**ON BEHALF OF THE REPUBLIC OF AZERBAIJAN**

**DECISION**

**OF THE PLENUM OF THE CONSTITUTIONAL COURT**

**OF THE REPUBLIC OF AZERBAIJAN**

*On verification of conformity of decision of the Judicial Board on Civil Cases of the Supreme Court of the Republic of Azerbaijan of 14 May 2009 to Constitution and laws of the Republic of Azerbaijan in connection with the complaint of Masuma Vezirova*

**21 June 2010 Baku city**

Plenum of the Constitutional Court of the Republic of Azerbaijan composed of F.Abdullayev (Chairman), S.Salmanova, F.Babayev, S.Hasanova, B.Garibov (reporter judge), R.Qvaladze, E.Mammadov. I.Nadjafov and A.Sultanov,

with participation of the secretary I.Ismayilov,

applicant M.Vezirova and her representative M.Gadi

representative of the respondent – R.Akberov, employee of the Staff of Supreme Court of Azerbaijan Republic

according to Article 130.5 of the Constitution of the Republic of Azerbaijan has examined in open court session on constitutional proceedings the complaint of M.Vezirova concerning verification of conformity of decision of the Judicial Board on Civil Cases (hereinafter JBCC) of the Supreme Court of the Republic of Azerbaijan of 14 May 2009 to Constitution and laws of the Republic of Azerbaijan

Having heard the report of Judge B.Garibov, speech of the complainant and her representative and having considered materials of the case, Plenum of the Constitutional Court

**DETERMINED AS FOLLOWS:**

Decision of Nasimi district court of Baku city of 24 May 2007 satisfied the claim of M.Akberova against A.Akberov and D.Akberova concerning recognition of the right to use house and living therein, recognized right of .Akberova to use house #52 located on S.Solayev street of Baku and adopted decision on her moving to the mentioned house.

Decision of Judicial Board on Civil Cases of Baku Court of Appeal (hereinafter, JBCCBCA) of 3 October 2007 kept decision of Nasimi district court without any changes.

The decision of Judicial board on Civil Cases of the Supreme Court of the Republic of Azerbaijan (hereinafter, JBCC of the Supreme Court) of January 29, 2008 cancelled decision of JBCCBCA and case was returned to re-examination.

On June 6, 2008 the decision of Nasimi district court was kept by decision of JBCCBCA without any changes.

On September 28, 2008 decision of JBCCBCA was cancelled by decision of JBCC of the Supreme Court and the case was returned on new consideration.

On December 26, 2008 the judgment of the court of first instance was kept by decision JBCCBCA without changes.

On May 14, 2009 the appeal of defendants on a civil case were satisfied by decision JBCCBCA of the Supreme Court, the judgment of appeal instance was cancelled, and the claim of Masuma Akberova was not satisfied.

On August 12, 2009 M.Vezirova's (Akberova) additional appeal was not satisfied by the letter of the chairman of the Supreme Court.

The applicant M.Vezirova (Akberova), having applied to the Constitutional Court of the Republic of Azerbaijan (hereinafter - the Constitutional Court), asked to examine decision of court of cassation instance of May 14, 2009 on the civil case considered on its claim, on conformity to laws and Constitution of the Republic of Azerbaijan (hereinafter - the Constitution).

Plenum of the Constitutional Court in connection with the complaint notes the following.

As evident from case materials, case on M.Vezirova's was repeatedly considered in judicial instances, the court of appeal instance some times came to a conclusion on validity of the claim, however in each case by court of cassation instance a judgment of appeal instance was recognized unreasonable and cancelled.

In article 60 of the Constitution legal protection of rights and liberties of every citizen is ensured. In CPC, acting as one of the basic mechanisms of this guarantee, the constitutional principles of realization of justice are reflected.

The legislator for the purpose of maintenance of justice and legality of judicial acts on civil cases establishes in CPC the rights and duties of court, persons participating in case and other participants of process and regulates procedural rules in civil justice. Proceeding from these rules directed on realization of the rights and duties of participants of process, achievement fair decision of case, maintenance of the right of giving of the complaint as the appeal and the cassation serves as objective.

According to the procedural legislation court of cassation instance, having considered case, has the right having cancelled the decision or definition of court of appeal instance completely or in a part to make the new decision on the basis of circumstances and proofs established by court of appeal instance. Such decision is accepted only in the case that the court of appeal instance breaks or incorrectly applies norms and procedural right (article 417.1.4 and 417.2 of CPC).

Apparently from the maintenance of the specified norms, the court of cassation instance does not establish circumstance of case and the proof, and, having established infringement or incorrect application of norm of the substantive law on circumstances and proofs established only by court of appeal instance, may make the corresponding decision.

Plenum of the Constitutional Court in connection with an essence of this institute recently brought in the procedural legislation, especially notices that power of court of cassation instance in acceptance of the new decision cannot be interpreted as the right of this court to consider case as a matter of fact as full court. Application of article 417.1.4 of CPC can be recognized by lawful exclusively within the limits of the legal nature and limits of powers of court of cassation instance, and in any case should not come to the end with a capture this court on itself of powers of minor courts. This article also does not give a legal ground on an establishment court of cassation instance of new circumstances of the civil case which has been not established by courts of the lowest instances, and application on these circumstances of norms of the substantive law. The opposite approach would not correspond to the maintenance of article 131 of the Constitution establishing constitutional-legal status of the Supreme Court. Similar legal positions were reflected also in decisions of the Constitutional Court of April 12, 2004; May 21, 2004; August 3, 2004; October 28, 2004.

