**ON BEHALF OF REPUBLIC OF AZERBAIJAN**

**DECISION**

##### OF THE CONSTITUTIONAL COURT

##### OF THE REPUBLIC OF AZERBAIJAN

*On interpretation of Articles 39.1.5 and 41.2 of the Criminal Procedure Code*

*of the Republic of Azerbaijan*

# 17 June, 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.Qvaladze, I.Najafov and A.Sultanov (Reporter Judge);

attended by the Court Clerk I. Ismayilov,

the legal representative of the subject interested in special constitutional proceedings: I.Kerimov, Judge of the Nasimi District Court, E.Askerov, senior adviser of department of the administrative and military legislation of Milli Majlis of the Republic of Azerbaijan,

the expert: M.Gafarov, associate professor of the Chair of Criminal Procedure of the Baku State University;

the specialists: M.Aghazade, Judge of the Supreme Court of the Republic of Azerbaijan, M.Mirzoyev, senior investigator of Office of General Prosecutor of the Republic of Azerbaijan,

based on Article 130.6 of the Constitution of the Republic of Azerbaijan has examined in open court session on special constitutional proceeding the constitutional case on request of Nasimi District Court of Baku city concerning interpretation of Articles 39.1.5 and 41.2 of the Criminal Procedure Code of the Republic of Azerbaijan;

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

**DETERMINED AS FOLLOWS:**

The Nasimi District Court of Baku city in its request concerning interpretation of Articles 39.1.5 and 41.2 of the Criminal Procedure Code of the Republic of Azerbaijan (hereinafter referred to as CPC), specified that on 21 November 2006 behind the building N 7 at the address: the Baku city, Eni Yasamal, 2 there was found corpse of S. Ibragimov, nearby the gun from 9 mm with 7 cartridges in a charger, an unused wide sticky tape, on a roof of this building the thick knit rope attached to a concrete ledge, sagging to the 7th floor, a nail-catcher on a ledge where the rope was attached.

On the same day the internal affairs body, according to Article 39.1.5 of the CPC, adopted the resolutions on cessation of proceedings on the criminal case raised on Articles 29, 181.2.3, 29, 181.2.5 and 228.1 of the Criminal Code of the Republic of Azerbaijan (hereinafter referred to as CC), but on the basis of complaints of close relatives and the lawyer of the dead these resolutions were cancelled by the prosecutor who was carrying out the procedural management over preliminary investigation, and by the court via procedure of judicial control the case was returned in investigative authorities for carrying out of additional investigation.

At the last time on 10 August 2009 the investigative department on cases of grave crimes of the Office of General Prosecutor of the Republic of Azerbaijan once again terminated the proceedings on criminal prosecution under Article 39.1.5 of the CPC having indicated that S. Ibragimov's murder was not confirmed, there is no criminal incident in his death, and in his action there were signs of components of Articles 29, 181.2.3, 29, 181.2.5 and 228.1 of CC.

S. Ibragimov's defender, having made the complaint against this resolution via procedure of judicial control, indicated that neither he nor S. Ibragimov's close relatives along with other circumstances were not acquainted with materials of criminal case and according to Article 41.2 of the CPC at cessation of proceeding on criminal prosecution their consent was not received.

The Nasimi District Court of Baku city when examining the complaint considered that in the norms concerning possibility of the termination of the instituted criminal prosecution in case of death of the person who has committed an action provided by the criminal law, without receiving the consent provided in Article 41.2 of the CPC there is an inferiority and in need of the rehabilitation fixed in Article 39.1.5 of the CPC the mechanism of implementation of it in the legislation is not provided. And this creates a misunderstanding and uncertainty in practice.

According to the above, the court in connection with consideration of this complaint asked to interpret the Articles 39.1.5 and 41.2 of the CPC from the point of view of Articles 60 and 71 of the Constitution of the Republic of Azerbaijan (hereinafter referred to as Constitution), and also Article 6 of the Convention “On protection of human rights and fundamental freedom” (hereinafter referred to as Convention).

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

According to the Article 12.1 of the Constitution ensuring the rights and liberties of a person and a citizen is the highest objective of the State. The state guarantees protection of rights and liberties of all people. 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. State bodies may function only on the basis of the present Constitution, in the manner and within the boundaries pre- scribed by law (Article 26.2, parts I and X of Article 71 of the Constitution).

