the Republic of Azerbaijan on the Constitutional Court, the Plenum of the Constitutional Court

**DECIDED:**

1. The provision of Article 7 Para 2 of the Law of the Republic of Azerbaijan on Enactment and Enforcement of and Legal Regulation Related to the Code of Criminal Procedure of the Republic of Azerbaijan shall be applied to decisions about selecting detention as a pre-trial restraint in criminal cases commenced prior to the enforcement of the new CCrP for persons arrested and detained before that time within detention terms stipulated in Article 92 of the old CCrP.
2. The provision of Article 7 Para 3 of the Law of the Republic of Azerbaijan on Enactment and Enforcement of and Legal Regulation Related to the Code of Criminal Procedure of the Republic of Azerbaijan shall be accepted as defining a duty of an investigative agency to continue pre-trial investigation for all criminal cases commenced prior to the enforcement of the new CCrP according to the rules of investigation jurisdiction set in the old CCrP and in consideration of with provisions of the new CCrP in order to complete pre-trial investigation in the comprehensive, complete, objective and timely manner.
3. The Decision shall become effective from the day it is published.
4. The Decision shall be published in the newspaper “Azerbaycan” and in the Bulletin of the Constitutional Court of the Republic of Azerbaijan.
5. The Decision is final and can not be annulled, amended or officially interpreted by whichever person or entity.