**ON BEHALF OF REPUBLIC OF AZERBAIJAN**

**DECISION**

##### OF THE CONSTITUTIONAL COURT

##### OF THE REPUBLIC OF AZERBAIJAN

*On interpretation of Article 83 of the Criminal Code of the Republic of Azerbaijan in connection with inquiry of the Court on Grave Crimes*

# 25 May, 2009 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: M.Khankishiyev, Judge of the Court on Grave Crimes;

the expert: professor F.Samandarov, Head of the Law Department of Baku State University, Doctor of Legal Sciences;

the specialists: M.Agazade, Judge of the Supreme Court of the Republic of Azerbaijan and G.Bayramli, deputy head of department of the General Prosecutor’s Office on public prosecution;

based on Article 130.6 of the Constitution of the Republic of Azerbaijan has examined in open court session the constitutional case on inquiry of Court on Grave Crimes of the Republic of Azerbaijan concerning interpretation of Articles 83 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 opinions of expert and specialist, the Plenum of Constitutional Court of the Republic of Azerbaijan

**DETERMINED AS FOLLOWS:**

By the decision of Lankaran district court of 19 January 2001 Adalat Mirishov was recognised guilty according to part II of Article 93.3 of the Criminal Code of the Republic of Azerbaijan which was valid till 1 September 2000 (hereinafter referred to as former CC) and has been sentenced to punishment in the form of imprisonment for the term of 1 year and 6 months. By the decision of the same court of 3 April 2002 he also has been recognised guilty according to Articles 177.2.1 and 177.2.2 of the Criminal Code of the Republic of Azerbaijan which came into force on 1 September 2000 (hereinafter referred to as CC) and was sentenced to punishment in the form of imprisonment for the term of 3 years and 6 months. According to Article 67 of the given Code was imposed the final punishment in the form of imprisonment for the term of 4 years 2 months and 7 days. On 20 April 2006 A.Mirishov has served a sentence.

Further, by a sentence of the same court of 14 December 2006 he was recognised guilty according to Article 221.1 of the CC and sentenced to punishment in the form of imprisonment for the term of 8 months and then was early discharged from punishment according to amnesty act.

On 13 June 2008 by the sentence of Lankaran district court A.Mirishov has been recognised guilty according to Articles 177.2.2, 177.2.3 and 177.2.4of the CC and was sentenced to punishment in the form of imprisonment for 4 years and 6 months.

The appeal protest via the procedure provided by Article 391.8.11 of the Criminal Procedure Code of the Republic of Azerbaijan (hereinafter referred to as CPC) on the given sentence was submitted. The protest has been proved by the fact that in view of non-serving by A.Mirishov’s of two previous convictions for commitment of theft, the preliminary investigation of his deeds should be qualified not by Articles 177.2.2, 177.2.3, 177.2.4 of the CC but by the Article 177.3.3 of the CC which provide for responsibility for commitment of theft by the person who have been sentenced two or more times for plunder or extortion.

On 1 August 2008 the protest has been satisfied by the decision of Judicial Board on Criminal Cases of Shirvan Appeal Court, the sentence was abolished and on the basis of the petition of the public prosecutor the judicial consideration on criminal case the proceedings was suspended, the criminal case is returned to the public prosecutor who was carrying out a procedural administration of preliminary investigation for submission of new charge against accused within 10-day term.

The preliminary investigation body conducted the additional investigation and a new charge under Article 177.3.3 of the CC against A.Mirishov was brought, the given case was directed for consideration to Court for Grave Crimes of the Republic of Azerbaijan.

The given court taking into account the presence of the various approaches to legislation requirements in connection with served conviction on criminal case, has addressed to the Constitutional Court concerning interpretation of Article 83 of the CC.

The Court, referring to point 10 of the decision of Plenum of the Supreme Court of the Republic of Azerbaijan of 28 June 2002 “On practice of imposing by courts of a kind of institutions on serving of punishment for the persons sentenced to punishment in the form of imprisonment” concerning not reductions of term of served conviction and independent calculation of terms of end for each previous conviction, has proved the position that in case of commitment by the person of the new crime, the not served part of previous punishment shall be added to the new punishment, thereby the first punishment is considered served from the date of announcement of a following sentence.

Plenum of the Constitutional Court in connection with the submitted request marks the following:

For the correct resolution of the question, first of all, the essence of institute of a previous conviction and also the purpose of imposition of punishment on set of crimes and sentences should be exposed.

The essence of institute of a previous conviction consists in that the person having a previous conviction is brought to deprivations of civil or administrative-legal character and the commitment by the given person of a new crime leads to occurrence of the criminal-legal consequences causing deterioration of position.

According to Article 83.1 of the CC of the Republic of Azerbaijan the person condemned for commitment of a crime is 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.

In the decision of Plenum of the Constitutional Court of the Republic of Azerbaijan of 8 July 2008 “On on interpretation of Article 83.2 of the Criminal Code of the Republic of Azerbaijan” is specified that, 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.

The current legislation provides two procedures of the termination of a previous conviction: release or removal of previous conviction (Articles 83.3 and 83.6 of the CC).

Release of previous conviction means the end of all legal consequences connected with the fact of condemnation for a crime committed by the person as a result of the expiry of the term provided by the law. For recognition of the person as non-convicted no any other document confirming the present fact or the special judicial decision is required.