These provisions of the Constitution guaranteeing the protection of rights and freedoms of everyone by the State include also the inadmissibility of unauthorized actions of judges or officials of the bodies which carry out criminal trial on illegal suspicion, charge or condemnation of persons who are innocent in commission of crime. And Article 60 of the Constitution guarantees the protection of the rights and freedoms of everyone in court.

The right to fair trial guaranteed by judicial protection includes the right to a acquittal of the person whose fault was not proved by authorized court. Acquittal being the right of accused person is confirmed by the act of the judicial authority officially declaring and providing his innocence – the verdict of not guilty.

So, the importance of ensuring of protection of the rights and freedoms of the persons attracted to criminal proceedings, caused the inclusion in the criminal procedure legislation of institute of an acquittal (rehabilitation) (Article 55.1 of the CPC). According to Article 350.1 of this Code, the verdict of not guilty of the court represents the final decision on the results of the court’s examination of the case to the effect that the accused is not guilty of the charge brought against him in court.

The essence of an acquittal and its wide character has special value as regards the question of an acquittal of the dead accused or suspected. So, Article 39 of the CPC establishes the circumstances which exclude criminal prosecution. Article 39.1.5 of this Code establishes as one of the bases of the termination of criminal prosecution (or deviations of initiation of criminal prosecution) the circumstance of death of the person which took place after commission of action provided by the criminal law. According to this article, if a person dies after committing of action provided for in criminal law (excluding the circumstances in which it is necessary to acquit the person) a criminal prosecution may not start or should be discontinued.

As it gets evident from contents of article, first of all, a criminal prosecution (or criminal case) may not be initiated with respect to the deceased person. If a criminal prosecution (or criminal case) is initiated on a fact upon or the person died after institution of prosecution concerning him the instituted criminal prosecution (or criminal case) should be discontinued. In any case the termination of criminal prosecution (or criminal case) in connection with death of the person is caused by that he is recognized as committed the action provided by the criminal law.

And this, in its turn, demands the determination of the reasons of incident, the giving of correct legal assessment, establishment of the damage caused to society or individuals, the relation of the person to commission of the action provided by the criminal law, research of the circumstances indicating the absence of criminal incident, corpus delicti, absence of correlation between person and committed crime and an absence of proof of his guilt which can make necessary its acquittal, and also participation in commission of action of other persons. And these aims can be reached only by carrying out the investigative actions. Therefore, the circumstance specified in Article 39.1.5 of the CPC, as a rule, provides the termination of criminal prosecution (or criminal case).

In spite of the fact that application of this article at a stage of preliminary investigation is left to the discretion of the interrogating officer, the investigator or the prosecutor, the legislator on this basis causes the termination of criminal prosecution by existence of certain facts of the case, that is the circumstances which have made necessary an acquittal of the died person. In the presence of similar circumstances they have to be comprehensively, completely and objectively investigated. If as a result of the proceeding directed on a full or partial acquittal of the died person the commission by the deceased person of the action provided by the criminal law was not established the criminal prosecution proceeding has to be stopped under Articles 39.1.1, 39.1.2 and 39.2 of this Code, that is on the rehabilitation bases. And in case of establishment of the sufficient circumstances proving the commission of an action provided by the criminal law by deceased person, criminal prosecution in his relation can be stopped under Article 39.1.5 of the CPC.

According to Article 63 of the Constitution guaranteeing a presumption of innocence, everyone concerning which criminal prosecution, including concerning which criminal prosecution is stopped even without the acquittal bases is stopped, is considered innocent, and in this regard recognition him as guilty is inadmissible. So, the resolution of the interrogating officer, the investigator or the prosecutor on cessation of proceedings on criminal case does not replace a sentence of court and, respectively as it is provided by the constitutional norm fixing a presumption of innocence, cannot be considered as the act establishing guilt of the deceased person.

On the other hand, according to Article 280.4 of the CPC, in case of discontinuation of criminal proceedings in the circumstances provided for in Article 39.1.1, 39.1.2, 39.1.11 and 39.2 of this Code, it shall be prohibited to include into decision the provisions causing the doubt as to the innocence of the person against whom the proceedings were discontinued. Within the sense of this norm, the provisions calling into question the innocence of the person with respect to whom the criminal case proceeding on the basis of other circumstances including under Article 39.1.5 of the CPC is stopped can be included in the decision.

