**ON BEHALF OF THE REPUBLIC OF AZERBAIJAN**

**DECISION**

**OF THE CONSTITUTIONAL COURT**

**OF THE REPUBLIC OF AZERBAIJAN**

*Review of the complaint by B.Yusifova concerning conformity of the decision*

*of the Collegium of Criminal and Administrative Offences of the Supreme Court of the Republic of Azerbaijan of 7 March 2005 to the Constitution and laws*

*of the Republic of Azerbaijan*

**17 February, 2006 Baku city**

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

Judges F.Abdullayev (President Judge), F.Babayev, S.Hasanova, B. Qaribov, R.Qvaladze, E.Mammadov, I.Najafov, S.Salmanova and A.Sultanov (Reporting Judge) and Court Secretary I.Ismayilov,

in presence of the complainants B.Yusifova and representatives of the respondent party Judge A.Kalbaliyev of the Supreme Court

based on a complaint lodged by Beyim Yusifova

has examined in the open session under the special constitutional procedure in accordance with Article 130 Section V of the Constitution of the Republic of Azerbaijan the constitutional case of conformity of the decision of the Collegium of Criminal and Administrative Offences of the Supreme Court of the Republic of Azerbaijan of 7 March 2005 in the criminal case against Beyim Yusifova concerning charges under Articles 221.2.2 and 221.3 of the Criminal Code of the Republic of Azerbaijan to the Constitution and laws of the Republic of Azerbaijan.

Having heard a report of Judge Sultanov and statements from the complainants and representatives of the respondent party, studied materials and deliberated the case, the Plenum of the Constitutional Court of the Republic of Azerbaijan

**DETERMINED AS FOLLOWS:**

On 26 August 2004 the Sumqayit City Court pronounced a verdict of guilty for Beyim Yusifova under Articles 221.2.2 and 221.3 of the Criminal Code of the Republic of Azerbaijan and sentenced her to three years and six months of imprisonment. In consideration of Article 79.1 of the same Code, the court ruled to reprieve the sentence until Yusifova’s little daughter reaches the age of eight.

As seen from the materials of this criminal case, Yusifova was convicted for committing an act of hooliganism by grossly violating public order, showing flagrant disregard to social mores and iniquitously assailing private citizens using violence, specifically for acts committed on 2 May 2004 in the apartment located at Apt. #9, Building 11/15, Block 45, City of Sumqayit, i.e.:

verbally offending S.Allahverdiyeva with profane language; and

resisting attempts of Kh.Rustamova to restore public order by assailing her with objects used as weapons, i.e. hitting her on the head with a handbag and beating her on her right arm with a desk lamp, thus causing her a light bodily injury.

At the trial Yusifova testified to the effect that she cohabited with A.Maharramov since June 2000 and bore two children in this relationship. She further testified that she had not had any hooliganism intent when entering an apartment belonging to S.Allahverdiyeva, the mother of her de facto husband A.Maharramov. Her intention was to explain to her de facto mother-in-law that she had no place to live and ask her for shelter. With this purpose in mind, she took her two-year-old son and four-month-old daughter with her. However, the mother-in-law did not accept her request, verbally offended her and called in her relatives and neighbours. During an ensuing dispute a relative of her mother-in-law Kh.Rustamova punched her with a fist in the mouth area. In such situation she resorted to using a handy bad and a lamp to defend herself.

Considering the verdict of the court unlawful and unsound, Yusifova appealed the verdict to higher court instances.

On 9 November 2004 the Collegium of Criminal and Administrative Offences of the Court of Appeals of the Republic of Azerbaijan ruled to uphold the verdict of the Sumqayit City Court of 26 August 2004.

On 7 March 2005 the Collegium of Criminal and Administrative Offences of the Supreme Court of the Republic of Azerbaijan ruled to uphold the decision of the Court of Appeals of 9 November 2004.

An additional cassation claim by Yusifova about bringing the case before the Plenum of the Supreme Court was dismissed for the lack of merits by the letter of the Chairperson of the Supreme Court of 25 May 2005.

Subsequently, Yusifova complained to the Constitutional Court. She substantiated her complaint by arguing that the courts did not provide proper legal assessment of her actions, i.e. qualified a family dispute occurring at Allahverdiyeva’s apartment as “an act of hooliganism” and a handbag and a desk lamp she used to defend herself as “objects used as weapons”. In the opinion of the complainant, the courts wrongly applied to her case Article 221 of the Criminal Case. In view of the above, Yusifova requested the Constitutional Court to recognise the decision of the Collegium of Criminal and Administrative Offences of the Supreme Court of the Republic of Azerbaijan of 7 March 2005 as contravening the Constitution of the Republic of Azerbaijan and other legislation currently in force and to adopt a decision restoring her constitutional rights and freedoms.

