**ON BEHALF OF REPUBLIC OF AZERBAIJAN**

**DECISION**

##### OF THE CONSTITUTIONAL COURT

##### OF THE REPUBLIC OF AZERBAIJAN

*On interpretation of Article 449.2.3 of the Criminal Procedure Code*

*of the Republic of Azerbaijan*

# 5 August, 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 (Reporter Judge), F.Babayev, S. Hasanova, , R.Qvaladze, I.Najafov and A.Sultanov;

attended by the Court Clerk I. Ismayilov,

the legal representative of the subject interested in special constitutional proceedings: I.Shirinov, Judge of the Nasimi District Court, I.Jafarov, Head of Department of maintenance of state prosecution of General Prosecutor’s Office of the Republic of Azerbaijan, E.Askerov, senior adviser of department of the administrative and military legislation of Milli Majlis of the Republic of Azerbaijan,

the expert: F.Abbasova, Head of Chair of Criminal Procedure of the Baku State University;

based on Article 130.4 of the Constitution of the Republic of Azerbaijan has examined in open court session the constitutional case on request of Nasimi District Court of Baku city of 19 March 2009 concerning interpretation of Article 449.2.3 of the Criminal Procedure Code of the Republic of Azerbaijan;

having heard the report of Judge E.Mamedov, the reports of the lawful representatives of the subjects interested in special constitutional proceedings and opinions of expert, the Plenum of Constitutional Court of the Republic of Azerbaijan

**DETERMINED AS FOLLOWS:**

From the submitted materials it gets obvious that on 23 February 2007 on the basis of A.Kyazimov's complaint the General Prosecutor’s Office of the Republic of Azerbaijan had initiated a criminal case. By the resolution of the inspector of Head Department of Police of Baku city (hereinafter referred to as HDP of Baku city) of 1 August 2007, taking into account the fact that the materials of investigation did not prove the availability in A.Madatov's actions of a components of Article 186.2.2 and Article 306.1 of the Criminal Code, the criminal prosecution and criminal proceedings concerning him was ceased. The given decision were appealed by A.Kyazimov via procedure of judicial review and by the decision of Nasimi district court of 15 September 2008 the complaint was upheld - the resolution of the inspector of 1 August 2007 concerning the ceasing of a criminal case was canceled and the conducting of investigation of the case was transferred to another inspector.

Having disagreed with this decision the chairman of Housing Association “Abida” A.Madatov lodged a complaint to Nasimi district court via procedure of judicial review.

In the complaint it was noted that on 20 October 2008 A.Madatov sent by mail to the inspector conducting an investigation on criminal case the written petitions for suspension and termination of proceedings on criminal case and in spite of expiration of sufficient time after delivery of petitions on 22 October 2008 to the inspector conducting an investigation on criminal case, there was given no respond on the specified petitions in the terms establish by the law and groundlessly the proceedings on criminal case was not terminated.

Through consideration of the complaint via procedure of judicial review the inspector conducting investigation on criminal case in his evidences specified that on criminal case A.Madatov was interrogated only as a witness. As he was not involved as accused or suspected person, there was no necessity to answer to the petitions submitted by him. Besides, [in view of the fact that](http://www.multitran.ru/c/m.exe?t=3475243_1_2) A.Madatov is not a subject possessing the right to the appeal via procedure of judicial review the processing of his complaint in court is illegal. The public prosecutor who conducted a procedural management of pretrial investigation expressed the consent with evidences of the inspector.

Nasimi district court, having heard the opinions of participants of court session and investigated the complaint of A.Madatov, the enclosed documents, materials of criminal case, came to a conclusion concerning necessity of interpretation of the legal norm which should be applied at proceedings via procedure of judicial review and adopted a decision to apply to the Constitutional Court of the Republic of Azerbaijan (hereinafter referred to as Constitutional Court).

In the request of court it is noted that as the decisions made by the body conducting the investigation actions and investigatory actions implemented with respect to A.Madatov directly infringe his legitimate interests and actually prejudice his innocence, then it can create a basis of recognition of his right to lodge a complaint against specified decisions via procedure established by the law.

