**ON BEHALF OF THE REPUBLIC OF AZERBAIJAN**

**DECISION**

**OF THE PLENUM OF CONSTITUTIONAL COURT**

**OF THE REPUBLIC OF AZERBAIJAN**

*On interpretation of Article 228.5 of the Civil Code of the Republic of Azerbaijan and Article 30.4 of the Housing Code of the Republic of Azerbaijan*

**8 October 2013 Baku city**

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

attended by the Court Clerk Elmaddin Huseynov,

representatives of interested parties – Bagir Asadov, Judge of Supreme Court of the Republic of Azerbaijan; Orhan Jafarli, Advisor of Department for Legislation in the Field of State Construction of the Milli Majlis of the Republic of Azerbaijan;

specialists – Ragif Gurbanov, Judge of the Court of Appeal of Baku city;

experts – Server Suleymanli, senior lecturer of Civil Law Board of the Baku State University, Emin Guliyev, lecturer of Department of Theory and History of State and Law of the Baku State University,

in accordance with the Article 130.4 of the Constitution of the Republic of Azerbaijan examined in open judicial session via special constitutional proceedings the case on request of Supreme Court of the Republic of Azerbaijan on interpretation of Article 228.5 of the Civil Code of the Republic of Azerbaijan and Article 30.4 of the Housing Code of the Republic of Azerbaijan from the point of view of Articles 2.5 and 10.5 of the Constitutional Law of the Republic of Azerbaijan “On Normative Legal Acts”.

having heard the report of Judge Rovshan Ismaylov, the reports of the legal representatives of the subjects interested in special constitutional proceedings and specialist, conclusions of experts, examined the materials of the case the Plenum of Constitutional Court of the Republic of Azerbaijan

**DETERMINED AS FOLLOWS:**

The Supreme Court of the Republic of Azerbaijan in accordance with the Article 130.4 of the Constitution of the Republic of Azerbaijan asks the Constitutional Court of the Republic of Azerbaijan (hereinafter referred to as the Constitutional Court) to interpret the Article 228.5 of the Civil Code of the Republic of Azerbaijan (hereinafter referred to as the Civil Code) and the Article 30.4 of the Housing Code of the Republic of Azerbaijan (hereinafter referred to as the Housing Code) from the point of view of the Articles 2.5 and 10.5 of the Constitutional Law of the Republic of Azerbaijan “On Normative Legal Acts” (hereinafter referred to as the Constitutional Law “On Normative Legal Acts”).

In the request it is noted that in the Article 228.5 of the Civil Code and Article 30.4 of the Housing Code having equal validity are revealed various regulations on keeping for the previous member of the family of owner of the right of use of living space.

According to conclusion of applicant, there are several ways in legislation for solution of such issues. According to the Article 2.5 of the Constitutional Law “On Normative Legal Acts” in case of contradiction between the Civil Code of the Republic of Azerbaijan and other codes and laws, reflecting regulations of civil law the Civil Code of the Republic of Azerbaijan shall be applied. According to the Article 2.3 of the Civil Code family, labor relationships, relationships concerning the use of natural resources and environmental protection, and copyright and related rights are regulated by civil law and other legal acts, except as otherwise provided stipulated by family, labor, land, environmental, copyright and other special legislation. On the other hand, according to Article 10.5 of Constitutional Law “On Normative Legal Acts” the new regulatory legal act has a larger legal force in relation to the regulatory legal act accepted earlier by the same state body on the same issue.

In a request it is specified that presence in the legislation of various regulations connected with keeping for the previous member of the family of owner of the right of use of living space creates difficulties in court practice, exerts negative influence on forming of common court practice, on a comprehensive protection of the property right and the housing right. From this point of view, there is a need for interpretation of the above-stated articles as special constitutional proceeding.

In a request it is also specified that, the Constitutional Law “On Normative Legal Acts” came into force - on February 17, 2011, the Civil Code - on September 1, 2000, and the new Housing Code - on October 1, 2009.

According to Article 7 of previous Constitutional Law of the Republic of Azerbaijan “On Normative Legal Acts” (hereinafter referred to as previous Constitutional Law “On Normative Legal Acts”) adopted on November 26, 1999 and acting till February 17, 2011 at elimination of the collision existing between regulatory legal acts the order in case of which the new regulatory legal act has higher legal force was established. The retroactive effect of this Law is not provided in the Constitutional Law “On Normative Legal Acts” establishing an order, other than it. In that case, draws attention the question of solution of the collision existing between the Articles 228.5 of Civil Code and 30.4 of Housing Codes accepted before entry into force of the Constitutional Law “On Normative Legal Acts”.

