**ON BEHALF OF REPUBLIC OF AZERBAIJAN**

**DECISION**

##### **OF THE CONSTITUTIONAL COURT**

##### **OF THE REPUBLIC OF AZERBAIJAN**

*On the Conformity of provision “…appearance in public places under the effect of alcohol followed by violation of human dignity and public moral” of Article 398.1.1 of the Code of Administrative Offences of the Republic of Azerbaijan with Articles 28, 71.2 and 80 of the Constitution of the Republic of Azerbaijan*

# 27 August, 2004 Baku city

The Constitutional Court of The Republic of Azerbaijan composed of F. Abdullayev (Chairman), Judges B. Garibov (Reporter Judge), R. Gvaladze, E. Mamedov, I. Najafov and A. Sultanov,

attended by the Court Clerk I.Ismayilov,

the legal representatives of the subjects of special constitutional proceedings, R. Ragimov, Head of Administration of Ombudsman of the Republic of Azerbaijan, S.Mamedov, official of the Administration of the Milli Mejlis (Parliament) of the Republic of Azerbaijan

in accordance with Article 130.3 of the Constitution of the Republic of Azerbaijan has examined in open judicial session via special constitutional proceedings the case on inquiry of Ombudsman of the Republic of Azerbaijan of 28 June 2004, N 1/3485-04 concerning on the conformity of provision “…appearance in public places under the effect of alcohol followed by violation of human dignity and public moral” of Article 398.1.1 of the Code of Administrative Offences of the Republic of Azerbaijan with Articles 28, 71.2 and 80 of the Constitution of the Republic of Azerbaijan,

having heard and discussed the report of Judge B. Garibov, the statements of legal representatives of parties R.Ragimov and S. Mamedov, the Constitutional Court of the Republic of Azerbaijan

**DETERMINED AS FOLLOWS:**

The representative of Ombudsman in his inquiry noted that according to Article 396 of the Code of Administrative Offences of the Republic of Azerbaijan, with the view to prevent the administrative violations, to identify the person, to develop administrative violation protocol when such protocol is necessary, to provide the timely and rightful execution of cases and to execute the resolutions the authorised official shall have the right to apply measures on ensuring of proceeding on cases of administrative offences. Among the measures listed in same article, there is indicated the measure of administrative detention. According to Article 398.1 of the given Code, administrative detention is the short term limitation of freedom of physical person which may be applied in exceptional cases when deemed necessary for enforcement of correct and timely examination of the administrative violation case or execution of decision adopted with respect to administrative offence except for cases stipulated by the legislation.

In article 398.1.1 of the Code among the actions which constitute the bases for application of administrative detention, there is specified the appearance in public places under the effect of alcohol followed by violation of human dignity and public moral.

According to Article 398.1.1 of the Code of Administrative Offences, appearance in public places under the effect of alcohol followed by violation of human dignity and public moral is the basis for administrative detention and restriction of freedom for short term. However in this Code it is not provided any responsibility for appearance in public places under the effect of alcohol followed by violation of human dignity and public moral. In this case there is no basis for a temporary restriction of the right to freedom, and the application of administrative detention contradicts to the purposes established in Article 398.1 of the Code of Administrative Offences.

Taking into account the above stated, the representative of Ombudsman in his inquiry asks to check up the conformity of provision of Article 398.1.1 of the Code of Administrative Offences of the Republic of Azerbaijan “… appearance in public places under the effect of alcohol followed by violation of human dignity and public moral” to Articles 28, 71.2 and 80 of the Constitution of the Republic of Azerbaijan.

In connection with inquiry the Plenum of the Constitutional Court considers necessary to note the below-mentioned.

Legal norms constitute a basis of regulation of the legal relations arising from public relations. The legal norms are regarded as the basis of realisation of such relations, express a will of the state and define the mutual rights and duties of legal subjects. It is necessary to note that the behaviour of the individual contradicting to instructions and requirements provided in legal norms as the action which is not considered socially necessary and useful and being offence, leads to occurrence of relevant responsibility before the state and a society.

According to Article 80 of the Constitution of the Republic of Azerbaijan, violation of provisions of the present Constitution and laws including usurpation of rights and liberties and also failure to fulfill responsibilities specified in the present Constitution and laws are persecuted.

Also in the Code of Administrative Offences (hereinafter referred to as CAO) with the view of fulfillment of the actions defined as administrative offences provides a responsibility.

In Article 2 of CAO it is specified that the legislation of the Republic of Azerbaijan on administrative violations 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 violations.

According to Article 3of Code only person, who was declared guilty for committing administrative violations under this Code and had performed a deed (action or inaction) having all other signs of an administrative violation, shall be called to account and punished.

Obviously in order to bring the individual to administrative responsibility and a disciplinary action the obligatory presence of the conditions listed in given article (the norms providing administrative offence, fault and other signs of structure of administrative offence) is required.