In this sense it should be noted that, according to the legal position of Plenum of the Constitutional Court, an assessment of the person concerning whom the charge for commission of action (not constituting big public danger), provided by the criminal law (article 223.2, 297.0.2 and 300.1.2 CPC) as the committed crime (repeatedly) on again instituted criminal prosecution is brought (the decision of Plenum of the Constitutional Court on interpretation of notion of “person who have committed a crime for the first time that does not represent a significant public danger” fixed in the Articles 72, 73 and 74 of the Criminal Code of the Republic of Azerbaijan of 25 December 2009) is possible. From this it follows that the weighty suspicions, on which the conclusion of investigative body concerning recognition of the person who committed an action provided by the criminal law is based, can be described in the decisions on criminal proceedings, including the decision on the termination of criminal prosecution.

According to case-law of the European Court of Human Rights on similar questions, the reflection in decisions on criminal proceedings of existence of weighty reasonable suspicions against the person in commission of crimes, and recognition of this person as the one who committed criminal action on this basis in spite of the fact that his guilt in commission of crime was not ascertained yet according to the law, does not make a contradiction with a presumption of the innocence guaranteed by Article 6.2 of the Convention (ruling in the case of R. v. Germany of 11 October 1988 and the decision on case of Garycki v. Polandof 6 February 2007, §§ 66-67).

Nevertheless, the existence even of the similar decision as to the person concerning whom the criminal prosecution was stopped (or institution is rejected) in the absence of the acquittal bases, can affect its reputation and lead to emergence of other public consequences following from this. So, recognition of the person as committed the action provided by the criminal law, within the procedural decision without a sentence of the court which has entered into force, can inevitably affect his personality and reputation. And this, in its turn, can demand the protection of the rights including honor and dignity, fixed in Article 46 of the Constitution.

From this point of view the Article 41.2 of the CPC regulating the procedure of the termination of criminal prosecution at a stage of preliminary investigation has important significance. According to this norm, in the absence of the acquittal bases the interrogating officer, the investigator or the prosecutor has no right to take out the decision on the termination of criminal prosecution without consent of accused (suspect). In that case criminal prosecution proceeding proceeds in an order established by the present Code, and comes to the end with adjudgement, other decision of court.

As it gets evident from the content of this norm, the legislator established the possibility of pronouncement of the decision on the termination of criminal prosecution on the acquittal bases by the interrogating officer, the investigator or the prosecutor not for own reason but based on the consent of accused (suspect). Similar approach coincides with a legal position of the European Court of Human Rights, that found its reflection in its decision of 5 July 2001 on case of Phillips v. the United Kingdom. The European Court on Human Rights specified in this decision that, a person’s right in a criminal case to be presumed innocent and to require the prosecution to bear the onus of proving the allegations against him or her forms part of the general notion of a fair hearing under Article 6 § 1 (§ 40)

It is also necessary to note that in spite of the fact that the mentioned provision of CPC relates to the person who was given the status of accused (suspect) on criminal trial, Article 39.1.5 of the CPC, without connecting circumstance of death only with the persons possessing the status of accused (suspect), also includes the person who does not have any status on criminal prosecution but considered by the body of preliminary investigation as committed the action provided by the criminal law. In view of the fact that in Article 7.0.18 of the CPC such person is not specified among participants of criminal trial, in case of application of Article 39.1.5 CPC this person, without having the procedural status, becomes attracted to criminal proceedings.

So, within the sense of Article 39.1.5 of the CPC, the termination of criminal prosecution is substantiated by the fact the identity of the person who committed a crime was identified and commission of this action by him was confirmed by collected materials, however the criminal prosecution (or criminal case) was stopped in view of impossibility of attraction of him as accused, presentations to him of charge and drawing up the indictment because of death of this person. In that case, the deceased person even though is not formally recognized in the capacity of accused on criminal case but the decision on commission of the action, provided in the criminal law, by him is adopted.

Taking into account the peculiarity of a legal status of this person, the criminal procedure legislation called him as “the person who can be charged” (Articles 46.5-46.5.2 of the CPC). According to the noted norms, for immediate initiation of legal proceedings it is enough the existence of the circumstances provided by Article 209.2 of the present Code. In this case the comprehensive, full and objective preliminary proceedings before establishment of circumstances specified in Articles 39.1.4-39.1.7 and 39.1.10 of this Code excluding criminal prosecution of the person only who can be accused of commission of the action provided by the criminal law is conducted.