For resolving the issue of whether rights and freedoms of Yusifova as guaranteed by the Constitution and laws of the Republic of Azerbaijan were infringed, the Plenum of the Constitutional Court has considered necessary to note the following in relation to the content and applicability of Article 221 of the Criminal Code.

The offence of hooliganism should be differentiated from other criminal offences with respect to the substance, intent of an offender, circumstances, motive and purpose. Hooliganism is a premeditated offence committed by someone who realises public threat posed by this offence, foresees its outcome as menacing public order and wishes them to occur.

Article 221 of the Criminal Code defines hooliganism as gross violation of public order, flagrant disregard to social mores and unwarranted assault accompanied by violence, threat of violence, destruction of or damage to others’ property. As seen from the disposition of this Article, an act of hooliganism is characterised by the following elements:

gross violation of public order;

flagrant disregard to social mores; and

unwarranted assault accompanied by violence, threat of violence, destruction of or damage to others’ property.

Presence of the above elements in the actions of an offender is absolutely necessary for determination of the offence of hooliganism.

For example, actions grossly violating public order are defined as actions that disrupt normal functioning of transport, public organisations, commercial enterprises, conduct of public events, or instigate long-term disruption of public order, or pose threat and cause apprehension to inviolability of rights and lawful interests of people, or iniquitously violate rules of communal life regulated by law.

Flagrant disregard to social mores is defined as actions that, along with compromising lawful interests of a group of persons or the entire society, demonstrate open unconcern and insolence of an offender to surroundings and oneself, or his/her contempt to universally accepted rules of behaviour, morals and ethics.

A given act cannot be qualified as hooliganism without determining that actions of an offender constitute gross violation of public order and flagrant disregard to social mores.

It should be noted that place and circumstances of committing an offence may strongly influence its classification as hooliganism. For example, verbal offence, battering, infliction of light or unsevere injury, destruction of property and other such actions, committed in the family or at home or against family members, relatives and acquaintances, including if provoked by faulty actions or other conduct of a victim, if not accompanied by violation of public order and flagrant disregard to social mores, shall not be qualified as hooliganism but treated as crimes against person or other such offences under the Criminal Code.

Along with indicating elements of the offence of hooliganism, the Plenum of the Constitutional Court considers necessary to clarify certain matters related to Articles 221.2.2 and 221.3 of the Criminal Code applied in this case as it was qualified as an especially iniquitous form of hooliganism.

“Another person” in the meaning of Article 221.2.2 of the Criminal Code could be a person, other than a victim of an offence, lacking competencies of a government official but fulfilling duties of protecting public order or participating in restoring public order violations on his/her own initiative. In such case, it should be noted that restoring public order (or prevention of public order violations) by another person on his/her own initiative is expressed in active actions aimed at halting hooliganism, including by using violence against an offender.

Furthermore, it is crucial to elucidate the definition of the phrase “objects used as weapons” found in the text of Article 221.3 of the Criminal Code. In order to define the meaning of the phrase “objects used as weapons,” it is essential to consider criteria setting them apart from weapons as such, on the one hand, and objects that can never be used weapons, on the other hand.

The Law of the Republic of Azerbaijan on Duty and Civil Weapons determines the definition, types and circulation of service and civil arms and weapons. According to Article 2 of the said Law, a weapon is a device or a contraption purported to kill manpower and other animate objects or destroy hardware and structures, or intended for signalling purposes but usable for killing and destroying manpower and other objects.

Objects used as weapons, as opposed to weapons per se, are not constructively intended for killing or destruction; such use is opposite to their purpose and nature. Objects used as weapons are those that are constructively intended for other purposes, including for productive or domestic use, or those that are in general not intended for any specific purpose and are neither produced nor processed, i.e. natural objects. These objects are not weapons according to the above definition thereof; nevertheless, they may possess lethal capacity and certain characteristics of cold arms and other weapons. The list of such objects is inexhaustible. Lethal capacity possessed by objects used as weapons is the primary and absolute feature distinguishing them from other objects lacking such capacity.

Demonstrating availability of lethal capacity of objects and the intent to use this capacity for the purposes of hooliganism is paramount for establishing corpus delicti under the discussed Article of the Criminal Code.

