**ON BEHALF OF THE REPUBLIC OF AZERBAIJAN**

**DECISION**

# OF THE PLENUM OF CONSTITUTIONAL COURT

**OF THE REPUBLIC OF AZERBAIJAN**

# *Concerning request of Narimanov district court of Baku city on interpretation of Articles 68.2 and 83 of the Criminal Code of the Republic of Azerbaijan*

**22 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 (Reporter-Judge), Isa Najafov and Kamran Shafiyev;

attended by the Court Clerk I.Ismayilov,

the legal representatives of interested parties: Turgay Huseynov, judge of the Narimanov district court of Baku city and Eldar Askerov, senior advisor of the Department for Administrative and Military Legislation of Milli Majlis of the Republic of Azerbaijan,

the specialists – Shahin Yusifov, Acting Chairman of Military Board of the Supreme Court of the Republic of Azerbaijan, Gazanfar Bayramli, deputy head of Department of Public Prosecution of the Prosecutor’s Office,

has examined in open session via special constitutional proceedings in accordance with Article 130.6 of the Constitution of the Republic of Azerbaijan the constitutional case initiated by Narimanov district court of Baku city concerning the interpretation of Articles 68.2 and 83 of the Criminal Code of the Republic of Azerbaijan.

Having heard the report of Judge R.Gvaladze and statements of representatives of interested parties, opinions of specialists, studied materials of the case and examined the case, the Plenum of the Constitutional Court of the Republic of Azerbaijan

**DETERMINED AS FOLLOWS:**

When considering the case of E.Mamedov by Narimanov district court of Baku city it was mentioned that he was condemned by decision of Nasimi district court of 28 August 2007 to imprisonment for a period of 1 year and 6 months and on the basis of the decision of Garadag district court of Baku city of 31 January 2008 the unexpired part of his punishment was changed to punishment in the form of restriction of liberty for 4 months and 15 days.

Thereafter on 17 July 2008 by decision of Nasimi district court E.Mamedov was condemned for attempt to theft to punishment in the form of penalty payment of the sum of 200 AZN and completely was condemned to punishment in the form of restriction of liberty for 4 months and 15 days and penalty payment in the sum of 200 AZN. On 16 August 2009 on the basis of Article 177.1 of the CC E.Mamedov was bringing to criminal liability for commitment of theft. Investigative body, having taken as a basis E.Mamedov's condemnation for theft by a sentence of Nasimi district court, execution of independently established punishment in the form of restriction of liberty and penalty per totality of sentences and clearing of previous convictions, was came to a conclusion concerning absence in his deed of an element of repeatability and qualified the theft committed by him not according to Article 177.2.2 of the CC but according to Article 177.1 of this Code.

In the request to the Constitutional Court of the Azerbaijan Republic (hereinafter referred to Constitutional Court), the court, having specified independent execution of the final punishment imposed by Nasimi district court concerning E.Mamedov on the basis of Article 68.2 of the CC asks to clarify a question concerning calculation of a period of a clearance previous conviction – whether it has to be considered from the moment of serving of final punishment or from the moment of serving for each crime separately.

The Plenum of the Constitutional Court in connection with the request notes that for the last 3 years the Constitutional Court adopted 3 decisions concerning a previous conviction, and in these decisions the essence of a previous conviction, the purpose of punishment on set of crimes and sentences, the recurrence nature was uncovered.

In decisions of Plenum of the Constitutional Court of 8 July 2008 and of 25 May 2009 concerning Article 83 of the CC it is specified that the previous conviction of the person condemned on a certain type of punishment for commitment of crime, begins from the date of the entering of a conviction of court in validity and proceeds both during all term of punishment, and after the termination of term of punishment within the terms established by the law.

The previous conviction admits as a legal consequence of a crime and punishment. Here a crime – primary act, and condemnation and application of punishment act as its consequence. Lack of one of three specified bases (a crime, a conviction and punishment) excludes existence of previous conviction.

Along with it, according to the decision of Plenum of the Constitutional Court of 25 May 2009 “On interpretation of Article 83 of the Criminal Code of the Republic of Azerbaijan in connection with inquiry of the Court on Grave Crimes”, the previous conviction is reasoned not only the fact of condemnation of the person and imposing of punishment. The previous conviction expresses a legal status of condemned leading to the legal consequences established by the criminal legislation at repeated commitment of crime; the pending not removed previous conviction possessed by a person constitutes special social-legal relations which are formed between him and the state on the basis of the criminal-legal regulation serving for appraisal of person to in case if he commits new crimes and the crimes committed by him which represent big public danger and consequently imposing regarding concerning him of more austerity measures of legal character.

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

As for a question raised in the request, first of all, the great value has disclosure of an essence of Article 68 of the CC.

According to article 68.1 of the CC, at partial or full addition of punishments on set of crimes and sets of decisions correspond to one day of imprisonment:

- one day of the maintenance in disciplinary military unit;

- two days of restriction of freedom;

- three days of corrective works or restrictions on military service;

- eight hours of public works.

And in Article 68.2 of the CC such types of punishment are provided that their addition in certain cases is not possible in an order provided by Article 68.1 of the CC.

Thus, according to Article 68.2 of the CC deprivation of the right to hold the certain posts or to engage in the certain activities, deprivation of the right to operate a vehicle, deprivation of special, military or honorary title and state award, and also the penalty or confiscation of property at their addition with corrective works, maintenance in disciplinary military unit, restriction on military service, imprisonment shall be executed independently.

As evident from the text of this article the law does not exclude addition of a different type of the punishments provided in this article, on set of crimes and sentences. In that case according to Articles 66 and 67 of the CC the uniform final punishment is imposed.

However it is necessary to consider that these punishments imposed on sets of crimes and sentences have to be executed independently in case are imposed as the main punishment. Imposing as additional punishment of such types of punishment as deprivation of the right to hold the certain posts or to engage in the certain activities, deprivation of the right to operate a vehicle, deprivation of special, military or honorary title and state award, and also the penalty or confiscation of property in itself demands their independent execution from the main punishment.

According to a legal position of the Plenum of the Constitutional Court concerning Article 83 of the CC, the calculation of term of release of a previous conviction should be considered from the moment of finishing of serving of final punishment imposed on set of crimes or sentences, or exemption from punishment, in via separate procedure for each classification of crimes.

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

This legal position established in the decision of Plenum of the Constitutional Court also covers cases of addition of punishments on set of crimes and sentences provided in Article 68.2 of the CC.

Plenum of the Constitutional Court comes to such conclusion that at addition of the punishments provided in Article 68.2 of the CC calculation of a period of clearance of previous conviction should be considered from the moment of finishing of serving of final punishment imposed on set of crimes or sentences or exemption from punishment.

Being guided by Article 130.6 of the Constitution of the Republic of Azerbaijan, Articles 60, 63, 65-67 and 69 of the Law of the Republic of Azerbaijan “On Constitutional Court”, Plenum of the Constitutional Court of the Republic of Azerbaijan

**DECIDED:**

1. At summation of punishments provided by Article 68.2 of the CC calculation of the period of clearance of previous conviction must be considered from the moment of finishing of serving of final punishment imposed for totality of crimes or sentences or exemption from punishment.

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.