**ON BEHALF OF THE REPUBLIC OF AZERBAIJAN**

**DECISION**

**OF THE PLENUM OF CONSTITUTIONAL COURT**

**OF THE REPUBLIC OF AZERBAIJAN**

*On interpretation of Article 87.2 of the Law of the Republic of Azerbaijan “On execution” and Article 2.1 of the Administrative Procedure of the Republic of Azerbaijan*

**04 April, 2012 Baku city**

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

attended by the Court Clerk Ismail Ismaylov,

the legal representatives of the subjects interested in special constitutional proceedings: Elmar Ragimov, Judge of Binagadi District Court of Baku city, Seyyad Kerimov, Deputy head of the Department for Administrative and Military Legislation of Milli Majlis of the Republic of Azerbaijan;

expert: Elchin Usub, member of the Bar of the Republic of Azerbaijan;

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 Binagadi District Court of Baku city and Lankaran District Court.

having heard the report of Judge Jeyhun Garajayev, the reports of legal representatives of the subjects interested in special constitutional proceedings and expert, and upon examination of materials of the case the Plenum of Constitutional Court of the Republic of Azerbaijan

**DETERMINED AS FOLLOWS:**

Binagadi District Court of Baku city applied to the Constitutional Court of the Republic of Azerbaijan (hereinafter referred to as the Constitutional Court) in connection with interpretation of provision “Decision shall be issued in accordance with norms of procedural law acting at the time of examination of case” of Article 217.2 of Criminal Procedure Code of the Republic of Azerbaijan (hereinafter referred to as CPC) from the point of view of provisions of the Law of the Republic of Azerbaijan “On Introduction of Modifications to the Civil Procedure Code of the Republic of Azerbaijan” (hereinafter referred to as the Law “On Introduction of modifications to the Civil Procedure Code of the Republic of Azerbaijan”), Article 32.7 of the CPC and Article 87.2 of the Law of the Republic of Azerbaijan “On Execution” (hereinafter referred to as the Law “On Execution”).

In the inquiry it is specified that T. Akhmedov appealed to Binagadi District Court with the complaint concerning recognition as illegal the actions of executive officials of Executive department of the Binagadi District of the Baku city. Considering character of the legal relations that arose between the parties the court concluded that this dispute should be considered in specialized court, i.e. in the Administrative-Economic Court N1 of Baku city and sent case materials to that court.

Administrative-Economic Court N1 of Baku city, referring to Article 87.2 of the Law “On Execution”, in definition of September 14, 2011, for determination of judicial jurisdiction of the complaint of T. Akhmedov, sent case materials to the Court of Appeal of Baku city.

Administrative-Economic Board of the Court of Appeal of Baku city, referring to Article 2.1 of the Administrative-Procedural Code of the Republic of Azerbaijan (hereinafter referred to as the Administrative-Procedural Code), Article 11 of the Law of the Republic of Azerbaijan of December 28, 2009 “On executive officials” (hereinafter referred to as the Law “On Executive Officials”), Article 87.2 of the Law “On Execution” adopted the decision on that the arisen dispute has to be considered not by Administrative-Economic Court N1 of Baku city but by Binagadi District Court of the Baku city.

The Binagadi District Court in the inquiry applied to the Constitutional Court and asked to clear up a question by which court, the court of law or administrative-economic court, the dispute that arose at execution of a judgment on a civil case, has to be considered.

At the same time, Lankaran District Court having sent to the Constitutional Court the address on the case which is at it consideration in connection with A. Guseynov's complaint to actions of the executive official, asked to give interpretation to Article 87.2 of the Law “On Execution” and Article 2.1 of the Administrative-Procedural Code, from the point of view of jurisdiction of court.

Due to the questions that are brought up in both addresses, Plenum of the Constitutional Court considers necessary to note the following.

According to Article 60 of the Constitution of the Republic of Azerbaijan (hereinafter referred to as the Constitution) legal protection of rights and liberties of every citizen is ensured. The judicial guarantee of protection of the rights and freedoms is an inviolable, indestructible and inalienable right of everyone from the moment of the birth. For implementation comprehensively of the rights for legal protection and restoration of the violated rights in the form conforming to requirements of the basic principles of justice in the legislation also provided the other guarantees.

