**ON BEHALF OF REPUBLIC OF AZERBAIJAN**

**DECISION**

**OF THE PLENUM OF CONSTITUTIONAL COURT**

**OF THE REPUBLIC OF AZERBAIJAN**

*On interpretation of Articles 132.1.1 and 132.1.2 of the Family Code*

*Of the Republic of Azerbaijan*

**05 October 2012 Baku city**

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

attended by the Court Clerk Ismayil Ismayilov,

the legal representatives of the subjects interested in special constitutional proceedings: Teyub Muhtarov, Judge of Geranboy District Court and Magomed Bagizov, senior advisor of department of social legislation of Administration of the Milli Mejlis of the Republic of Azerbaijan;

specialist: Bagir Asadov, Judge of Civil Board of the Supreme Court of Republic of Azerbaijan and Hagani Mammadov, Judge of the Court of Appeal of Baku city;

in accordance with Article 130.6 of the Constitution of the Republic of Azerbaijan examined in open judicial session via special constitutional proceedings the case on inquiry of the Geranboy District Court concerning interpretation of Articles 132.1.1 and 132.1.2 of the Family Code of Republic of Azerbaijan;

having heard the report of Judge Kamran Shafiyev, the reports of the legal representatives of the subjects interested in special constitutional proceedings and specialists, examined the materials of the case the Plenum of Constitutional Court of the Republic of Azerbaijan

**DETERMINED AS FOLLOWS:**

The Geranboy District Court having applied to the Constitutional Court of the Republic of Azerbaijan (hereinafter referred to as the Constitutional Court) indicates that claimants G.S. and R.S. on the civil case that is in its procedure asked to adopt the decision on cancellation of adoption.

As evident from the inquiry and case materials, G.S. and R.S. substantiated the claim requirement by the fact that after the birth of the child of G.S., on January 27, 2007, transferred him to adoption to the brother E.S. and his spouse F.S. But after adoption of the child E.S. and F.S. after a while began to interfere to meetings and communication of the child with his biological parents, did not care of the child and did not carry out the parental responsibilities properly.

Geranboy District Court, considering this case, noted the need of interpretation of a disposition of Articles 132.1.1 and 132.1.2 of the Family Code of the Republic of Azerbaijan (hereinafter referred to as the Family Code) from the point of view of Articles 17, 25, 60 and 71 of the Constitution of the Republic of Azerbaijan (hereinafter referred to as the Constitution), and also Articles 6 and 8 of the Convention “On Protection of Human Rights and Fundamental Freedoms”, appealed to the Constitutional Court.

The inquiry also contained a request for interpretation of Articles 132.1.1 and 132.1.2 of the Family Code from the point of view of Article 130 of this Code and Article 175 of the Criminal Code of the Republic of Azerbaijan (hereinafter referred to as the Criminal Code).

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

According to Article 17 of the Constitution, family as a basic element of society is under special protection of the state. Parents must take care of their children and their education. The state controls implementation of this responsibility.

Implementation of the rights of the child, creation of conditions for formation of children as highly moral, comprehensive persons is one of the priority directions of a state policy of the Republic of Azerbaijan.

The state policy concerning children is focused on ensuring of upbringing of each child in the corresponding material and living conditions, receiving of education, training on the basis of progressive requirements, formations as worthy citizen.

Each child has the right to live and be brought up in a family, to know the parents and to use their care, to live together with them. At the same time, the child has the right to be brought up by the parents and the right for ensuring its interests, all-round development and respect of advantage.

Implementation of the right of the child to live and be brought up in a family is provided with various means, including institute of adoption. The basis of purpose of institute of adoption is in ensuring of normal physical and moral development of the adopted child. At adoption are guided by the principle of protection of the rights and interests of minor children that is one of the basic principles of the family legislation.

According to Article 117.1 of the Family Code, adoption is permitted regarding to minors and only in their interests. Under interests of children at adoption are meant the creation of necessary conditions (both material, and moral character) for their education and all-round physical, mental and moral development.

According to Articles 118.1 and 118.2 of the Family Code, adoption is carried out by court on the basis of the statement of the person (persons), interested to adopt the child. Case on adoption is considered by court according to special procedure provided by the civil and procedural legislation with participation of appropriate authority of executive power. The rights and duties of adoptive parents and the adopted children arise from the date of the introduction in validity of a judgment concerning establishment of adoption of the child.

The legal essence of adoption consists that by the entering into force of the judgment on adoption between the adopter and adopted child there are legal relations similar to the parental relations.

