**ON BEHALF OF THE REPUBLIC OF AZERBAIJAN**

**DECISION**

# OF THE PLENUM OF THE CONSTITUTIONAL COURT

**OF THE REPUBLIC OF AZERBAIJAN**

## On conformity of Article 53.8 of the Code of Administrative Offences to Constitution and laws of the Republic of Azerbaijan

**2 December, 2010 Baku city**

The Plenum of the Constitutional Court of the Republic of Azerbaijan composed of Farhad Abdullayev (Chairman), Sona Salmanova, Fikret Babayev, Sudaba Hasanova (Reporter-Judge), Rovshan Ismaylov, Jeyhun Garajayev, Rafael Gvaladze, Isa Najafov and Kamran Shafiyev;

attended by the Court Clerk I.Ismayilov,

representative of the addressed body – Mahir Mammadov, the senior adviser of Scientifically-analytical Department of the Staff of Ombudsman,

representative of respondent body – Ilgar Jafarov, senior adviser of Department for Administrative and Military Legislation of Milli Majlis of the Republic of Azerbaijan,

expert – Elshad Nasirov, senior lecturer of the Chair of Constitutional Law of Baku State University,

specialists – Abulfat Magerramov, Djeyran Kazimova, Hayala Abbasova, employees of the Ministry of Social Protection of Population and Labour, Ministry of Finance of the Republic of Azerbaijan and State Service of Migration,

has examined in open session via special constitutional proceedings in accordance with Article 130.VII of the Constitution of the Republic of Azerbaijan the constitutional case on the basis of inquiry of Ombudsman of the Republic of Azerbaijan on 30 July 2010 on conformity of Article 53.8 of the Code of Administrative Offences to Articles 25, 71, 79, 147 and parts I and III of the Constitution of the Republic of Azerbaijan.

Having heard the report of Judge S.Hasanova and statements of the representatives of the parties and opinion of expert and specialists, studied materials and examined the case, the Plenum of the Constitutional Court of the Republic of Azerbaijan

**DETERMINED AS FOLLOWS:**

Ombudsman of the Republic of Azerbaijan in its inquiry to the Constitutional Court of the Republic of Azerbaijan (hereinafter referred to as Constitutional Court) asked for verification of conformity of Article 53.8 of the Code of Administrative Offences (hereinafter referred to as CAO) approved by the Law of the Republic of Azerbaijan of 11 July 2000 to Articles 25, 71, 79, 147 and parts I and III of the Constitution of the Republic of Azerbaijan (hereinafter referred to as the Constitution).

According to Article 53.8 of the CAO involving of the foreigners or stateless persons by the employer to the work without obtaining individual permits with violation of the requirements of the legislation involves penalization on officials at the rate of thirty thousand to thirty five thousand manats.

According to the conclusion of a applicant in view of the fact that expression “employer” provided in challenged norm covers the legal person, individual and official and that the upper limit of the size of a penalty is set by provisions of the general part of CAO, and penalty application against them penalty “at the rate from thirty thousand to thirty five thousand manat” for the specified administrative offense, violating the rights of individuals and officials does not correspond to the criteria of justice which are put forward against the normative legal act, and do not correspond to the abovementioned provisions of the Constitution.

Plenum of the Constitutional Court, in connection with the inquiry considers necessary to note the following.

The legislation on administrative offenses is based on the Constitution, the universally recognized international legal norms and principles. Tasks of this legislation include protection of the rights and freedoms of the person and the citizen, his health, sanitary and epidemiologic wellbeing of the population, public moral, property, economic interests of persons, a public order and public safety, environment, ruled managements, strengthening of legality and prevention of administrative offenses.

According to Article 3 of the CAO, only person, who was declared guilty for committing administrative violations under this Code and had performed a deed (action or inaction) having all other signs of an administrative violation, shall be called to account and punished.

According to Article 12 of the CAO an administrative violation is characterised as a guilty (deliberate or careless) deed (action or inaction), infringing upon social relations protected by this Code, which would involve an administrative liability.

