**ON BEHALF OF REPUBLIC OF AZERBAIJAN**

**DECISION**

##### OF THE CONSTITUTIONAL COURT

##### OF THE REPUBLIC OF AZERBAIJAN

*On interpretation of Article 83.2 of the Criminal Code of the Republic of Azerbaijan*

# 8 July, 2008 Baku city

The Plenum of the Constitutional Court of the Republic of Azerbaijan composed of F.Abdullayev (Chairman), S.Salmanova, B.Garibov, E.Mamedov, F.Babayev, S. Hasanova, , R. Gvaladze (Reporter Judge), I.Najafov and A.Sultanov;

attended by the Court Clerk I.Ismayilov,

the legal representatives of the subjects interested in special constitutional proceedings: I. Fattahov, Chairman of the Kyapaz district court of Ganja city; I.Jafarov, senior adviser of department of the administrative and military legislation of Milli Majlis of the Republic of Azerbaijan

the experts: professor F.Samandarov, Head of Criminal Law Board of Baku State University, Sh.Yusifov, Head of Judicial Board on Military Courts of the Supreme Court of the Republic of Azerbaijan; M.Agazade, Judge of the same court; G.Mammedov, Judge of the Court of Appeal of Baku city;

based on Article 130.6 of the Constitution of the Republic of Azerbaijan has examined in open court session the constitutional case on appeal of the Kyapaz district court of Ganja city on interpretation of Article 83.2 of the Criminal Code of the Republic of Azerbaijan;

having heard the report of Judge R.Qvaladze, the reports of the lawful representatives of the subjects interested in special constitutional proceedings and experts, the Plenum of Constitutional Court of the Republic of Azerbaijan

**DETERMINED AS FOLLOWS:**

In the Kyapaz district court of Ganja city during consideration of criminal case of Ramin Aslanov on Article 321.1 of the Criminal Code of the Republic of Azerbaijan (hereinafter referred to as Criminal Code) has been established that on 8 September 2005 according to the decision of Yasamal district court of Baku city he has been sentenced finally on the ground of Articles 127.1 and 128 of the Criminal Code, to 2 (two) years punishment in the form of correctional works, the beginning of the expiration of punishment actually was estimated from the moment of sentence execution.

On 8 June 2007 R.Aslanov has been released by the decision of the senior judicial executor of department of judicial executors of Yasamal district court from the punishment, according to point 3.4 of the decision of Milli Majlis of the Republic of Azerbaijan of 8 May 2007 “On the Amnesty devoted to memory of the National Leader of the Azerbaijan people of Heydar Aliyev”.

In October 2007 R.Aslanov has been called to active service, however without any good reason and the lawful basis he avoiding the military service has deliberately evaded from the next military call.

During consideration in court of the specified case there raised a question on application of point “b” of Articles 21.2 of the Law of the Republic of Azerbaijan “On bases of call for military service in the Republic of Azerbaijan”. According to this norm the person who are not released from a previous conviction for the crimes committed before, shall not be called on military service.

Considering the aforesaid, Kyapaz district court in its inquiry, addressed to the Constitutional Court of the Republic of Azerbaijan (hereinafter referred to as Constitutional Court), asks to give interpretation of norm, for the purpose of clearness whether the persons recognized guilty and condemned by sentence of court, but released from punishment on the basis of the amnesty act are related to the circle of persons, released from punishment by Article 83.2 of the Criminal Code.

In connection with the inquiry Plenum of the Constitutional Court notes the following.

According to Article 83.1 of the Criminal Code, the person condemned for commitment of a crime shall be considered as convicted from the date of the introduction of a decision of court into validity up to the moment of removal or release from a previous conviction.

As evident from article’s essence, the previous conviction is understood as a legal consequence of a crime and punishment. Here the crime acts as primary act, and condemnation and administration of punishment as its consequence.

Absence of one of three specified bases (a crime, a verdict of guilty, punishment) excludes the presence of conviction.

Just because of not adopting of guilty verdict on a case the persons released from a criminal liability on the bases, provided in Articles 72-74 of the Criminal Code and the persons released from punishment on the bases, provided in Articles 78 and 89 of the same Code are considered as not condemned.

