**ON BEHALF OF THE REPUBLIC OF AZERBAIJAN**

**DECISION**

##### OF THE CONSTITUTIONAL COURT

##### OF THE REPUBLIC OF AZERBAIJAN

*On interpretation of Article 71.1 of the Criminal Code of the Republic of Azerbaijan*

# 13 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 , Rovshan Ismaylov, Jeyhun Garajayev, Rafael Gvaladze, Isa Najafov and Kamran Shafiyev (Reporter-Judge);

attended by the Court Clerk Vugar Zeynalov,

the legal representatives: Ikram Shirinov, Judge of Nasimi district court of Baku city and Ilgar Jafarov, senior advisor of the Department for the Administrative and Military Legislation of Milli Majlis of the Republic of Azerbaijan;

experts: Kamala Nazarova, Ph.d. in law, Associate Professor of the Criminal Procedure Board of the Law Faculty of Baku State University,

specialist: Zahid Alizadeh, Head of General Department of Ministry of Justice of the Republic of Azerbaijan;

 in accordance with Article 130.6 of the Constitution of the Republic of Azerbaijan has examined in open judicial session via special constitutional proceedings the case initiated by Nasimi district court of Baku city concerning interpretation of Article 71.1 of the Criminal Code of the Republic of Azerbaijan,

having heard the report of Judge K.Shafiyev, the reports of legal representatives of the interested subjects, specialist and opinion of the experts, the Plenum of Constitutional Court of the Republic of Azerbaijan

**DETERMINED AS FOLLOWS:**

In its request Nasimi district court asks to give interpretation of Article 71.1 of the Criminal Code of the Republic of Azerbaijan (hereinafter referred to as Criminal Code).

In request it is specified that by the sentence of the Court on grave crimes of the Republic of Azerbaijan of 18 September 2009 D.Shyukryu was recognized as guilty according to Articles 32.5, 29, 318.1 of the Criminal Code, was sentenced to punishment in the form of imprisonment for the period of 1 year, 5 months and 28 days, and also determined 1 year of probation period applying in his regard Article 70 of the Criminal Code**.**

D.Shyukryu addressed to Nasimi district court with the application for cancellation of probation having specified that being probationer he cannot leave borders of the Republic of Azerbaijan and leave for Turkey in connection with a serious illness of the father.

Referring to Article 71.1 of the Criminal Code, the public prosecutor during judicial review specified that considering implementation of cancellation of probation and clearing of a criminal record only on representation of the government body exercising control of behavior of condemned, instead of on the basis of the application of condemned, his application has to be returned. The applicant and his defender having disagreed with such position of the public prosecutor and having specified that the right of the applicant to appeal to the court is provided in the Constitution of the Republic of Azerbaijan (hereinafter referred to as Constitution), and also in the International treaties which the Republic of Azerbaijan is a party too, asked the court to examine application and pronounce the relevant decision.

Due to the matter, in the request of Nasimi district court it was noted that as opposed to the Criminal Procedure Code and the Code of Administrative Offenses of the Republic of Azerbaijan (hereinafter referred to as CPC and CAO) where is provided that at execution of a sentence or other final decision of court the consideration by courts of similar issues is possible on the basis of applications of condemned. None provision in Criminal Code of the right of condemned to apply to court for cancellation of probation or clearing of a criminal record is restriction of his basic rights connected with the right of the personal applying to government bodies and judicial guarantee for the rights and freedoms of everyone, which are provided for by Constitution.

The Constitutional Court of the Republic of Azerbaijan (hereinafter referred to as Constitutional Court) on the basis of the application, first of all, in connection with ensuring the right of judicial protection of the rights and freedoms of the person considers important to note the following.

According to Article 12 of the Constitution the ensuring of the rights and freedoms of a man and citizen and a proper standard of living to the citizens of the Republic of Azerbaijan is the highest objective of the state.

The Constitution based on values inherent to the constitutional and democratic state having consolidated the rights and freedoms of the person and the citizen also established a guarantee directed on their guarding and protection.

Proceeding from the above mentioned the Constitution provides for the right of everyone to protect his rights and freedoms using ways and means not prohibited by law (Article 26), a guarantee of protection of rights and freedoms in court of law (Article 60).