On the other hand, according to Article 12 of the given Code, an administrative violation is characterised as a guilty (deliberate or careless) deed (action or inaction), infringing the social relations protected by this Code, which would lead to administrative liability.

From the analysis of positions CAO it gets evident that the basis of occurrence of administrative responsibility is formed by norms of the substantive law of the special part of the given Code, establishing administrative responsibility and its application. It is necessary to note that the regulation of is administrative-procedural activity connected with realization of substantive norms of law, is one of the characteristics inherent to CAO. So, for maintenance of functional activity of the same Code the presence of clearness, logicality, system legal unity among material and procedural (formal) norms is very important.

According to article 398.1of CAO, administrative detention is the short term limitation of freedom of physical person which may be applied in exceptional cases when deemed necessary for enforcement of correct and timely examination of the administrative violation case or execution of decision adopted with respect to administrative offence except for cases stipulated by the legislation.

In Article 398.1.1 of the given Code it is noted that the administrative detention of shall be carried out by officials of the relevant executive authority of the Republic of Azerbaijan in case of hooliganism, deliberate non-compliance with lawful requirements or instructions of police or military officers, appearance in public places under the effect of alcohol followed by violation of human dignity and public moral, violation of the rules for hunting, fishing and protection of fishery resources. Administrative detention is one of measures provided for with the view to prevent the administrative violations, to identify the person, to develop administrative violation protocol when such protocol is necessary, to provide the timely and rightful execution of cases and to execute the resolutions the authorised official shall have the right to apply measures on ensuring of proceeding on cases of administrative offences (Article 396 of CAO).

In the special part of CAO the norms of the substantive law defining the appearance in public places under the effect of alcohol followed by violation of human dignity and public moral as action (offence), being the basis for administrative responsibility are not provided.

It leads to conduction of proceedings on the case of administrative offence which is the basis for restriction of the right to freedom for the action which does provide for attraction to administrative responsibility and imposition of official penalty upon a person who actually did not committed an offence.

According to Article 28 of the Constitution of the Republic of Azerbaijan, everyone has the right for freedom. Right for freedom might be restricted only as specified by law, by way of detention, detention or imprisonment. (parts I, II of Article 28 of the Constitution). According to Article 71.2 of the Constitution no one may restrict implementation of rights and liberties of a human being and citizen.

Apparently, in spite of the fact that for appearance of person in public places under the effect of alcohol followed by violation of human dignity and public moral the special part CAO does not provide for the norm of the substantive law which is the basis of administrative responsibility, its presence as offence among other administrative offences defining the application of administrative detention according to Article 398.1.1 of the same Code, on the one hand, does not correspond to parts I, II of Article 28 and Article 71.2 of the Constitution, on the other hand, breaking the system unity of material and legal procedure constitutes at the end the negation by norm of a procedural law of norm of the substantive law. At the same time it does bring, in the framework of purposes of CAO, to any legal result with the exception of the fact that it transforms the specified procedural procedure into legal tool that leads to infringement of requirements of the Constitution of the Republic of Azerbaijan specifying that the legal acts should be based on law and justice (equal relations to equal interests), and that laws should not contradict the Constitution (a part I, III of Article 149 of the Constitution).

The Constitutional Court also notes that, according to Article 94.1.17 of the Constitution, the competence of interpretation of crime and other violations of law, establishment of responsibility for these acts belongs to Milli Mejlis of the Republic of Azerbaijan. During realisation of this power the observance of deriving of norms of a procedural right from norms of the substantive law and their conformity to them is an indispensable condition.

Plenum of the Constitutional Court of the Republic of Azerbaijan comes to such conclusion that provision of Article 398.1.1 of the Code of Administrative Offences of the Republic of Azerbaijan “… appearance in public places under the effect of alcohol followed by violation of human dignity and public moral”, in view of the fact that in a special part of the same Code the norm providing for responsibility for given action (offence) is not provided, does not correspond to parts I, II of Article 28, to Article 71.2, to Article 80, parts I, III of Article 149 of the Constitution of the Republic of Azerbaijan and should be recognised as null and void.

Being guided by parts III, IX and X of Article 130 of the Constitution of the Republic of Azerbaijan, Articles 52, 62, 63, 65, 67 and 69 of the Law of the Republic of Azerbaijan “On Constitutional Court”, the Constitutional Court of the Republic of Azerbaijan

**DECIDED:**

1. In connection with provision of Article 398.1.1 of the Code of Administrative Offences of the Republic of Azerbaijan “… appearance in public places under the effect of alcohol followed by violation of human dignity and public moral”, in view of the fact that in a special part of the same Code the norm providing for responsibility for given action (offence) is not provided, does not correspond to parts I, II of Article 28, to Article 71.2, to Article 80, parts I, III of Article 149 of the Constitution of the Republic of Azerbaijan and should be recognised as null and void.

2. The decision comes into force from the date of its publication.

3. The decision is a subject to publication in the "Azerbaijan" newspaper and “Bulletin of the Constitutional Court of Azerbaijan Republic”.

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