However Articles 449.2.1-449.2.3 of the Criminal Procedure Code of the Republic of Azerbaijan (hereinafter referred to as CPC) establishing a circle of subjects possessing the right to submit of the complaint concerning procedural actions or decisions of body conducting the criminal procedure do not obviously provide such opportunity for the witness. As regards the using of the phrase “other persons” provided by Article 449.2.3 of specified Code, there exist absolutely differing approaches. Taking into account the existence among legal practitioners of different views on the matter, there emerges a need to officially interpret the phrase “other persons” used in this article.

In connection with the request of Nasimi district court the Plenum of the Constitutional Court considers necessary to note the following.

According to Article 60.1 of the Constitution of the Republic of Azerbaijan (hereinafter referred to as Constitution), legal protection of rights and liberties of every citizen is ensured. According to the part II of the specified article, everyone may appeal to law court regarding decisions and action (or inaction) of state bodies, political parties, trade unions, other public organizations and officials.

These provisions of the Constitution can be considered as the state guarantee of observance of the rights and freedoms of the person and as special responsibility of government bodies and public associations. The guarantee of legal protection means, on the one hand, the right of everyone to submission of the complaint to the relevant court, on the other hand - an obligation of court to consider this complaint and to adopt the lawful, fair and reasonable decision.

The right to legal protection is the integral component of the right inshrined in the international legal acts on fair judicial inquiry. This right covers a number of elements and possesses the wide legal contents. For example, according to the European Convention for the protection of human rights and fundamental freedoms (hereinafter referred to as European Convention), in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law (Article 6.1).

According to Article 71.1 of the Constitution to observe and to protect rights and liberties of a human being and citizen specified in the Constitution - is responsibility of bodies of legislative, executive and legal power. According to the part II of the specified article no one may restrict implementation of rights and liberties of a human and citizen.

The right to appeal, being an integral part of the rights and freedoms composing the legal status of the individual, for the exception of cases directly provided by the legislation, should not be limited in any area of the state activity and it has to be guaranteed to each person entering into relations with public authorities or their officials.

The right to appeal in criminal procedure, including the pre-trial procedure, has particular importance. So, in certain cases at implementation of justice and conducting fight against crime during investigation of criminal case the interrogating officer, the investigator, the prosecutor or the judge by the adoption of groundless decisions or commission of illegal actions (inactions) may exceed the allowed by the law necessary limitations of rights and freedoms of the persons participating in criminal procedure.

Ensuring the rights and legitimate interests of participants of criminal procedure is one of the most important obligations of bodies of investigation, prosecutor's office and courts. It is impossible to carry out true justice and to conduct effective fight against crime, without paying necessary attention to the rights of individual, in particular of participants of criminal procedure.

Protection and ensuring the rights and legitimate interests of each participant of criminal procedure is the integral substance of the constitutional state. The increase of guarantees of the rights and legitimate interests of these persons corresponds to interests not only of individual, but also society as a whole.

Therefore, the criminal procedure legislation provides the special rules of submission of complaints and their consideration as to procedural actions and decisions of officials and bodies responsible for implementation of criminal procedure.

Execution of functions of criminal legal proceedings is possible only in the conditions of security of the rights and legitimate interests of persons participating in criminal procedure. It is not by chance that in the acts regulating criminal legal proceedings of the Republic of Azerbaijan, there are absolutely and specifically established the protection of the rights and freedoms of everyone and also their guarantees.

The right of appeal is carried out at all stages of criminal legal proceedings. At the same time, implementation of the right of the appeal of participants of criminal procedure at each stage has the features. The object of the appeal, subject, circle of subjects, order of submission of the complaint belong to these features (cases, terms, etc.), a procedure of its consideration, a circle of people competent to examine a complaint, a basis of ensuring the right to the appeal, etc. Implementation of the right to the appeal makes special sense in a pre-judicial stage of criminal legal proceedings, since during this stage (especially at a stage of preliminary investigation) there is a possibility of groundless affection or illegal restriction of the rights and legitimate interests of a wide range of persons.

It is necessary to consider that each complaint of the participant of criminal procedure in itself has official character and is a kind of the appeal addressed to government bodies and their officials. From the legal point of view such complaint is made because the rights of a person are violated or his legitimate interests are not provided. In the conditions of prevention of violation or restriction from government bodies or their officials of the rights and legitimate interests of participants of criminal procedure the appeal of these participants to government bodies for other reasons has other legal nature. For example, an application is the different kind of appeal which is directed on implementation of legislatively vested subjective rights and interests of citizens. At the same time the refusal of ensuring the rights and legitimate interests, the failure of necessary measures for resolution of the appeal in essence by the representative on that body or officials creates the basis for the appeal against their actions.