As it gets evident from Article 83.1 of the Criminal Code, the previous conviction of the person condemned on a certain kind of punishment for commitment of a crime, begins from the date of the introduction of a decision of court into validity and proceeds both in a current of all term of punishment, and after the termination of term of punishment within the limits of the terms established by the law.

However the legal consequences of a previous conviction do not carry constant character and these consequences are eliminated by release from a previous conviction.

The criminal legislation, having connected occurrence of a previous conviction with setting of any punishment, considers the person released from punishment as not convicted (Article 83.2 of the Criminal Code).

However there are no instructions concerning the bases of clearing of punishment of the defendant in Article 83.2 of the Criminal Code.

In this connection Plenum of the Constitutional Court considers necessary to analyze the bases of releasing from punishment provided in the criminal legislation.

The bases of releasing of punishment are provided in different chapters of the Criminal Code. It concerns the conditional condemnation (Article 70), c**onditional - prescheduled release from serving a punishment** (Article 76), **replacement of deserved punishment by mitigating kind of punishment** (Article 77), r**elease from punishment in connection with illness** (Article 78), a d**elay from serving punishment to pregnant women and women having juvenile children** (Article 79), r**elease from serving punishment in connection with expiration of time limits for decision on accusation** (Article 80), amnesty (Article 81) and pardon (Article 82).

The legislator has not unequivocally approaches on the question of decision on presence of a previous conviction of the persons who have committed a crime.

So, according to Article 81.2 of the Criminal Code, person who has committed crimes can be released from a criminal liability by amnesty act.

In the Article 44 of the Criminal Procedure Code of the Republic of Azerbaijan (hereinafter referred to as Criminal Procedure Code) the condemnation grounds are provided. According to requirements of this article, during the trial in the circumstances if the person has released by an amnesty act, court shall absolve the accused of the penalty imposed (Article 44.2.2 of the Criminal Procedure Code).

Besides, according to Article 39.1.3 of the Criminal Procedure Code, if the time-limit for prosecution has expired (excluding the circumstances in which the time-limit for prosecution is suspended) a criminal prosecution may not start or should be discontinued.

Apparently from the contents of Article 43.3 of the specified Code, during the trial, if the time-limit for prosecution has expired the court may decide to discontinue the criminal prosecution only with the consent of the defence.

And in the absence of such consent, according to Article 44.2.1 of the Criminal Procedure Code, the court shall deliver a judgment of guilty but not impose a punishment.

In the Criminal Procedure Code it is established that in the absence of the grounds for acquittal or grounds for discontinuing criminal prosecution during the trial, specified in Articles 42 and 43 of the present Code, the court deliver a judgment of guilty in all other cases provided by the present Code and the criminal law (Article 44.2.4 of the Criminal Procedure Code).

Apparently, the criminal and criminal procedure legislation provides two unconditional circumstances of release from punishment by court on a verdict of guilty:

- if the time-limit for prosecution has expired;

- presence of amnesty act.

As opposed to it the legislator in connection with release from punishment gives conditional character to other norms of the Criminal Code.

These include conditional condemnation, c**onditional - prescheduled release from serving a punishment**, **replacement of deserved punishment by mitigating kind of punishment**, r**elease from punishment in connection with illness**, a d**elay from serving punishment to pregnant women and women having juvenile children**.

In the abovementioned cases it is a question of the persons who are serving a sentence for by a valid court sentence (Articles 76, 77, 78 of the Criminal Code), conditionally condemned or with a delay of serving of punishment (Articles 70 and 79 of the Criminal Code). From a point of view of requirements of Article 83.1 of the Criminal Code, such release from punishment does not eliminate a previous conviction.

According to the specified, Plenum of the Constitutional Court comes to such conclusion that Article 83.2 of the Criminal Code covers only the following cases on the basis of a court verdict of guilty:

- non imposition of punishments for the omission of period of limitation of time-limit for prosecution;

- release from punishment on the basis of amnesty act.

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

**DECIDED:**

1. Article 83.2 of the Criminal Code of the Republic of Azerbaijan covers only the following cases on the basis of a court verdict of guilty:

- non imposition of punishments for the omission of period of limitation of time-limit for prosecution;

- release from punishment on the basis of amnesty act.

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

3. 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”.

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