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

Based on contents of Article 228.5 added to the Civil Code on December 14, 2005, in case of termination of the family relations with the owner of living space the members of his family (previous) have the right of use of this living space.

According to Article 30.4 of Housing Code in case of the termination of the family relations with the owner of living space the right to use of these living spaces for the previous member of the family of the owner of these living spaces does not kept if other is not established by the agreement between the owner and the previous member of his/her family. If the former member of the family of the owner of living space has no bases for acquisition of living space or implementation of the right of use of living space, financial position of the previous member of the family of the owner of living space and other circumstances deserving attention do not allow him/her to provide themselves with living space, then on the basis of the judgment the right of use of the living space belonging to the specified owner can be kept for the former member of his/her family for a certain term.

Apparently while it is provided in Article 228.5 of Civil Code, that also after the termination of the family relations with the owner of living space, his/her previous member (owner of living space) of a family has the right of use of this living space, in Article 30.4 of the Housing Code the absence at the previous member of the family of the right of use of this living space at the termination of the family relations with the owner of living space is clearly established.

Thus, because the specified norms regulating the same issue establish completely different from each other order, in the legislation there was a collision. The collision of regulatory legal acts that is a contradiction essence in the regulatory legal acts governing the public relations consists that in case of availability of two or more norms of law governing these relations, application of one of them excludes application of others. Such approach is also reflected in the current legislation.

Existence of legal collisions is explained by complexity and variety of any legislative system. For this reason for many years in legal practice of various countries, a number of the principles resolving legal collisions was created. First of all it is possible to refer the principles of hierarchy (Lex superior derogate legi inferiori), a temporality (Lex posterior derogate legi priori), pithiness (Lex specialis derogate legi generali) to these principles. Collisions between the legal acts having a different legal force are eliminated with the principle of hierarchy, and a collision between norms of the regulatory legal acts having an identical legal force - by the use of two other principles.

In a number of the countries these principles are expressed in the legislation. In this sense the Republic of Azerbaijan does not an exception. Thus, after finding of independence in the Republic of Azerbaijan three laws reflecting these principles were adopted: the laws “On Normative Legal Acts” of 1994 and 1999 and the Constitutional Law “On Normative Legal Acts” of 2011.

The purpose of these principles consists in elimination of the collisions arising at interpretation of law by law-enforcement bodies, in particular by courts.

It should be noted that use of the principle of hierarchy in case of a research of the actual circumstances on concrete case and implementation of the choice of regulations which shall be applied based on interpretation of the legislation first of all according to relevant provisions of Article 147.2 and Article 149 of the Constitution and interpretation of the right shall be perceived as manifestation of law-enforcement activity of the courts of general jurisdiction.

On the other hand, in case of a contradiction between regulations of the regulatory legal acts having an identical legal force courts shall resolve this issue independently according to the principle of a temporality. According to a sense of this principle even if in late there is no special note on cancellation of action of regulations of the previous law in case of obvious, clear and irreconcilable collisions between these laws the subsequent law is applied.

According to specified and considering value of the mentioned principles in legal system, the Plenum of the Constitutional Court in connection with raised issue considers important to note the following.

According to contents of Article 11 of the Constitutional Law “On Normative Legal Acts” at elimination of a collision of regulatory legal acts preference is given first of all, to the principle of hierarchy, and in case of not elimination of a collision in the second queue, regulations of Articles 10.2-10.5 of the Constitutional Law are consistently applied.

Content of the principle of hierarchy according to Articles 148 and 149 of the Constitution it is enshrined in the Article 2 of the Constitutional Law. On the other hand, in Article 2.5 of the Constitutional Law it is specified that in case of a contradiction of the Civil Code of the Republic of Azerbaijan to other codes and laws reflecting regulations of the civil law the Civil Code of the Republic of Azerbaijan is applied.

Apparently, this regulation selects the Civil Code from a number of the regulatory legal acts of an identical type governing the civil relations and establishes that it has the prevailing legal force over others, including over the Housing Code.

The issue raised in request is actually connected with the choice of one of the principles (hierarchy or a temporality) provided for solution of a collision between Article 228.5 of Civil Code and Article 30.4 of Housing Code.

Plenum of the Constitutional Court proceeding from the principle of a temporality directed to solution of collisions arising between regulatory legal acts and considering the entering into force on February 17, 2011 of Constitutional Law “On Normative Legal Acts” considers that any collision which arose between the norms of law existing before the specified date including a collision between Article 30.4 of Housing Code that enter into force on October 1, 2009 and the Article 228.5 of Civil Code shall be solved according to Article 7 of the previous Law “On Normative Legal Acts”.