The persons who have reached 16 years upon performing the administrative violation shall be called to account for an administrative violation. Foreigners and persons without citizenship are called to account for administrative violations committed in the territory of the Republic of Azerbaijan as per generally accepted rules. Officials bear administrative responsibility for administrative violations connected with non-fulfillment or improper fulfillment of their duties. Legal persons including foreign legal persons bear administrative responsibility for administrative violations under this Code as per generally accepted rules (Articles 15.1, 15.6, 16 and 17 of the CAO).

According to Article 69.I of the Constitution, foreigners and stateless persons staying in the Republic of Azerbaijan shall enjoy all rights and fulfil allduties equally with citizens of the Republic of Azerbaijan, unless otherwise provided by law or international treaty to which the Republic of Azerbaijan is a party.

Bases of implementation of the right to work of foreigners and stateless persons it is regulated by the labor legislation of the Republic of Azerbaijan. According to Article 13.1 of the Labour Code of the Republic of Azerbaijan (hereinafter referred to as Labour Code) foreign citizens and stateless persons who have entered into employment contracts are enjoy the same rights and have the same obligations as defined in this Code, regardless of their length of stay in the Republic of Azerbaijan, unless provided otherwise by law or an international treaty to which the Republic of Azerbaijan is a party.

Employers can involve the foreigner or the stateless person only after obtaining private permission for implementation of paid labor activity on the territory of the Republic of Azerbaijan, in an order established for them by the legislation (Article 13.4 of the Labour Code).

At the same time, in the labor legislation fundamental obligations and employer's liability, and also powers of the body exercising the state control in the field of labour are defined. According to Article 12.2 of the Labour Code, the employer violating the rights of workers, not fulfilling the obligations under the employment contract, employing the persons who have not reached 15 years age, attracting children to the activity dangerous to their life, health and a spiritual condition, and also not observing the requirement of the present Code in the order defined by the legislation is attracted to the corresponding responsibility. According to Article 15.2 of the same Code the authority implementing state control over the execution of Labour Legislation have the right to require those persons guilty of Labour legislation violations to cease their violations of the law, to hold these persons accountable in cases and the manner determined by the Code of Administrative Offences of the Republic of Azerbaijan and to table before the relevant authorities whether to hold said persons liable for other infringements.

As it is stated above, according to requirements of the labor legislation, foreigners and stateless persons, can be involved by the employer via procedure defined by the legislation only after obtaining the corresponding permission from executive authority. Besides assignment on the employer of this duty, the legislator also established administrative responsibility for non-execution of this duty.

Discussed administrative responsibility is defined in Article 53.8 of the CAO. In the text of this Article for violation of requirements of the labor legislation the employer, is specified as the subject imposed to a penalty being a type of an administrative penalty.

According to Article 3 of the Labour Code, the employer is a completely capable owner or appointed (authorized) to them the director, the authority, having the right to conclude, terminate or change conditions of the employment contract (agreement) with workers, and also the individual who is engaged in business activity without creation of the legal entity.

As evident, the legal persons, individuals and officials are bear responsibility for involving to work of the foreigner or the stateless person, with violation of requirements of the labor legislation, and also without obtaining private permission.

However, in Article 53.8 of the CAO administrative responsibility provided for an offense, concerns to the employer and precisely the size of a penalty applied behind this offense being administrative penalty concerning legal person, individual and official is not specified.

In specified Article, in a case when expression “employer” is perceived only as legal persons, individuals and officials, for commission of identical administrative offense remain out of bounds of responsibility, and it in turn does not promote execution of duties of the legislation of administrative offenses and achievement of the objectives of an administrative penalty.

Thus, the administrative penalty is a measure of responsibility and is applied with the objective to bring up the person who has committed an administrative violation in the spirit of following the Law and also to prevent committing the new administrative violations both by aforementioned person and the others (Article 22 of the CAO).

Along with that definition by the CAO of an administrative penalty as one of types of an administrative penalty, there its criteria, the bottom and upper limits of administrative penalties imposed for administrative offenses also are specifically defined is given.