The criminal legislation, based on the Constitution of the Republic of Azerbaijan both the universally recognized principles and norms of international law, provides the grounds and principles of the criminal liability, defines what shall be dangerous to the person, societies and the states, by actions admitted as crimes and establishes kinds, limits and the sizes of punishments and another measures of criminal - legal nature for committing of these crimes (Articles 1.2 and 2.2 of the Criminal Code).

Punishment is the measure of criminal - legal nature imposed by a decision of court. Punishment is applied to the person recognized as guilty in commitment of a crime and consists of the deprivations established by the present Code or restrictions of rights and freedom of this person. Punishment is applied with a view of restoration of social justice, correction of condemned and prevention of committing new crimes by condemned and other persons (Articles 41.1 and 41.2 of the Criminal Code). From the specified norms is clear that punishment, being a legal result of the committed crime, in cases and the limits provided by the criminal law, it is applied against guilty and inflict of destitutions in connection with execution of punishment, serves to achievement of the objectives of punishment.

According to Articles 70.1 and 70.2 of the Criminal Code if the court, imposed corrective works, restriction on military service, maintenance in disciplinary military unit, restriction of freedom or imprisonment on the certain term will consider probable correction of the punishment to condemned without serving, it can adopt a decision on conditional application of given punishment. At imposing of probation the court takes into account nature and a degree of public danger of committed crime, personality of condemned, and also circumstances mitigating and aggravating fault.

Probation is a release of condemned under certain conditions from the punishment which imposed by a judgment and has not been executed during the corresponding trial period. However it should be noted that it is not necessary to accept probation, as release from the punishment imposed for the committed crime. As application by a judgment of probation does not provide release of condemned from criminal liability or punishment, on the contrary the kind and the term of the punishment imposed on condemned, term of control over behavior of probationer is established.

The criminal legislation, recognizing that probation is a measure of criminal and legal action, demands imposing by court on condemned certain duties and execution of these duties becomes the reason of restriction of his rights. These duties are following: not changing of permanent residence, place of study, place of employment without of notice to appropriate body which is carrying out control of condemned behavior, to not attend certain place and etc. (Article 70.5 of the Criminal Code).

Probation comprises many signs of punishment though is not a type of punishment. In the decision of Plenum of the Constitutional Court of 22 September 2008 “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” it is noted that “…probation, being a special measure of criminal-legal influence, by its nature represents the form of realisation of a criminal liability and institution of clearance of real serving of punishment”.

At the same time it should be noted that probation provides punishment application against the person found guilty by the adjudication of commission of crime and existence of certain restrictions for this person.

At imposing to the person of probation the court establishes a trial period. In Article 70.3 of the Criminal Code the trial period of probation is imposed for the term from six months to five years. During this term condemned by the behavior has to prove his correction that is beginning of respect for the law, society, rules and traditions of coexistence and their observance.

According to Article 71.1 of the Criminal Code if after the expiration of suspension period, which is not less than half of it probationer by his behavior has proved a correction, a court on presentation of the state body, which is carrying out a control over behavior of condemned, can decide about a cancellation of probation and about clearing of a criminal record.

As evident, in specified article the right of condemned directly appeal to court in connection with cancellation of probation and clearing of a criminal record is not provided.

However, as opposed to Article 71.1 of the Criminal Code in the relevant articles of CPC and CAO consideration of questions arisen at execution of a sentence or other final decision of court does not limit their implementation by courts directly on the basis of the application of condemned (Articles 509, 513.1, 514.1 and 517.2 CPC; Articles 10.2.12, 171.1 and 172.3 CAO).

In this regard the Plenum of the Constitutional Court considers that provided in Article 71.1 of the Criminal Code possibility of consideration of a question of cancellation of probation and clearing of a criminal record of condemned only on representation of the government body exercising control of behavior of condemned, granting advantage to another condemned in difference from probationers, creates an inequality in implementation of the right of an appeal to the court fixed in the Constitution.

According to Article 25.1 of the Constitution everyone are equal before the law and court. In democratic society the right and freedom of people it is carried out on the basis of the principle of equality. The main essence of this principle is that proclaiming of the equal rights of everyone, equal opportunities to have these rights has to be created. However for subjects with various legal statuses there cannot be equal rights and duties. According to the right of equality to subjects with various legal statuses equal regulation cannot be applied.