However on the present case court of cassation instance, having applied articles 417.1.4 and 417.2 of Civil Procedure Code in order, not corresponding to their constitutional-legal meaning, at the end result has broken requirements of these legal norms.

How civil case materials indicates, court of appeal instance, being based on testimony containing in case, written statements of respondents, has come to such conclusion that M.Akberova, having created at 1974 a family with A.Akberov, has the same year moved to the disputable house, has brought dowry subjects in this house, living together with the husband in the disputable house kept house, in connection with marital status, having remodel one of house rooms for shop, together with the husband has temporarily moved to the house of parents of the claimant, through certain time has returned to the disputable house, in 1978 and 1979 give birth two children, in 2002 M.Akberova with the consent of husband A.Akberov has gone to the son whom get higher education in Kingdom of the Netherlands, at returning in 2009 in Baku the husband with the new wife don’t not let her in the house.

Court of appeal instance, being based on article 228 of the Civil Code of the Republic of Azerbaijan, article 60 and 123 Housing Code of the Republic of Azerbaijan, acting till October 1, 2008 (hereinafter referred to as expired Housing Code), has considered that the claimant M.Akberova has found the right to residing in the disputable house, her departure for any reason for certain term from the disputable house cannot be regarded, as resettlement for inhabitancy to other home accommodation, and departure to Kingdom of the Netherlands, does not deprive her for existing right to the house. Here the court of appeal instance has referred also to the decision of the Constitutional Court on March 12, 1999 «Concerning Article 60 of the Housing Code of the Republic of Azerbaijan». According to point 2 of a operative part of the given decision in case of absence of the grounds stipulated in Article 87 of the Housing Code, the temporary absence of the lessee or members of his/her family, including during six months and more, does not deprive their rights for dwelling space.

The court of appeal instance has come to such conclusion that to recognize the right of the claimant to using of lost, the bases specified in article 87 of the Civil Code should be established. And this basis consists that the claimant should leave for inhabitancy to other human settlement or move to another a floor space in the same settlement.

Court, having established that M.Akberova is the citizen of the Republic of Azerbaijan, has not obtained the citizenship of Kingdom of the Netherlands that in materials of a civil case there are no documents on presence at it a floor space in this Kingdom and reception of the right of a constant residence in Kingdom territory, also has considered that arrest of the claimant in Kingdom of the Netherlands, her deportation and other similar circumstances, do not related with case.

Civil Board of the Supreme Court, last time considered case in a cassation order, having estimated proofs available in case, has come to such conclusion that M.Akberova has not get the right of use of the house at all. The court of cassation instance has come to a conclusion that the applicant has left to Kingdom of the Netherlands for inhabitancy and it has proved not by the circumstances established by court of appeal instance, but the own conclusion. In this connection in the decision of court of cassation instance it is noticed that «… in case of residing of the applicant at Kingdom of the Netherlands on legal bases, it does not create any doubts in that that its residing there with the children will be inhabitancy».

Besides, the court of cassation instance has considered that court of appeal instance by a new examination of case, not followed to instructions given in decision of Civil Board of the Supreme Court on January 29, 2008, has not specified in the report the subjects being in the disputable house belonging to the applicant, has not bring to case of other persons registered in the disputable house and by that has broken requirements of article 420 of Civil Procedure Code.

According to requirements of the civil procedure legislation if the court of cassation instance will come to a conclusion concerning infringement or wrong application by court of appeal instance of norms material and a procedural right, as a rule, according to article 417.1.3 of Civil Procedure Code, it should direct case for new examination to court of appeal instance. Revealing of any emptiness that influence on making of correct decision on case, excludes acceptance of the new decision on the basis of circumstances and the evidences established by court of appeal instance.

Considering the above-stated Plenum of the Constitutional Court considers that decision of Civil Board of the Supreme Court on May 14, 2009 on the case of a recognition of the right of use of an apartment house and moving in apartment on M.Akberova claim to A.Akberov and D.Akberova does not correspond to requirements of articles 416, 417.1.4 and 417.2 of Civil Procedure Code. The acceptance during legal examination of decision contradicting requirements of specified procedural rules, became a cause of infringement, fixed in article 60 of the Constitution of a guarantee of judicial protection of the rights and freedom of the applicant of M.Vezirova (Akberova).

Being guided by parts V and IX of Article 130 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”, the Plenum of the Constitutional Court of the Republic of Azerbaijan

**DECIDED:**

1. To Recognize the decision of Judicial board on civil cases of the Supreme Court of the Republic of Azerbaijan on May 14, 2009 on the case of a recognition of the right of use of an apartment house and moving in apartment on M.Akberova's claim to A.Akberov and D.Akberova become null and void in view of discrepancy to article 60 of the Constitution of the Republic of Azerbaijan, to articles 416, 417.1.4 and 417.2 of Civil Procedure Code of the Republic of Azerbaijan. To consider case again according to the present decision, manner and the terms established by the civil procedure legislation of the Republic of Azerbaijan.

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