One of such guarantees is the right of everyone for consideration of his/her case in the law court specified by the legislation fixed in Article 62 of the Constitution. Interpretation of the provision “the law court specified by the legislation” noted in this norm of the Constitution gives the grounds to include in this concept the rules of jurisdiction of cases, existence of the structure of court determined by the law, and other conditions. The clear and exact indication in the legislation of issues of judicial jurisdiction of disputes very important from the point of view of a judicial guarantee of the rights and freedoms of the person and the citizen.

Thus, at administration of justice, judicial jurisdiction has to be perceived as one of the main procedural guarantees of the rights and legitimate interests of the person. It demands exact definition by the law of rules of jurisdiction of court. Otherwise, before court and the parties, besides emergence of uncertainty in issue of that in what court the case has to be considered, there can be difficulties in consideration of case by court in reasonable terms and to become impossible the effective restoration of the violated rights of the person.

According to Article 8 of the Universal Declaration of Human Rights, Article 6 of the Convention “For the Protection of Human Rights and Fundamental Freedoms” (hereinafter referred to as the Convention), Article 14 of the International Covenant “On Civil and Political Rights” at the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

According to sense of noted international norms, everyone entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law provides comprehensive and objective consideration not by any court, but courts of the corresponding jurisdiction which powers initially defined by the law.

According to the legal position expressed in the decision of the European Court of Human Rights (hereinafter referred to as the European court) of September 16, 2010, on case of Chernichkin. Russia, not exact definition by the legislator of issue of jurisdiction violates the right of the person for protection in court and the requirement of Article 6.1 of the Convention.

In the decision of the European Court of May 22, 1998, on case of Vasilescu. Romania it was noted that only the court comprehensively possessing powers for consideration of the case able to be regarded as a “court” within the meaning of Article 6 of the Convention.

It should not to miss from attention that unreasonable and illegal change of judicial jurisdiction is inadmissible. Thus, according to Article 15 of the Law of the Republic of Azerbaijan of June 10, 1997 “On Courts and Judges” (hereinafter referred to as the Law “On Courts and Judges”), diverting of cases from the appropriate jurisdiction of courts provided by the legislation of the Republic of Azerbaijan or undue withdrawal of the cases from the relevant authorized judge is not allowed.

Along with it, according to Article 31.1 of the CPC breach of rules of jurisdiction is not permitted. In Articles 385, 387 and 418 of the CPC it is specified that even if among the bases for cancellation of the judgment under appeal or cassational procedure, the direct violation of the rules of judicial jurisdiction is not established, the judicial act adopted with such violations cannot be considered as the lawful.

In the decision of Plenum of the Constitutional Court of February 10, 2012 “On interpretation of Articles 512.2 and 519.0.4 of the Criminal Procedure Code of the Republic of Azerbaijan” it was noted that from the point of view of merits of case of the rules of judicial jurisdiction are regulated by the normative legal act of procedural character.

According to Article 24 of the CPC determining the jurisdiction of court in respect of disputes, relevance of dispute to general court or economic court are established, in accordance with this Code, further to composition of the parties participating in case, subject matter of dispute or nature of legal relationships.

In view of the fact that the issue which is brought up in inquiries is connected with dispute between the individual and the executive official who arose at execution of judgments, Plenum of the Constitutional Court considers necessary to pay attention to the legal nature of the disputes following from administrative legal relations to the procedural rules regulating a disputability of acts of administrative bodies.

According to Article 1 of the Law of the Republic of Azerbaijan “On Administrative Procedure” (hereinafter referred to as the Law “On Administrative Procedure”) this Law belongs also to other activity (actions) of the actual character of administrative bodies concerning individuals or legal entities and establishes the legal bases, the principles and procedural rules which are carried out by administrative bodies, activity in connection with adoption, execution or cancellation of administrative acts.

According to Article 2.0.1 of this Law appropriate authorities of executive power of the Republic of Azerbaijan, their local (structural) and other organizations, municipalities, and any individual or legal entity authorized to adopt the administrative act on the basis of the law are considered as administrative body. According to Article 2.0.2 of this Law, the administrative act is the decision, the order or an imperious measure of other character adopted by administrative body for settlement or the solution of a certain (concrete) issue in the general legal (public) sphere and generating certain legal consequences for the individuals or legal entity, to which they are addressed.

Administrative legal relations (the general (public) legal relations in the management sphere) arise in the sphere of public administration or local government and are directly connected with fulfillment of duties and powers of administrative bodies in the course of implementation of activity of public administration. As evident, in such legal relations of one of the parties necessarily acts the administrative body. It should be noted that given sign of administrative legal relations is the demonstration of an essence of activity of public administration.