Plenum of the Constitutional Court particularly notes that the complaint for any person, including the participant of criminal procedure, is the opportunity provided by the law for on the one hand to draw attention of the appropriate government bodies to violation of the rights, on the other hand – to protect and restore these rights. Solely for this reason, unlike other means of appeal, there is an appeal concerning the violated right on the basis of complaint. At the same time it should be noted that from the objective point of view the complaint can be made even concerning the actions corresponding to the law and sufficiently reasonable resolutions as the decision on their illegality or groundlessness can be adopted only after the relevant investigation. At the first stage it is enough that everyone who lodged the complaint, including the participant of criminal procedure, considered that the challenged actions or decisions violate his rights or do not correspond to the law.

Among the special proceedings of the CPC there is the proceedings relating to implementation of judicial control (Articles 442-454). Given proceeding is the absolutely new for the criminal procedural legislation, institute of lodging of the complaint to court. This institute, in the presence of information on violation of the rights and freedoms, actuate the judicial control over legality of actions and decisions of officials of the bodies which carry out criminal prosecution (special investigation means, interrogation, investigation).

When implementing the judicial control the court generally carries out two tasks: the ensuring of legality of various actions and the decisions adopted by the authorized bodies and officials; protection of the rights and freedoms of participants of criminal procedure (exception of unreasonable and illegal restrictions, termination of violation of the rights and their restoration).

As it gets evident from the text of Article 449.2 of the CPC, the following persons have the right to lodge a complaint concerning the procedural acts or decisions of the prosecuting authority: the accused (the suspect) and his defence counsel (Article 449.2.1), the victim and his legal representative (Article 449.2.2), other persons whose rights and freedoms are violated as a result of the decision or act (Article 449.2.3).

Articles 449.2.1 and 449.2.2 of the Criminal Procedure Code precisely defined the group of persons representing protection and charge among the subjects having the right to appeal, therefore there were no problems connected with this task when implanting this right.

The reason of the request of Nasimi district court is connected with the provision of Article 449.2.3 of the CPC “other persons whose rights and freedoms are violated as a result of the decision or act”. During consideration of the complaint of A.Madatov via procedure of judicial control the possibility of detection of the witness among “other persons” became interest for participants of process and caused the need for official interpretation.

Plenum of the Constitutional court considers that for studying of a commented question, along with the above provisions of the Constitution and the international legal acts, it is necessary to pay attention to Articles of CPC providing the human and civil rights and freedoms concerning the status of participants of criminal procedure and also to the international judicial practice.

First of all it is necessary to take into consideration that according to Article 9 of the CPC, the basic principles and conditions governing the criminal proceedings are provided for to ensure a protection against restrictions on human and civil rights and liberties. According to Article 12.1, the judicial authorities shall observe the human and civil rights and liberties afforded by the Constitution to all participants in criminal proceedings.

It is also necessary to note that according to Article 122.1 of the CPC the parties to criminal proceedings and, in accordance with the provisions of this Code, other participants in criminal proceedings may complain against procedural acts or decisions of the prosecuting authority.

According to the provision of Article 449.2.3 CPC, other persons whose rights and freedoms are violated as a result of the decision or act, also have the right to appeal against actions of the investigator and the prosecutor who is carrying out the procedural management of preliminary investigation via procedure of judicial control.

It is obvious that by the Articles 122.1 and 449.2 there were defined the general circle of persons having the right to appeal the procedural actions or resolutions of the bodies which carry out criminal procedure. Besides, the participants of criminal procedure and other persons participating in criminal procedure are also attributed to a circle of subjects possessing the right of the appeal.

The concept of the circle of persons related to “participants of criminal procedure” is explained in the second part of the CPC. According to this part, the persons participating in criminal procedure are shared on 5 groups: court (Articles 66-83); party of prosecution (Articles 84-89); party of defence (Articles 90-93); other persons which are taking part in criminal procedure (Article 94-99); representatives and legal heirs (Articles 100-106).

As Article 95 of the CPC which defines the position of the witness in criminal procedure is included into structure of part X of this Code, the witness is also a part of other persons participating in criminal procedure.