The Article 7 of this Law required in case of contradictions between the regulatory legal acts having various legal force to apply the regulation having higher force, and in case of contradictions between the regulations having an identical legal force - that from them which came into force later.

It is necessary to consider that in the Article 7 of the previous Law “On Normative Legal Acts” content of the principle of a temporality (Lex posterior derogate legi priori) of the Constitutional Law “On Normative Legal Acts” enshrined in the Article 10.5 stipulates that even if in the late law there were no special notes on cancellation of action of regulations, the adopted law, in case of collisions between them the late law shall be applied. Acting of the previous law only in part that does not contradict to the subsequent law is allowed.

Thus, the provision “the right of these persons for use of a component of the residential building remains also in case of the termination of the family relations with the owner” of Article 228.5 of Civil Code contradicting to provisions of the Housing Code from the date of its entering in force cannot be applied because of the actual loss of the validity. For this reason by consideration of the issues connected with the right of use of living space of the former member of the family of the owner of the given area after the termination with him/her of family relations to the relations which have arisen till October 1, 2009 provisions of Article 228 of Civil Code, and after this date of Article 30.4 of Housing Code have to be applied.

The Plenum of the Constitutional Court considers that with the purpose of ensuring of stability of judicial acts that took legal effect following from the principle of legal certainty, this order should not extend to the judicial acts which took legal effect on the lawsuit connected with right to use by living space of the former member of the family of the owner of this area.

At the same time, the Plenum of the Constitutional Court notes that anyway from the point of view of the above-stated principles the regulation that is subject to application can be applied only in case of compliance with requirements of constitutional rights. In this sense, it is necessary to consider that in court practice of a provision of normative legal acts shall be applied according to their constitutional and legal sense.

If the collision of normative legal acts leads to collision of constitutional rights, then the issue of elimination of such contradictions carries the constitutional value and in these cases ensuring of establishment of a constitutional and legal sense of the law in force belongs to powers of the Constitutional Court.

Proceeding from this position and in view of essence of request the Plenum of the Constitutional Court considers necessary to examine the Article 30.4 of Housing Code.

Along with establishment of some provisions connected with implementation of the property right of the owner of living space affirmed in the Constitution, the legislator in this article also provided restriction of this right with the purpose of protection of housing interests of participants of the corresponding legal relationship.

According to Article 29.1 of Constitution everyone has the right to property. The property right, including the private property right, is protected by law.   
No one is dispossessed without a decision of the court. Complete confiscation is inadmissible. The alienation of property for state needs is allowed only after a fair reimbursement of its value has been granted.

The content of this right should be understood, in view of provisions of Article 13 of the Constitution. The property as important institute of civil society is one of the main factors for economic development of the state. Therefore, the property is declared inviolable under Article 13 of the Constitution and is protected by the state. The property right, being a basis of freedom of each individual in society, is an important condition for development of personality and free business. Along with it, despite the importance of noted right, it is not obligatory and can be limited. It is necessary to take into consideration that besides that the property bears important function in implementation of special interests of the individual, it has also important social function in socially directed state on the basis of contents of Article 15 of the Constitution (decision of the Plenum of Constitutional Court of December 16, 2011 on interpretation of Articles 107.2.1 and 107.5.1 of Civil Code of the Republic of Azerbaijan).

It also must be taken into account that along with classification of the right to property in the Constitution, its general and specific restrictions boundaries (limits) have been established (Article 13.3 of the Constitution, Article 29.2 and Article 71.2, Article 3.3 of the Constitutional Law of the Republic of Azerbaijan “On regulation of implementation of human rights and freedoms in the Republic of Azerbaijan”). Thus, the restriction of property rights must meet the requirements of the rule of law, to be applied in order to protect the rights and freedoms of other persons, shall be proportionate and not affect the substance of the constitutional law. Such restrictions, including the possibility of living standard and its character must be conditioned by protection of important constitutional values. Reflection of social protection of citizens and care of worthy level of living among the constitutional purposes of the state in the social sphere and establishment in the Constitution of the fact that nobody can be illegally deprived of the apartment is a an evidence of importance and the constitutional significance of state policy in the sphere of the housing relations. Thus, the constitutional basis for decisions made on the state’s housing policy from the constitution in accordance with the conditions, can act as the basis for the limitation of the right to property. In any case, such a restriction being reasonable and proportionate of the goal, should not impose on the individual owner an excessive burden (decision of the Plenum of Constitutional Court on interpretation of Articles 1, 5 and 12 of the Law of the Republic of Azerbaijan “On Privatization of Housing Stock in the Republic of Azerbaijan”).