It is necessary to consider that one of features the distinguishing the administrative legal relations from other legal relationship is the forming of these relations on the basis of the principle the power submission. It demands to establish judicial control over the activity of administrative bodies connected with adoption, execution and cancellation of administrative acts.

Article 72 of the Law “On Administrative Procedure” provided possibility of lodging in administrative or a legal process of the administrative complaint to the administrative acts adopted by administrative bodies.

According to Article 8.1 of the Law “On Execution” the sending of the writ of execution to execution is a direct obligation of the court or other body which adopted the relevant decision.

The final judgment which entered into force and the court order issued on its basis acts as the writ of execution for execution of the judgment.

According to point 2.1.1 of part II of “Classification of administrative bodies”, approved by the Resolution of the Cabinet of Ministers of the Republic of Azerbaijan No. 136 as of August 28, 2007, the Enforcement Service of the Ministry of Justice of the Republic of Azerbaijan is considered as the administrative body.

It should be noted that any decision adopted by the executive official on the base of the writ of execution according to the Law “On Execution”, or directed on execution of its actions which are not leading to changes in the existing legal status of the interested person can be regarded as the actions of the actual character. Besides, executive officials act on the basis of unilateral will of the power and action of these officials, carried out in the general (public) legal sphere, there is a measure of the power. Thus, requirements of the executive official in connection with execution of the judgment are obligatory for legal entities and their non-execution or preventing to the executive official in performance of duties lead to the criminal or administrative liability established by the legislation.

Along with it, the Article 29 of the Law “On Execution” provided for rights and obligations of the parties of procedure (complainant and respondent). The objection to executive official and the right of lodge of complaint to its action (inaction) also concern such rights.

It should be noted that Chapter 29 of the CPC defined the procedural rules regulating special claim procedure the consideration of the disputes connected with decisions and actions (inaction) of appropriate authorities of executive power, local self-government institutions, other bodies and organizations, their officials, including the executive official. According to Article 25.2 of the CPC, general courts considers cases on special claim proceeding.

The specified special claim procedure regulates the procedural conditions of consideration of the challenged decisions and actions (inaction) of appropriate authorities of executive power in a judicial proceeding. Thus, this type of special claim procedure provided in CPC, define the protection of the rights and freedoms of individuals in the sphere of administrative law and under civil legal procedure.

However, considering feature of the disputes arising in the sphere of administrative law, responsibility of government bodies of executive power and ensuring human rights in the sphere of public administration and for ensuring of increase of effective judicial protection in this sphere on June 30, 2009was adopted the Administrative Procedural Code.

After that, in connection with adoption of this Code, for bringing of the existing acts to conformity, the corresponding modifications made to CPC and other laws.

On the basis of Article 14 of the Law “On Introduction of Modifications to the Civil Procedural Code of the Republic of Azerbaijan” Chapters 26-29 and 38 were excluded from CPC. Besides, according to the Article 3 of this Law, the word “administrative” was excluded from the Article 25.1 of CPC, while the Article 25.2 was excluded completely.

In its turn, the Law of the Republic of Azerbaijan as of June 22, 2010 “On modifications and amendments in laws of the Republic of Azerbaijan “On Courts and Judges” and “On Judicial and Legal Council”, in the Article 42 of the Law “On Courts and Judges”, defining authorities of economic courts, to the word “economic” had added the word “administrative”. At present, according to this article, administrative-economic courts as court of the first instance, consider the cases on administrative and economic disputes referred to their powers by the law.

As a result of the specified modifications, the legislator defined the solution of the disputes arising in the administrative and legal sphere under administrative legal proceedings.

Plenum of the Constitutional Court considers important to report in depth the administrative justice that is the new in the legal system of the Republic of Azerbaijan.

In the theory there are three main signs of administrative justice:

• concern of the character of administrative dispute to the general (public) legal sphere (material aspect);

• settling of administrative dispute by special authorized bodies;

• existence of a special legal procedure and rules of procedure for the settlement of administrative disputes (procedural aspect).