At the same time, for subjects of one group of the rights and duties have to be identical. Existence of the various relations between the individuals being in similar situation violates the right of equality. In the absence of reasonable proportionality between the objective and reasonable basis of the various relations or the lawful purpose presented by applied means, such relation has discrimination character.

Along with it, the right of equality does not exclude application by the legislator of concessions and privileges to subjects of various categories. Such distinctions contradict the right of equality in case if they are not reasonable, objective and proportional.

As evident from the legislation if the persons condemned on more heavy punishments, possession the right of access to court, probationers are deprived of this right. Despite of the equal position of subjects of these two categories, they do not possess the equal rights, and this distinction in the relations has no legal basis.

And the equality of everyone before the law and court means that observance of laws to the same extent obligatory for everyone, and each person for protection of the violated rights can appeal to court. The right of access to court being a component of the right of judicial protection, in democratic society has fundamental value. So, fair trial – one of the most effective remedies of protection of human rights. Not coincidentally, it is exactly that the court is considered as the main guarantor of protection of human rights. At the same time, the right of access to court provides adopting by court of the relevant decision.

According to Article 60.1s of the Constitution protection of the rights and freedoms of everyone in court is guaranteed.

In the decision of the Plenum of the Constitutional Court of 19 March 2002 “On Articles 87.6.14, 89.4.12 and 422.3 of the Criminal Procedure Code of the Republic of Azerbaijan” it was noted that “the principle of legal equality that is the constituent part of justice provides for the obligation to create for parties the favorable conditions for presentation of their cases under condition not to leave openly at bay any of them with respect to another. In case where the purpose of a State consists *inter alia* of ensuring the right to fair trial any inequality as to the right to apply to any judicial instance provided for by legislation”.

The legal position created by the Constitutional Court in connection with the right to fair trial, consists is what “fair trial in fact have to answer concept of justice and have to provide effective restoration of the rights” (the decision of Plenum of the Constitutional Court of 19 April 2002 “On Article 420.3 of the Criminal Procedure Code of the Republic of Azerbaijan”).

It is necessary to consider that along with other elements forming the right of judicial protection (the court created on the basis of the law and possessing corresponding jurisdiction), the right of access to court has special value. So, groundlessness of restriction or not providing of the right of access to court finally results in pretentiousness of nature of the rights which protection is guaranteed by the Constitution.

The judicial guarantee defines, on the one hand, the right of access to court with the purpose of restoration of the violated rights and freedoms, and on the other hand, an obligation of courts to consider these applications and to adopt on them the fair decision.

The right of access to court enshrined in the international legal acts, is considered as effective restoration of the rights by independent courts on the basis of fair judicial proceedings (Article 8 of the Universal Declaration of Human Rights, Article 2 of the International Covenant on Civil and Political Rights, Article 6 of the European Convention for the protection of human rights and fundamental freedoms).

 The recommendations provided in the United Nations Standard Minimum Rules for Non-custodial Measures (the Tokyo Rules), adopted by the resolution N.45/110 of General Assembly of the UN of 14 December 1990, confirm the specified provisions. So, according to point 9 of these Rules decision on post-sentencing dispositions, except in the case of pardon, is the subject to review by a judicial or other competent independent authority, upon application of the offender.

Along with specified, it should be especially noted that, recognizing that the Constitution possesses also the highest and direct legal effect the absence in Article 71.1 of the Criminal Code of the instruction concerning realization of the right of the direct access of condemned to court in connection with cancellation of probation and clearing of a criminal record, should not be regarded as deprivation of this right.

According to the mentioned, the Plenum of the Constitutional Court considers that Article 71.1 of the Criminal Code must be applied according to requirements of Articles 25 and 60 of the Constitution. Probationer can directly apply to court concerning cancellation of probation and clearing of a criminal record.

Being guided by Article 130.6 of the Constitution of the Republic of Azerbaijan and Articles 60, 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. Article 71.1 of the Criminal Code must be applied according to requirements of Articles 25 and 60 of the Constitution. Probationer can directly apply to court concerning cancellation of probation and clearing of a criminal record.

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 can not be cancelled, changed or officially interpreted by any body or official.