The European Court of Human Rights expressed the similar legal position on property right enshrined in the Article 1 of the Protocol No. 1 to the Convention on Protection of Human Rights and Fundamental Freedoms. Thus, according to case law of Court, the principle of a “fair balance” inherent in Article 1 of Protocol No. 1 itself presupposes the existence of a general interest of the community ... An interference with the right to the peaceful enjoyment of possessions must strike a “fair balance” between the demands of the general interest of the community and the requirements of the protection of the individual’s fundamental rights… In particular, there must be a reasonable relationship of proportionality between the means employed and the aim sought to be realized by any measure applied by the State (decisions of Grand Chamber of June 22, 2004 on case of Broniowski vs. Poland, and of March 29, 2006 on case of Scordino vs. Italy).

Based on these legal positions it should be noted that regulation by the legislation of the property right to living space should be fulfilled based on fair and reasonable balance of the rights and interests of all participants of the corresponding legal relationship including members of the family of the owner of living space. For achievement of this constitutional purpose such regulation also should make possible application of the differentiated (various) approach for the purpose of establishment and a research by courts of the actual circumstances of specific case, accounting of different circumstances that arose or can arise based on those circumstances and the final result of prevention of unreasonable and excessive restriction of constitutional rights and freedoms. Besides, fair and reasonable balancing of interests of participants of the corresponding legal relationship has to be carried out on the basis of the acting system of legal regulation taking into account norms of all branches of the right.

According to content of Article 30.4 of Housing Code the provision of this article are not applied if between the owner of living space and members of his/her family the agreement regulating instructions for use these living space is signed. Not establishment by such agreement of any condition provided to its participants by wide freedom. For this reason, as such agreement can act, provided as civil (for example, the lease contract of the real estate or the agreement on free use) and the family legislation (the marriage agreement or the agreement on payment of the alimony) a type agreement which is also not contradicting the current legislation of other agreement.

If the specified relations are not governed by the agreement then termination of the family relations is the basis for loss by the former member of the family of right to use living space, and it, in turn, does possible application of other rules, stipulated in Article 30.4 of Housing Codes.

At the same time the termination of the family relations between the owner of living space and other family members does not come to end without fail for the former family member with loss of the right of use of living space. Article 30.4 of Housing Code in certain cases provides a possibility of preservation of this right.

Thus, if the former member of the family of the owner of living space has no bases of acquisition of living space or implementation of the right of use of living space and also if financial position of the former member of the family of the owner of living space and other circumstances deserving attention do not allow him/her to provide themselves with living space, then on the basis of the judgment the right of use of the living space belonging to the specified owner can be kept for a certain term for the former member of his family.

Article 30.4 of Housing Code for ensuring of housing needs of the former family members having no other options and any means for satisfaction of these needs allowed a restriction for a certain term of the rights of the owner of living space.

Thus, even in the absence of the bases for existence of the right of use of living space for protection of housing interests of the former family member this right can be kept judicially. In this sense an implementation of this right in presence of reasonable and fair ground, provided in Article 30.4 of Housing Code, and preservation only for a certain term confirms harmony of restriction of the right of the owner.

Having leave an issue of establishment of preservation’s term for right of use regarding living space for owner’s former member of family to discretion of court the Housing Code provides in each case the importance of examination of that and when there are the grounds for preservation of right of use regarding certain living space for former members of family of these living space’s owner and eviction of relevant persons from living space which is in use shall be possible only upon examination by court of all facts of the case having legal importance.

Thus, according to the constitutional legal sense established in the present decision, provisions of the Article 30.4 of Housing Code in itself cannot be regarded as a norm that does not conform with the constitutional principles of legal regulation of ownership, use and disposal of living space and does not provide protection of the housing right which is the constitutional right.

According to the above, the Plenum of the Constitutional Court comes to the following conclusions:

- at consideration of issues of right of use with respect to living space of the former member of family of the owner of this premise after the termination with him/her of family relations - to the relations which have arisen till October 1, 2009 have to be applied the provisions of the Article 228 of Civil Code, and to the relations which have arisen after the specified date have to be applied provisions of Article 30.4 of Housing Code;

- the first point of resolutory part of this Decision does not extend to the judicial acts in effect;

Being guided by the Article 130.4 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 AS FOLOWS:**

1. At consideration of the issues connected with the right of use of living space of the former member of the family of the owner of this premise after the termination with him/her of family relations - to the relations which have arisen till October 1, 2009 have to be applied the provisions of Article 228 of Civil Code of the Republic of Azerbaijan, and to the relations which have arisen after the specified date have to be applied provisions of the Article 30.4 of Housing Code of the Republic of Azerbaijan.

2. The first point of resolutory part of this Decision does not extend to the judicial acts in effect.

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 may not be cancelled, changed or officially interpreted by any institution or official.