According to Article 134.1 of the Family Code, adoptive parents and their children concerning the adopted and their relatives, and also adoptive parents and their relatives concerning adopted (their children) are equated with the personal non-property and property rights and duties to relatives.

According to Article 134.2 of the Family Code, the adopted children lose personal non-property and property rights and duties concerning the parents (relatives).

As appears from noted norms, adoption leads to the termination of legal relations between adopted and their parents and relatives, the adopted children and their parents and relatives are exempted from all personal non-property and property rights and duties.

Thus, on sense of the law, adoptive parents find the rights and the duties peculiar to parents, and parents lose these rights and duties.

These norms provided by the family legislation also found reflection in the international legal documents regulating issues of adoption. According to Article 10 of the European Convention “On Adoption of Children”, upon adoption a child become a full member of the family of the adopter(s) and have in regard to the adopter(s) and his, her or their family the same rights and obligations as a child of the adopter(s) whose parentage is legally established. The adopter(s) have parental responsibility for the child. The adoption terminates legal relationship between child and his / her father, mother and family of origin.

Adoptive parents define methods and educational tools of the child. However, defining these methods and means, they are obliged to observe requirements of the family legislation. Thus, according to Articles 60.1 and 60.2 of the Family Code, the parental rights cannot be carried out contrary to interests of children. At implementation of the parental rights parents should not do harm to spiritual development, physical and mental health of children. At upbringing of children their exploitation, insult, derogation, cruelty, roughness, indifference are not allowed. Parents, who at implementation of the parental rights infringe the rights and interests of children, bear responsibility in the order established by the law.

Parents, considering interests and the rights of the child, define with whom they should communicate. Parents can limit communication of children with other persons. Establishment of such restrictions cannot be regarded, as abuse of the parental rights of adoptive parents.

Along with it, the legislator established cancellation of adoption. Cancellation of adoption is carried out in a judicial proceeding (Article 131.1 of the Family Code).

The circumstances which are the basis for cancellation of adoption are regulated by Article 132 of the Family Code. According to this article, the legislator established four bases of cancellation of adoption:

- if adoptive parents evade from the parental responsibilities assigned to them;

- if adoptive parents abuse the parental rights;

- if adoptive parents cruelly treat the adopted child;

- if adoptive parents are chronic alcoholics and drug addicts.

Non-execution by adoptive parents of the parental responsibilities assigned to them is shown in the form of inaction, thus adoptive parents do not make the actions established by the law. It can be expressed in absence of adoptive parents in moral and physical training, receiving education, display of necessary care and attention, etc.

Abuse of adoptive parents of the parental rights is meant use of these rights contrary to interests of children interests (for example, creation of obstacles in receiving education by children, their incline to begging, theft, the use alcoholic drinks and drugs, etc.).

The brutal treatment of the adopter can be shown in commission of physical or mental violence over children (beating, intimidation of the child, threat, attempt at inviolability of the child, etc.), and in the application of inadmissible ways of education (humiliating human dignity, ill-treatment of the child, the child's insult).

Cancellation of adoption on the base of that the adopter (adoptive parents) is the chronic alcoholic or the drug addict, is allowed in case if these diseases are confirmed by medical certificate. At the same time, the persons participating in case of cancellation of adoption can declare the petition for carrying out examination on identification at the adopter of these diseases according to the civil and procedural legislation.

Thus, according to the bases of Articles 132.1.1-132.1.4 of the Family Code at establishment of guilty behavior of adoptive parents contrary to interests of the child, or establishment of the above-noted diseases confirmed by medical certificate, the court adopt the decision on cancellation of adoption. In such cases the child's consent to cancellation of adoption is not required.

Along with it, by the Article 132.2 of the Family Code the legislator authorized court to cancel adoption and also on other bases, for the sake of interests of the child and taking into consideration his opinion.

Noted situation provides cases when in the absence of guilty behavior from the side of adopter on the circumstances which are depending and not depending on him there were no relations necessary for normal development and upbringing of the child. Such bases concern any circumstances infringing on interests of the child, including lack of mutual understanding owing to personal qualities of the adopter and (or) adopted, as a result of absence of authority of the adopter, etc.

In view of the above mentioned, Plenum of the Constitutional Court notes that at consideration of the case on cancellation of adoption, the court has to consider all circumstances on case and proceed from interests of the child.

Due to the question of an assessment of an appeal to the court concerning cancellation of adoption as violation of secret of adoption, Plenum of the Constitutional Court notes the following.

According to Article 32.2 of the Constitution, everyone has the right for confidentiality concerning personal and family life. Except cases envisaged by legislation interference in personal life is prohibited.