In this regard it is necessary to especially emphasize that, according to the legal position expressed in the decision of the European Court of Human Rights of 21 December 2000 on case of Heaney and Mcguinness v. Ireland, that the autonomous meaning of the expression “charge” in Article 6 § 1 of the Convention means that a person can be considered to have been “charged” for the purposes of that Article when that individual's situation has been “substantially affected” (§41). The need of interpretation of the concepts relating to the procedural status, including the concepts “accused” of constitutional and legal sense, and the account not only formal procedural position of the person concerning which criminal prosecution is carried out, but also his actual position for implementation of constitutional laws, meets in practice of bodies of the constitutional proceeding and other countries (definition of the Constitutional Court of the Russian Federation of No. 440-O of 4 December 2003).

Plenum of the Constitutional Court, in connection with the practice of the European Court of Human Rights, considers that the concept “accused” provided in Article 41.2 of the CPC, is subject to extensive interpretation. The rights relating to accused have to be widespread on any person, whose individual situation is substantially mentioned in view of the fact that with respect to him the procedural actions of accusatory character even if he does not possess this status, including the person who has died after commission of act, provided by the criminal law and concerning whom it is provided to apply Article 39.1.5 of the CPC with pronouncement of the decision of accusatory character about the termination of criminal prosecution are actually made.

According to the last position, as regards the protection of the rights of the person with respect to whom the criminal prosecution was ceased even if Article 2 of the Convention does not create for investigation authorities of the obligation of responding all demands made in connection with specific investigative actions by close relatives during the investigation (the decision of 15 May 2007 on case of Ramsahai and others v. the Netherlands, § 348). According to the formed legal position of the European Court the close relatives of the deceased person in any case have to be involved in process on all affairs in that measure of which they demand providing the legitimate interests (the decision of 7 January 2010 on case of Rantsev v. Cyprus and Russia, § 233; the decision of 27 July 2004 on case of Slimani v. France, § 32 and the decision of 4 May 2001 on case of Hugh Jordan v. the United Kingdom, §109). The European Court in the decisions on a number of cases emphasized that involvement of close relatives of the deceased person to process, granting to them access to materials of criminal case and providing them with corresponding data is important (the decision of 27 July 1998 on case Güleç against Turkey, § 82; the decision of 20 May 1999 on case of Ogur v. Turkey, § 92; the decision of 4 May 2001 on case of Kelly and others v. the United Kingdom, § 127; and the decision of 8 January 2009 on case of Dangayev and Taramov v. Russia, § 96).

Within resolution of the matter the approach of other member-states of the Council of Europe also causes interest. For example, in Article 199.2.2 of the CPC of the Republic of Estonia a continuation of criminal prosecution in case of the acquittal requirement from the representative of the suspect or accused is provided. Also, in within CIS: the procedural legislation of the Republic of Uzbekistan there is similar position. Article 84.2 of the CPC of this country provides that in case of death of accused or condemned, criminal proceedings can be continued via general procedure in case of insisting of close relatives of the deceased person.

In this regard it should be noted that the legislation of our country provides for some possibilities of participation of close relatives of deceased person in criminal trial. For example, according to Article 464.5 of the CPC if re-examination is applied for with a view to acquitting the convicted person, that person’s death shall not prevent examination of the court judgment or decision on the basis of newly discovered facts. In that case, the application for examination of the court judgment or decision on the basis of newly discovered facts may be filed by the spouse or other close relative of the dead person. And Article 43.3 of the CPC which can be recognized as one of opportunities of representation of close relatives of deceased person in criminal trial, establishes that during the trial, the court may decide to discontinue the criminal prosecution with the consent of the defence in the circumstances envisaged by Articles 39.1.5.

Taking into account the legal position of the European Court and applying though analogy the right of the party of defence to the judicial review, provided in Article 43.3 of the CPC, to a stage of preliminary investigation, the Plenum of the Constitutional Court considers that at the termination of criminal prosecution without the acquittal bases in case of death of the person who committed an action provided by criminal law, including, according to Article 39.1.5 of this Code, for implementation of his right provided in Article 41.2 of the CPC, the close relatives of the deceased person, specified in Article 7.0.32 of the CPC, and his defender provided in Article 7.0.28 of this Code, shall have to possess a right of protest. The similar protest has to be based on reasonably established facts and considerable proofs.

From this point of view it is necessary to bear in mind that in Article 219 of the CPC acting till 1 September 2000, there were enshrined the right of close relatives (and also the public organizations which member he was) of the deceased accused person to ask for completion of preliminary investigation for the purpose of his acquittal. However in the current criminal procedure legislation the mentioned right of these persons is not regulated.