According to Article 25.1 of the CAO the administrative penalty is the amount of money fixed by judges, an authorized body (official) and is forcedly withdrawn from the person who was found guilty, in favour of the state in cases provided by this Code.

According to Article 25.5 of the CAO the amount of penalty measured at cost of the item, being a direct object of the administrative violation may not exceed hundred percent of the item value, and the amount of penalty measured at the sum of outstanding credits, taxes—one hundred and fifty percent of these credits and taxes.

It should be noted that such distinction is directed on an individualization of the infliction of penalty being a type of an administrative penalty and determining of its sum, taking into account nature of perfect offense, the personality made offense, degrees of his guilt, the property status, softening and aggravating circumstances.

However, the sum of a penalty provided by Article 53.8 of the CAO exceeds the size of a penalty of the Code established by Article 25.5 for individuals ten times, and concerning officials three times.

At the same time, in view of the fact that expression “employer” in Article 53.8 of the CAO means concept legal person, individual and the official and on the basis of Article 25.5 of the Code, penalty application in the form of an administrative penalty for individuals of three thousand manats, for officials of ten thousand manats for the specified administrative offense is not excluded.

Plenum of the Constitutional Court considers that such solution of a question is violation concerning individuals and officials and does not correspond to the principle of the right and justice at adoption of normative legal acts (the equal relations to equal interests) So, the upper limit (thirty five thousand manats) of penalty provided by the sanction of Article 53.8 of the CAO, makes not the maximum limit (fifty thousand manats) of penalty established by the general part of this Code for legal entities, and only 70 percent from it. However, in sanctions of challenged article, because of not fixing of the size of an administrative penalty concerning individuals and officials for the same administrative offense, purpose of the upper limit of the penalty provided in Article 25.5 of the CAO for these persons is allowed. And it, in turn, can lead to violation of the principles of equality before the law, a ban of restriction of the rights and freedoms of the person and the citizen reflected in the Constitution.

Along with the specified it should be noted that in sanctions of the majority of articles of special part of CAO providing responsibility for administrative offenses made various subjects, responsibility of legal persons, individuals and officials was differentiated. Not coincidentally, in Articles 53.1, 53.9 and 53.10 of the Code, providing separate administrative offenses for violation of the labor legislation, responsibility of legal persons and officials acting as “employer” it is defined separately.

However, as opposed to this rule, despite of acting of individuals and officials along with legal entities as “employer” as subject of the administrative offense provided by Article 53.8 of the CAO, in the sanction of this article their responsibility is not distinguished, concerning each of three subjects the sum of an administrative penalty is generalized.

Such circumstance, creating uncertainty and a contradiction between provisions of the general and special parts of CAO, breaks the principles of respect of the rights established by these Code and freedoms of the person and the citizen, legality, equality before the law, justice and the principles directed on prevention of administrative offenses.

One of the basic principles of the legislation about administrative offenses is the highest mark of the rights and freedoms of the person and the citizen. CAO provides prevention by the state authorities (officials) violation of rights and freedoms of human and citizen and respect for these rights and freedoms (Articles 5.1 and 5.2 of the CAO). According to Article 7.1 of the CAO, the persons who have committed administrative violations are equal before the Law.

According to Article 9.1 of the CAO reflecting in the principle of justice, the penalties applied with regard to the person who has committed an administrative violation, must be fair, i.e., to correspond to the character of the administrative violation, circumstances of commitment, to be legal and proven.

It is necessary to take into account that legal regulation of various branches of the right has to be based on the principles of democracy reflecting the nature and essence of the constitutional state provided in the Constitution, providing the rights and freedoms of the person and the citizen. The constitutional principles it is inseparably linked among them and form uniform set of the legal origin being of identical importance for implementation, protection and guarding of the legitimate interests of legal subjects.

The basis of the principles reflected in the CAO is made by provisions of the Constitution, including part I and V of Article 25, part I and II of Article 71 of the Constitution. According to the specified norms, everyone is equal before the law and court. Everyone is guaranteed equal rights in any proceedings before state authorities and bearers of public authority that decide upon his rights and duties. To observe and protect the rights and freedoms of the person and the citizen, fixed in the Constitution an obligation of bodies of legislative, executive and judicial authorities. No one may restrict the exercise of rights and freedoms of man and citizen.