Storage of information on the adoption which is considered as personal and family secret it is provided by acts of the Republic of Azerbaijan. According to Articles 130.1 and 130.2 of the Family Code, the secret of adoption is protected by the law. Providing any information on adoption without the permission of adoptive parents, and in case of their death – of tutorship and guardianship authority, and also delivery of extracts from the civil registration testifying that adoptive parents are not biological parents of adopted is forbidden.

As appears from norms of the legislation, preservation of secret of the fact of adoption depends on will of the adopter. From this point of view, disclosure of this secret possibly only with the consent of the adopter (and in case of his death – of tutorship and guardianship authority).

With the purpose of storage of secret of adoption the law provides possibility of change of a surname, the name and a middle name of adopted, places and dates of birth of adopted, records of adoptive parents as parents adopted (Articles 125, 126 and 127 of the Family Code).

For protection of the secret of adoption protected by the law, cases on adoption can be considered in the closed court session, including the announcement of the judgment (Article 10.4 of the Civil Procedure Code of the Republic of Azerbaijan).

At the same time, for protection of secret of adoption, the persons participating in case have to be warned by court about need of storage in secret of information which became known for them on trial, and also criminal prosecution for breach of confidence of adoption contrary to will of the adopter.

Breach of confidence of adoption is meant as the disclosure of this fact contrary to will of the adoptive father to other persons or adopted in any form (in writing, orally, anonymously). This action can be carried out in the form of informing (disclosure, the communication, transfer, demonstration of documents, etc.) of real information on adoption of the child to any person (to relatives, acquaintances, to adopted, to strangers).

The disclosure of the fact of adoption to other person in an uncertain form, that is, without indication of a name, a surname, the middle name, age and other data as adopted, and the adopter, cannot be regarded as disclosure of secret of adoption.

Article 130.3 of the Family Code provides bringing of the persons who disclosure secret of adoption, contrary to will of the adopter, to responsibility in the order established by the law.

Such responsibility is established in Article 175 of the Criminal Code. According to this article, the disclosure of secret on adoption against adopter’s will, committed by the person, who is obliged to keep fact of adoption in accordance to his service or professional position, or other person from self-interest, revenge or other base motives leads to criminal liability.

The person obliged to keep secret of adoption as service or professional secret (for example, the judge, the staff of bodies of the registry office, tutorship and guardianship authority, educational, medical institutions and institutions of social protection of the population, etc.), or other persons (parents of the child and their relatives, relatives of adoptive parents, etc.) can be the subject of the crime provided by Article 175 of the Criminal Code. However, it should be noted that this crime has to be committed deliberately in the mercenary purposes, from revenge or other base motives.

At the same time, the appeal to the appropriate official bodies (court, prosecutor's office, law-enforcement bodies, tutorship and guardianship authority, etc.) in connection with the request of cancellation of adoption does not lead to formation of structure of the mentioned article of the Criminal Code.

In the Family Code the legislator accurately defined the subjects having the right to appeal to court on cancellation of adoption. The child's biological parents also among these subjects (Article 133 of the Family Code).

Based on the above-noted norms of the legislation, Plenum of the Constitutional Court considers that the appeal of parents of the child to court on cancellation of adoption should not be regarded as disclosure of secret of adoption by these persons.

Considering the above, Plenum of the Constitutional Court comes to a conclusion that:

- by making of decision on cancellation of adoption on the bases provided in Article 132 of the Family Code, the court has to consider all circumstances on case and proceed from interests of the child;

- establishment by adoptive parents of restrictions on communication of children with other persons, taking into account their interests and rights, cannot be considered as abuse of the parental rights;

- where there are the bases provided in Article 132 of the Family Code, the appeal of the persons specified in Article 133 of this Code to court concerning cancellation of adoption does not break secret of adoption, and does not lead to criminal liability provided by Article 175 of the Criminal Code.

Being guided by the Article 130.6 of the Constitution of the Republic of Azerbaijan and 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. By making of decision on cancellation of adoption on the bases provided in Article 132 of the Family Code, the court has to consider all circumstances on case and proceed from interests of the child.

2. Establishment by adoptive parents of restrictions on communication of children with other persons, taking into account their interests and rights, cannot be considered as abuse of the parental rights.

3. Where there are the bases provided in Article 132 of the Family Code, the appeal of the persons specified in Article 133 of this Code to court concerning cancellation of adoption does not break secret of adoption, and does not lead to criminal liability provided by Article 175 of the Criminal Code.

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

5. 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”.

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