According to above-stated the Plenum of the Constitutional Court comes to a conclusion that in view of the fact that implementation of the rights of close relatives of the deceased person on participation in proceeding on criminal case at application of Article 39.1.5 of the CPC is not settled in the CPC, and according to Article 94.1.6 of the Constitution, settling of the matter belongs to powers of legislature, to the Milli Majlis of the Republic of Azerbaijan it has to be recommended to adjust within shortest terms the rights to participation in criminal trial of close relatives of the deceased person in the.

The similar conclusion follows from a reason that the right of proof of innocence of each person in the commission of act, provided by the criminal law, was not limited in a contradiction with Articles 60 and 63 of the Constitution which guarantee the judicial protection and a presumption of innocence, and provisions of Articles 2 and 6 of the Convention which guarantee the right to a productive investigation and fair judicial proceedings. On the other hand, the termination of criminal prosecution according to Article 39.1.5 of the CPC without legitimate interests of close relatives of deceased person can also cause damage to the tasks of the criminal procedure legislation. From the point of view of achievement of these tasks the condemnation and an acquittal are admitted as two parties of criminal procedure activity connected among themselves.

Establishment of the truth in connection with the committed crime serves for crime prevention. From this point of view it is worthy to emphasize that at the termination of criminal prosecution (or criminal case) in connection with death of the person recognized as committed crime, this person it is considered as committed the action provided by the criminal law even if his fault won't be proved in judicial review on merits. The similar solution of a question does not exclude the possibility of avoidance by the real criminal of responsibility and continuation of the criminal activity, on the contrary, increases this probability. And it is inadmissible from the point of view of the above-noted provisions of the Constitution.

The solution of a question of guilt of a person by court on merits excludes the emergence of similar situation. It is indicated also in Article 350.4 of the CPC. According to this article if, when an acquittal is given, the person who committed the offence remains unknown, the court shall refer the criminal case file or the file on simplified pre-trial proceedings to the public prosecutor, once the judgment has become final, to decide the question of the criminal prosecution of that person in accordance with the provisions of this Code.

Along with this the Plenum of the Constitutional Court considers that before entering into the criminal procedure legislation of the corresponding additions and changes there should ensured the guarantees which can protect honor and dignity of close relatives of the person with respect to whom Article 39.1.5 of the CPC was applied, including the possibility to challenge the decision on termination of criminal prosecution via procedure of judicial supervision. This mean will create in a certain degree of a condition for implementation of a guarantee of the judicial protection fixed in Article 60 of the Constitution, as guarantor of all constitutional laws and freedoms, in accordance with Article 450 of the CPC, and by that the restoration of the rights by means of the trial responding to the right to fair judicial proceedings.

Similar approach found its reflection in Article 449.2.3 of the CPC which reinforced the right of not only participants of criminal trial, but also of other persons, whose rights and freedoms were broken because of adoption of the decision or carrying out of action, to challenge the of actions or decisions of the officials who are carry out the criminal prosecution. Proceeding from this, with the view of productive implementation of a guarantee of judicial protection the close relatives and the defender of deceased person shall have the right to examine materials of criminal case, to lodge a petitions for implementation of procedural measures and to receive data on a course of investigation, including the adopted decisions.

It is also necessary to consider that in case of cancellation of the decision on application with respect the person of Article 39.1.5 of the CPC followed by recognition him as the one who committed the action, provided by the criminal law, according to Article 451.3.1 of the CPC the termination of criminal prosecution (or criminal case) on the same facts and arguments is inadmissible.

Thus, Plenum of the Constitutional Court, according to the above stated comes to such conclusion that:

It should be recommended to Milli Majlis of the Republic of Azerbaijan to adjust within shortest terms the rights of close relatives and the defender of the deceased person to participation in criminal trial in case of application Article 39.1.5 CPC via the procedure corresponding to Article 41.2 of this Code;

Before entering into the criminal procedure legislation of the corresponding additions and changes the right of close relatives and the defender of deceased person to challenge the decision on the termination of criminal prosecution (or criminal case), according to Article 39.1.5 of the CPC, can be carried out via procedure of judicial supervision.

Being guided by Article 130.6 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. To recommended to Milli Majlis of the Republic of Azerbaijan to adjust within shortest terms the rights of close relatives and the defender of the deceased person to participation in criminal trial in case of application Article 39.1.5 CPC via the procedure corresponding to Article 41.2 of this Code.

2. Before entering into the criminal procedure legislation of the corresponding additions and changes the right of close relatives and the defender of deceased person to challenge the decision on the termination of criminal prosecution (or criminal case), according to Article 39.1.5 of the CPC, can be carried out via procedure of judicial supervision.

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

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

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