Article 60 of the Constitution of the Republic of Azerbaijan guarantees everyone judicial protection of his/her rights and freedoms.

The Plenum of the Constitutional Court considers essential to note in respect to the substance of this provision that it affirms protection by the courts of rights and freedoms of every individual guaranteed to him/her by the Constitution and other normative legal acts of the Republic of Azerbaijan. Hence, prosecution, conviction and determination of types and terms of penalties under current legislation shall be performed in accordance with the system of guarantees afforded by the Constitution.

Article 127 Section II of the Constitution of the Republic of Azerbaijan stipulates that judges shall try cases fairly and impartially, based on facts and law while respecting equality of the parties.

According to Article 1.1 of the Code of Criminal Procedure (henceforth “CCP”), criminal procedure law of the Republic of Azerbaijan defines criteria for determination of whether acts displaying criminal features can be considered criminal offences and whether persons accused in committing those acts can be found guilty of crimes as well as sets legal procedures for criminal prosecution and defence of persons suspected or accused in committing acts falling under purview of criminal law.

A final decision about the outcome of any court trial (a verdict or any other decision) is made in the consultative room of a court only after a judge debates (examines) matters indicated in the Code of Criminal Procedure. In accordance with CCP Article 346.1 determining the scope of these matters, one of the matters subject to obligatory debate is correspondence of actions of a defendant to characteristics of an offence incriminated to him/her under a pertinent provision of criminal law.

As a court verdict decides a matter of vital importance of whether a defendant is guilty of crime he/she is accused of and, therefore, to certain extent, his/her destiny, procedural law puts stringent requirements to verdicts.

Criminal procedure law establishes that a court verdict must be lawful and sound. A court verdict is considered lawful only if it has been passed in conformity with the Constitution of the Republic of Azerbaijan, the Code of Criminal Procedure, criminal law and other laws of the Republic of Azerbaijan. For a court verdict to be considered sound (substantiated), conclusions drawn by a court shall be based on evidence duly examined at a trial, this evidence shall be sufficient for assessing an indictment, and circumstances determined by a court shall correspond to evidence it has examined (CCP Article 349.3, .4 and .5).

Circumstances of the case, i.e. the fact that the incriminated episode occurred inside Allahverdiyeva’s apartment owing to personal relationships between her and the defendant, that Rustamova only verbally protested against actions of Yusifova she disagreed with, that objects used for inflicting health damage were a handbag and a desk lamp, were indisputably determined in the verdict convicting Yusifova.

However, the verdict failed to substantiate what were the elements of Yusifova’s actions allowing to qualify them as hooliganism and Rustamova’s protest against them as resistance to crime as well as what were the criteria permitting classification of the objects indicated in the verdict as “objects used as weapons” and refutation of the argument that they had been used by Yusifova in self-defence.

While considering Yusifova guilty of hooliganism, the court did not specify the nature of Yusifova’s actions as grossly violating public order and showing flagrant disregard to social mores, nor the nature of Rustamova’s resistance to such actions. The court contended with general indications of corpus delicti of the hooliganism offence and did not properly classify it in line with provisions of Articles 221.2.2 and 221.3 of the Criminal Code.

CCP Article 399 establishes that lack of correspondence of conclusions drawn by a court to factual circumstances of the case and misapplication of a norm of criminal law are grounds for reversal or modification of a verdict or decision of the first-instance court. By misapplication of a criminal law norm, the procedural law means failure of a court to apply an applicable norm, application of a norm that should not have been applied, or misinterpretation of a norm (CCP Article 403).

Disregarding the above requirements of the law, the Collegium of Criminal and Administrative Offences of the Court of Appeals upheld the legally flawed verdict of first-instance court.

CCP Article 416 states grounds for voiding or modifying a court verdict or decision under cassation procedure. The cassation court may reverse (void) or modify a verdict or a decision of the first-instance or appellate court if the court in question has pronounced a guilty verdict without elements of corpus delicti being present in actions of a defendant (416.0.6), or if it has erred in classification of actions of a defendant (416.0.15). According to CCP Article 419.1, the cassation court, based on a cassation complaint or a cassation motion, reviews only legal issues in application of relevant criminal and criminal procedure law.

However, the Collegium of Criminal and Administrative Offences of the Supreme Court of the Republic of Azerbaijan, by ruling on 7 March 2005 to uphold the decision of the Collegium of Criminal and Administrative Offences of the Court of Appeals of 9 November 2004, failed to comply with the requirements of CCP Articles 416 and 419.1 and thus violated the guarantee of judicial protection of rights and freedoms granted to the complainant by Article 60 of the Constitution.