One of the main objectives of administrative justice is protection of subjective human rights in the sphere of public administration. The subjective rights in the administrative sphere, as a rule, cover the right of the person for the appeal to administrative bodies and courts for protection of the rights and power to demand freedom of behavior within, determined by the legal norm, opportunities to use certain social privileges, implementation of certain actions and implementation of certain actions by others. The subjective rights of the person in the administrative sphere in an obligatory form are characterized by the relation with institute of the power. On the one hand, the carrier of powers of authority vested with a function to provide the rights and freedoms of the person and the citizen, and with another - in case of violation of the rights and freedoms of the person, assigned to exercises the right for the complaint to executive and judicial authorities. From this point of view, the procedural principles and rules for jurisdiction over the disputes concerning the administrative legal relations, consideration and settlement of those disputes by a court defined by norms of the Administrative Procedural Code (Article 1.1 of the Administrative Procedural Code).

Considering the above, Plenum of the Constitutional Court considers that in view of the fact that complaints to decisions, actions (inaction) of executive officials in connection with execution of judgments, by its nature and the contents have administrative procedural character, they have to be challenged in administrative economic courts.

Along with specified, it should be noted that when the Law “On Execution” was adopted in the legal system of the Republic of Azerbaijan there was no the Administrative Procedural Code regulating activity of administrative courts. From this point of view, submission of the complaint to actions or inaction of the executive official in connection with execution of judgments, in economic court across the territory or in court on location of given official, carried function of judicial control of the activity connected with execution of any judgments.

Thus, according to Article 87.1 of the Law “On Execution” in connection with execution of the writ of execution issued by administrative economic court, complainant or the debtor can make the complaint to actions of the executive official, or to his refusal to execute these actions, including on dissatisfaction of rejection of the executive official. According to Article 87.2 of this Law, in connection with execution of other writs of execution which are not provided by Article 87.1 of this Law the complaint to actions of the executive official or his refusal to execute these actions, including to dissatisfaction of rejection of the executive official, lodged within 10 days from the moment of commission of the corresponding action (or refusal to execute these actions) in court on location of the executive official.

According to Article 5 of the Law of the Republic of Azerbaijan of June 10, 2011 “On Introducing of Modifications to the Law of the Republic of Azerbaijan “On Execution””, in the text of Article 87.1 of the Law “On Execution” the word “economic” replaced by “administrative economic”. As a result of this change it was established that challenging of the decision, actions (inaction) of the executive official is carried out in a new form of administrative judicial proceedings.

It is necessary to take into consideration that procedure of consideration of such kind complaints by courts of law was excluded from CPC by the Law “On Introducing of Modifications to the Civil Procedural Code of the Republic of Azerbaijan”.

From this point of view, it may be appropriate to improve by the legislator of order of challenge provided by Article 87.2 of the Law “On Execution”, according to the modifications which carried out in some normative legal acts in connection with adoption of the Administrative Procedural Code.

At the same time, it should be noted that with the exception of circumstances of challenge of the decision, actions (inaction) of the executive official, application of Article 231 of the CPC regulating the issues connected with execution of the judgment under civil legal proceedings is not excluded.

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

- the disputes following from the decision of actions (inaction) of the executive official in connection with execution of the judgment according to Article 2.1 of the Administrative Procedural Code are considered by administrative and economic courts, under administrative production;

- considering the legal position of Plenum of the Constitutional Court created in the present Decision, concerning the judicial jurisdiction of the disputes following from the decision, actions (inaction) of the executive official in connection with execution of the judgment it is necessary to recommend to Milli Mejlis of the Republic of Azerbaijan to eliminate the discrepancy between Article 87.2 of the Law “On Execution” and Article 2.1 of the Administrative Procedural Code;

- before introduction of corresponding modifications to the legislation, the provision “court at the location of the executive official” of Article 87.2 of the Law “On Execution” should be understood as administrative economic court throughout the territory of location of the executive official.

Being guided by 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. The disputes following from decision or action (inaction) of executive official in connection with execution of the judgment according to the Article 2.1 of the Administrative Procedural Code are considered by administrative and economic courts, under administrative production.

2. Considering the legal position of Plenum of the Constitutional Court created in the present Decision, concerning the judicial jurisdiction of the disputes following from the decision, action (inaction) of the executive official in connection with execution of the judgment it is necessary to recommend to Milli Mejlis of the Republic of Azerbaijan to eliminate the discrepancy between Article 87.2 of the Law “On Execution” and Article 2.1 of the Administrative Procedural Code.

3. Before introduction of corresponding modifications to the legislation, the provision “court at the location of the executive official” of Article 87.2 of the Law “On Execution” should be understood as administrative economic court throughout the territory of location of the executive official.

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.