These principles are reflected in the international acts connected with human rights, including in the Universal Declaration of Human Rights, the International Covenants “On civil and political rights” and “On economic social and cultural rights”, in the European Convention on Protection of Human Rights and Fundamental Freedoms.

Plenum of the Constitutional Court notes that the legislator at fixing of administrative offense and other offenses, at imposing of responsibility for their commission possesses appropriate authority. However, in all cases such regulation has to be carried out according to a principle of equality, including with the Constitution requirement that normative legal acts have to be based on the right and justice (the equal relations to equal interests) and should not contradict to Constitution (parts I and III of Article 149 of the Constitution). Requirements concerning legal certainty follow from the constitutional principles concerning a rule of law, and that normative legal acts have to be based on the law and justice.

According to the formed legal position of the Constitutional Court concerning an essence and value of the principle of legal certainty, the principle of legal certainty acts as one of the basic aspects of the rule of law. It is very important that any law or any of its provisions should meet with a principle of legal certainty. Norms of law should be unequivocal and clear for ensuring of it. It, in its turn, should give to everyone a confidence of protection of rights and freedoms and possibility to foresee the actions of applicators of law. Requirements concerning legal certainty follow from the constitutional principles of a prevalence of the right, conformity of regulatory legal acts to the law and justice (to equal relations to equal interests). The uncertainty of the contents of legal norm, which create at application of law the possibility for unlimited opinions, leads to infringement of rule of law which should base on one or another normative legal act, principles of equality before the law and court (decision of Plenum of the Constitutional Court of 22 September 2008 “On interpretation of provisions of Article 21 of the Law “On Basics of Call-up to Military Service in the Republic of Azerbaijan” and Article 180.3 of the Code of the Republic of Azerbaijan “On Execution of Punishments”).

Along with it, Plenum of the Constitutional Court once again notes that at determining by legislature of a type of an administrative penalty for any administrative offense, the principles of proportionality and the balances being components of the rule of law which is reflected in the Constitution also have to be considered.

According to abovementioned, Plenum of the Constitutional Court comes to such conclusion that Article 53.8 of the CAO has to be recognized as null and void because of discrepancy to parts I and V of Article 25, to parts I and II of Article 71, parts I and III of Article 149 of the Constitution.

According to Article 94.1.17 of the Constitution the Milli Majlis of the Republic of Azerbaijan defining crimes and other violations of law, and establishing liability for the commission thereof.

Plenum of the Constitutional Court considers that Article 53.8 of the CAO has to be brought into accord with parts I and V of Article 25, parts I and II of article 71, parts I and III of article 149 of the Constitution, it has to be recommended to Milli Majlis of the Republic of Azerbaijan to establish an administrative penalty for the administrative offense provided in this article separately for individuals, legal persons and officials.

In view of the fact that implementation of this recommendation will require a certain term, Plenum of the Constitutional Court according to part X of Article 130 of the Constitution considers as expedient to recognize Article 53.8 of the CAO as null and void since 1 June 2011.

Being guided by Article 130.7 of the Constitution of the Republic of Azerbaijan, Articles 52, 62, 63, 65, 67 and 69 of the Law of the Republic of Azerbaijan “On Constitutional Court”, Plenum of the Constitutional Court of the Republic of Azerbaijan

**DECIDED:**

1. To recognize Article 53.8 of the CAO as null and void because of discrepancy to parts I and V of Article 25, parts I and II of Article 71, parts I and III of Article 149 of the Constitution.

2. To recommend to Milli Majlis of the Republic of Azerbaijan to bring Article 53.8 of the CAO to conformity with parts I and V of Article 25, parts I and II of article 71, parts I and III of article 149 of the Constitution, to determine an administrative penalty for the administrative offense provided in this Article separately for individuals, legal persons and officials.

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

4. 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”.

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