The Plenum of the Constitutional Court considers essential to point out another procedural flaw allowed by the cassation court in review of the case, which imperils the principle of everyone’s access to judicial protection at any phase of judicial process guaranteed by Article 127 Section VIII of the Constitution, harms effective protection of rights and freedoms of the complainant and impacts conformity of court decisions to law. CCP Article 28.4.5 requires courts to ensure the right of parties in criminal process to participate in court proceedings. The right of a defendant to attend a cassation hearing if initiated upon his/her cassation complaint is stated in CCP Article 91.5.36.

A judge must notify the convicted party about the time and place of a cassation hearing of his/her cassation complaint within three months from the moment a judge learns about it. Persons able to file a cassation complaint are also entitled to attend a hearing. A chairperson of a relevant collegium of the cassation court must notify parties in criminal process about the date of the cassation hearing of the complaint. At the same time, failure of a complainant that has been properly notified to attend a hearing does not preclude holding a hearing (CCP Articles 418.2.7 and 419). Evidently, latter provision allows a court to go on with a hearing only if a person in question (a complainant) has been properly notified.

But as seen from the materials of this criminal case, in her cassation complaint the convicted party indicated her residence address as Apt. #10, Building 29/26, Micro-district 9, City of Sumqayit. The same address in quoted in the decision of the Collegium of Criminal and Administrative Offences of the Supreme Court as complainant’s permanent residence address. However, as evident from the letter of Judge of the Supreme Court attached to the case file, a notification about the time and place of the cassation hearing was sent to a different address.

It transpires from the above that the complainant was not notified about the cassation hearing in accordance with the law, was therefore deprived of her right to attend the hearing, which resulted in violation of her right to defence. Nevertheless, the decision of the Collegium of Criminal and Administrative Offences of the Supreme Court failed to specify whether the complainant was notified of the cassation hearing and substantiate holding of the hearing in absence of the complainant.

The Plenum of the Constitutional Court is of the opinion that it is worthwhile to refer to the European Convention of Human Rights and Basic Freedoms in relation to the above-stated matters.

Practice of the European Court of Human Rights has important ramifications as seen from this perspective. In its decision of 27 May 2004 in the case of Yavuz v. Austria, the European Court of Human Rights stressed that the right of a defendant to attend court proceedings personally is a key element of fair trial. A defendant may decline this right, but then his/her decision to skip a court hearing or refuse to defend himself/herself should be expressly stated (§ 45). If not personally notified about a court hearing, a defendant must expend special efforts to assess the issue of using or declining to use the right to attend (§ 49).

In consideration of the foregoing, the Plenum of the Constitutional Court has come to a conclusion that because the decision of the Collegium of Criminal and Administrative Offences of the Supreme Court of the Republic of Azerbaijan of 7 March 2005 in the criminal case against Beyim Yusifova contravenes Article 60 and Article 127 Sections II and VIII of the Constitution of the Republic of Azerbaijan and Articles 416, 418.2.7 and 419 of the Code of Criminal Procedure of the Republic of Azerbaijan, the said decision shall be deemed void. Therefore, the case shall be tried again in the manner and at times prescribed by the criminal procedure law of the Republic of Azerbaijan.

Guided by Article 130 Sections V and IX of the Constitution of the Republic of Azerbaijan and Articles 52, 62, 63, 65, 66, 67 and 69 of the Law of the Republic of Azerbaijan on the Constitutional Court, the Plenum of the Constitutional Court

**DECIDED:**

1. As the decision of the Collegium of Criminal and Administrative Offences of the Supreme Court of the Republic of Azerbaijan of 7 March 2005 in the criminal case against Beyim Yusifova concerning charges under Articles 221.2.2 and 221.3 of the Criminal Code of the Republic of Azerbaijan contravenes Article 60 and Article 127 Sections II and VIII of the Constitution of the Republic of Azerbaijan and Articles 416, 418.2.7 and 419 of the Code of Criminal Procedure of the Republic of Azerbaijan, the said decision shall be deemed void. In accordance with the present Decision, the case shall be tried again in the manner and at times prescribed by the criminal procedure law of the Republic of Azerbaijan.
2. The Decision shall become effective from the day it is published.
3. The Decision shall be published in the newspapers Azerbaycan, Respublika, Xalq Qazeti and Bakinskiy Rabochiy and in the Bulletin of the Constitutional Court of the Republic of Azerbaijan.
4. The Decision is final and can not be annulled, amended or officially interpreted by whichever person or entity.