While Article 95 of CPC does not directly specify the right of the witness to challenge the actions and resolutions of responsible persons, according to Article 95.6.12 he is entitled to other rights provided by the present Code.

Thus, in Article 449.2.3 CPC when disclosing the definition “other persons whose rights and freedoms are violated as a result of the decision or act” relating to a number of entities entitled to challenge the procedural actions or decisions of the bodies which carry out criminal procedure via procedure of judicial control, it is necessary to take into account both Article 122.1 of the present Code and the provisions defining the structure of persons through entering into the concept “participants of criminal procedure” (the part II of the CPC), and also provisions of Article 95.6.12.

However, at the same time, it is necessary to specify that the sense of Article 449.2 of the CPC implies that the participants of criminal procedure including the defender or the lawful representative, respectively, can appeal against actions (inaction) and decisions of the interrogation officer, the investigator, the prosecutor who carry out the procedural management of preliminary investigation in the part where procedural actions and the adopted procedural resolutions concern the rights and legitimate interests of participants of criminal procedure. If one or another person is not the participant of criminal procedure then his right to appeal in the corresponding trial via procedure of judicial control cannot be recognized.

It is not by chance that during preparatory stage of a court session it is necessary to establish the jurisdiction of the complaint, the lodging of this complaint by the corresponding person, and also, according to Article 449 of the CPC, the subject of complaint and existence in this complaint of information necessary for its investigation.

In general it should be noted that the persons specified in Article 449.2 of the CPC, in any case have the right to appeal against procedural actions or resolutions of the bodies which carry out criminal procedure, in the cases stipulated by Article 449.3 of this Code.

At the same time, the Plenum of the Constitutional Court underlines that the courts recognizing the right of the participant of criminal procedure to challenge the actions and the resolutions affecting his rights and legitimate interests via the procedure established by the law, besides formal legal position of relevant person, should also have take into consideration his actual position and the rights which he possesses in this situation.

So, from the case materials considered in connection with the complaint by the Nasimi district court via procedure of judicial control, it follows that on 1 August 2007 investigator adopted the resolution on the termination of criminal prosecution and criminal proceedings concerning A.Madatov for failure of evidence in his actions of components of Articles 186.2.2 and 306.1 of the CC. When this criminal case was initiated A.Madatov during primary investigation was not defined as suspected or accused person and repeatedly questioned only as the witness. In that case for observance of criminal procedure requirements the questions concerning the actual legal status of A.Madatov and also his rights in this regard constitute the highlights which have to be established during judicial investigation regardless of how he was defined in procedural materials on criminal case.

It should be noted that according to Article 90.1 CPC, in the capacity of suspect there is recognized a person regarding whom it has been decided to detain with a view to submit a criminal charge, with the exception of a person detained on suspicion of committing an offence or a person about regarding whom a decision on the choice of restrictive measure, excluding arrest, bail and house arrest, is taken. According to Article 91.1 of the CPC, the individual whom the investigator, prosecutor or court decides to charge shall be referred to as the accused. Taking into account that under these articles A.Madatov was not recognized as suspected or accused because of absence of evidence in his actions of components of Articles 186.2.2 and 306.1 of the CPC the resolution on termination of criminal prosecution and discontinuance of proceedings concerning him was adopted. Such resolution can be adopted only with respect to the suspect or accused. In itself this situation can specify that A.Madatov actually is one of these persons. It is necessary to take into consideration that on the basis of Articles 90.7.20, 91.5.30 and of 449.2.1 of the CPC both suspected and accused have the right to challenge the resolutions or actions (inaction) of the officials who are carrying out criminal procedure.

The case-law of the European Court of Human Rights (hereinafter referred to as European Court) determined the norm different from provisions of CPC. In this regard it should be noted that in the sphere of interpretation of the European Convention the decisions of the European Court adopted on concrete cases are important since a case law is applied by the European Court and national courts of member-states of the Council of Europe.

In the decision on case of Deweer v. Belgium of 27 February 1980 the European Court declared that charge is a providing of official information from the government authority, indicating the commitment by the individual of criminal violation or the existence of the possibilities having important impact on his position in a quality of the suspect.

In the decision on case of Neumeister v. Austria of 27 June 1968 the European Court specified that the official notice of the individual on the beginning of his criminal prosecution is included into concept of charge.