In the present criminal legislation the terms of release of a previous conviction are differentiated according to the imposed punishment and a committed crime. The exception is provided only for the probationers: if probation is not cancelled on the bases established in Article 71of the CC a previous conviction of the persons condemned to given punishment extinguish after a suspension period (Article 83.3.1 of the CC).

According to Article 83.3.2 of the CC, the previous conviction is released with respect to persons condemned to more mitigate kinds of punishments than imprisonment - after the expiration of one year from the date of serving punishments. In this case the category of the committed crime has no significance.

The term of release of a previous conviction for the persons condemned to imprisonment fluctuates depending on the committed crime and is provided via following procedure: concerning persons condemned to imprisonment for crimes, not representing big public danger and less serious crimes - after expiration of three years from the date of serving the punishment; concerning persons condemned to imprisonment for minor serious crimes - after expiration of six years from the date of serving the punishment; concerning persons condemned for serious crimes - after expiration of eight years from the date of serving the punishment (Article 83.3.3 - 83.3.5 of the CC).

And in the Article 83.4 of this Code it is provided that if condemned in order provided by the law was prescheduled released from serving punishment or deserved part of punishment was replaced with mitigate kind of punishment, term of release from conviction should be estimated from a moment of release from serving a basic and additional punishment.

Thus, as it is evident from the content of Articles 83.3.2-83.3.5 and 83.4 of the CC, in all cases provided by the present articles the beginning of a term of release of a previous conviction is estimated from the moment of end of serving of punishment or exemption from punishment.

The given factor plays an important role in the decision of formulated question.

The previous conviction is reasoned not only the fact of condemnation of the person and imposing of punishment. The previous conviction expresses a legal status of condemned leading to the legal consequences established by the criminal legislation at repeated commitment of crime; the pending not removed previous conviction possessed by a person constitutes special social-legal relations which are formed between him and the state on the basis of the criminal-legal regulation serving for appraisal of person to in case if he commits new crimes and the crimes committed by him which represent big public danger and consequently imposing regarding concerning him of more austerity measures of legal character.

The criminal legislation also attributes to a number of such measures the imposing of punishments on set of crimes and sentences.

The concept of set of crimes and procedure of imposing of punishment are provided in Articles 17.1 and 66 of the CC.

According to the given norms, set of crime forms shall include two or more crimes, provided by various articles of the present Code, and if a person was not condemned or released from the criminal liability on the lawful grounds for committed crimes, and also if time for attraction to criminal liability on one of these crimes have not expired (Article 17.1 of the CC).

In case of imposing of the set of crimes the court imposes separate punishment for each crime and, by absorption of less strict punishment to more strict or by full or partial addition of the appointed punishments, imposes the final punishment. Punishment is appointed by the same rules if after adoption by court of a decision on case it was established that the condemned is guilty also in other crime accomplished by him before this judgment was adopted. In this case the period served on first decision of court shall be included into final punishment (Articles 66.1 and 66.5 of the CC).

According to Article 353.4 of the CPC, the judicial disposition of a verdict of guilty should specify the type and length of the sentence imposed for each offence proved to have been committed by the accused, the final sentence to be served, the date from which the sentence is to be served.

As it gets evident, the legislation along with imposition of individual punishment for each crime also establishes the imposition of one final punishment on set of crimes. Punishments for the criminal action constituting the set of crimes shall be accumulated together and the final punishment regarded by the legislator as a single shall be imposed.

The criminal legislation also establishes the assignment of punishment on sets of decisions. According to Article 67.1 of the CC, in case of assignment of punishment on sets of decisions the court, to the punishment imposed on a new decision, shall attach in part or completely the non-served part of punishment on the previous decision.

As it is seen from the sense of the given article, the non-served part of the punishment imposed on the first sentence is united with the punishment imposed on a new sentence and final single punishment shall be imposed.

As it is specified in request, unlike the old criminal legislation in the present criminal legislation there is no such provision as “the termination of calculation of term of release of a previous conviction”.

And in fact, the termination of calculation of term of a previous conviction for earlier committed crime, calculation of which term of release has begun, contradicts to the criminal law. But exceeding of this approach to cases when calculation of term of release has not begun would create the contradiction with requirements of Article 83 of the CC.

On sense of CC, the imposition of the new final punishment inevitably influencing a legal status of the person, prior to the beginning of calculation of term of releasing of a previous conviction, that is the serving of punishment, implies the continuation of term of a previous conviction.

Any other approach can lead to situation when during serving by the person of final punishment the terms of punishment on committed corresponding crimes or corresponding sentences to which he was condemned have already expired, and calculation of term of release of a previous conviction begun. And this contradicts to requirements of Articles 83.3, 83.4 of the CC connecting the calculation of term of release of a previous conviction with the termination of full serve of punishment or exemption from serving of punishment.

In view of the aforesaid, Plenum of the Constitutional Court comes to such conclusion that by implication of Articles 83.3, 83.4 of the CC in case of condemnation of the person on set of crimes or sentences the calculation of term of release of a previous conviction should be considered from the moment of finishing of serving of final punishment imposed on set of crimes or sentences, or exemption from punishment, in via separate procedure for each classification of crimes.

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. According to sense of Articles 83.3, 83.4 of the Criminal Code of the Republic of Azerbaijan in case of condemnation of the person on set of crimes or sentences the calculation of term of release of a previous conviction should be considered from the moment of finishing of serving of final punishment imposed on set of crimes or sentences, or exemption from punishment, in via separate procedure for each classification of crimes.

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.