If we follow the position of the European Court, then one can conclude that the resolution on termination of proceeding on the criminal case adopted by the investigator on 1 August 2007 that cancels the criminal prosecution of A.Madatov because of lack of evidence in his actions of components of Articles 186.2 and 306.1 of the CPC reinforced his in quality of the suspect.

According to Article 13 of the European Convention everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

As it gets evident, the right of other participants of criminal procedure, including witnesses, on the judicial appeal against actions and decisions of the officials who are carrying out criminal procedure, can be considered as corresponding to both Constitution and the European Convention, as well as the provisions of the existing criminal procedure legislation.

Due to this problem one should pay attention to the decision of the Supreme Court of the Russian Federation of 10 February 2009 “On practice of consideration by courts of complaints via procedure of Article 125 of the Criminal Procedure Code of the Russian Federation” that forms the judicial practice of Russia. In this decision the following explanation to courts was given: “… besides resolutions of the interrogator officer, the investigator and the head of investigative body on refusal in initiation of legal proceedings and the termination of criminal case according to the Article 125 of the CPC of the Russian Federation other decisions and the actions (inactions) of officials adopted at pre-judicial stages of criminal legal proceedings, if they can cause damage to constitutional laws and freedoms of participants of criminal legal proceedings or other persons whose rights and legitimate interests are broken or can complicate access of citizens to justice, shall be subject to the judicial appeal”.

To other resolutions and the actions (inactions) which can cause damage to the rights and freedoms vested by Constitution, it is possible to attribute, for example, the resolutions of the interrogator officer, the investigator and the head of investigative body on initiation of legal proceedings; on payment of a legal cost or return of the confiscated property to the rehabilitated; on refusal of assign of the defender or the admission of the lawful representative; pledge payment in accordance with the procedure established by legal process; on imposing and application of measures of procedural coercion to the suspect or accused, except for house arrest and imprisonment which are applied by a court decision.

Among the aspects which complicate the access of citizens to justice it is necessary to refer such actions (inactions) or the decisions of officials limiting the rights of citizens on participation in pre-judicial proceeding on criminal case which create to the citizen an obstacle for the further request for judicial protection of the violated right. Among these are, for example, the refusal in recognition of the person as the victim, refusal in reception of the message on a crime or inaction at verification of these messages, the resolution on stay of preliminary investigation and others”.

As it gets evident from the aforesaid, in Russian Federation which was a part of the USSR, as well as the Republic of Azerbaijan enduring nowadays a similar transition period to new legal values, the citizens, at stages of pre-judicial (criminal) proceeding, are recommended to use actively the right to challenge the decisions and actions (inaction) of officials.

Thus, taking into consideration the aforesaid, Plenum of the Constitutional Court comes to a conclusion that the provision of the Article 449.2.3 “other persons whose rights and freedoms are violated as a result of the decision or act” of the Criminal Procedure Code of the Republic of Azerbaijan does not exclude the right of the witness to the appeal against procedural actions or resolutions of the body which is carrying out criminal procedure because he is attributed to the other participants of criminal procedure. However the other participants of criminal procedure, including witnesses, have the right to appeal against decisions and actions (inaction) of officials of the body which is carrying out criminal prosecution, only in case if the carried-out actions and the adopted decisions affect their rights and legitimate interests, can harm their rights and freedoms enshrined in the Constitution of the Republic of Azerbaijan or to complicate the appeal (access) to justice.

Being guided by parts IV and IX of Article 130 of the Constitution of the Republic of Azerbaijan, Articles 60, 62, 63, 65, 66, 67, and 69 of the Law of the Republic of Azerbaijan “On Constitutional Court”, the Constitutional Court of the Republic of Azerbaijan

**DECIDED:**

1. The provision of the Article 449.2.3 “other persons whose rights and freedoms are violated as a result of the decision or act” of the Criminal Procedure Code of the Republic of Azerbaijan does not exclude the right of the witness to the appeal against procedural actions or resolutions of the body which is carrying out criminal procedure because he is attributed to the other participants of criminal procedure. However the other participants of criminal procedure, including witnesses, have the right to appeal against decisions and actions (inaction) of officials of the body which is carrying out criminal prosecution, only in case if the carried-out actions and the adopted decisions affect their rights and legitimate interests, can harm their rights and freedoms enshrined in the Constitution of the Republic of Azerbaijan or to complicate the appeal (access) to justice.

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.