**ON BEHALF OF THE REPUBLIC OF AZERBAIJAN**

**DECISION**

**OF THE PLENUM OF CONSTITUTIONAL COURT**

**OF THE REPUBLIC OF AZERBAIJAN**

*On interpretation of provision “consent of appropriate authority of executive power”, provided in Article 22.2 of the Law of the Republic of Azerbaijan “On Freedom of Religion”*

**13 June 2013                                                                            Baku city**

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

attended by the Court Clerk Faraid Aliyev,

representatives of interested parties – Rustam Kerimli, Judge of Administrative-Economic Court N.2 of Baku city; Hasan Shirinov, Senior Adviser of Social Legislation Department of Milli Majlis of the Republic of Azerbaijan,

expert – Farhad Mehdiyev, Associate Professor of the Department of History of State and Law of Faculty of Law of the Baku State University, Doctor of Philosophy in Law,

specialist – Sabina Allahverdiyeva, Senior Adviser of Law and Registration Department of State Committee of the Republic of Azerbaijan on Work with Religion Organizations;

in accordance with the 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 Administrative-Economic Court No. 2 of Baku city on interpretation of provision “consent of appropriate authority of executive power”, provided in Article 22.2 of the Law of the Republic of Azerbaijan “On Freedom of Religion”.

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

**DETERMINED AS FOLLOWS:**

Administrative-Economic Court No. 2 of Baku city having applied to the Constitutional Court of the Republic of Azerbaijan (hereinafter referred to as the Constitutional Court) asked to give interpretation of provision “consent of appropriate authority of executive power”, provided in the Article 22.2 of the Law of the Republic of Azerbaijan “On Freedom of Religion” (hereinafter referred to as Law “On Freedom of Religion”).

In the inquiry it is specified that by its letters as of February 23, 2011 and March 9, 2011 the State Committee of the Republic of Azerbaijan on Work with Religious Organizations (hereinafter referred to as the Committee) has introduced restriction for religious community Jehovah's Witnesses regarding the volume of import and use of religious literature. Members of religious community appealed to the Administrative-Economic Court No. 2 of Baku city with the claim concerning recognition as illegal of both of the above-mentioned letters and cancellation thereof with compensation of non-material damage. According to claimants, in the letters directed to a religious community from Committee it was expressed only the relation to prohibition of import of religious literature, establishment of restriction for its amount and uses and these letters cannot be perceived as the administrative act creating consequence in law.

The Administrative-Economic Court No. 2 of Baku city at consideration of the case had certain difficulties in a question of whether the provision “consent of appropriate authority of executive power” provided by the Article 22.2 of the Law “On Freedom of Religion” should be considered in its essence as the administrative act.

According to conclusion of the applicant, the correct determination by court of a matter in issue and type of the claim is one of the important conditions of administrative legal proceedings. From this point of view, Administrative-Economic Court No. 2 of Baku city asked for interpretation of Article 22.2 of the Law “On Freedom of Religion”, with the purpose to create single court practice in a question of whether the provision “consent of appropriate authority of executive power” is considered the administrative act in essence.

In connection with the inquiry, the Plenum of the Constitutional Court first of all notes that the disputes considered as administrative legal proceedings from the point of view of the object and a subject, differ from other types of legal proceedings. Therefore, in court practice, at solution of an issue of jurisdiction of disputes, the single position in use of procedural rules concerning the subject of the claim, to a matter in issue and the judicial jurisdiction connected with it shall be created. Otherwise, there can be an uncertainty in connection with what order of legal proceedings it is necessary to consider the case. Such uncertainty can create difficulties for consideration of case by court in reasonable time and finally make impossible restoration of the violated rights of the person.

According to the Article 62 of Constitution of the Republic of Azerbaijan, everyone has the right to have his or her case considered in a court specified by law. Provision “in a court specified by law” of given norm covers orders of jurisdiction of cases, availability of legal judicial structure, procedural conditions and other subjective elements.

The European Court of Human Rights (hereinafter referred to as the European Court) as of December 22, 2009 on case of Bezymyannaya vs. Russia has specified that the rules on jurisdictional parameters to judicial powers of various courts within the entire network of the State's judicial system are undoubtedly designed to ensure the proper administration of justice.

In its decision on case of Chernichkin vs. Russia the European Court indicates that improper establishment by the legislator of issues of jurisdiction violates the right of the person for legal protection, and also requirements of the Article 6.1 of the Convention “On Protection of Human Rights and Fundamental Freedoms” (hereinafter referred to as Convention).

Along with it, in the decision of the European Court as of March 24, 2005 on case of Baburin vs. Russia the Court observes substantial delays caused by the divergent rulings on the courts' competence to hear matters involving both commercial companies and private individuals and finally, it has to be regarded as violation of Article 6.1 of the Convention.

The administrative body acts as the main subject of administrative and legal disputes (carrying out public functions). One of the parties of the dispute considered in administrative and procedural order surely is the administrative body. The list of administrative bodies is provided in the Resolution of the Cabinet of Ministers of the Republic of Azerbaijan of August 28, 2007, N. 136 “On Approval of Classification of Administrative Bodies”.

The question that raised in the inquiry is directly connected with measures of public administration, in connection with ensuring of right to freedom of religion and conscience. Contest of this measure, in fact, is possible in administrative and economic courts. However, for exact and objective establishment of judicial jurisdiction on the territory, legal status of the body that adopted this act shall be analyzed.

According to Article 22.2 of the Law “On Freedom of Religion”, the religious associations, other legal entities and individuals that are not religious formations have the right, upon consent of appropriate authority of executive power, to produce, import and freely spread literature, things of cult designation and other informational materials of religious content.

Power of “appropriate authority of executive power” provided in Article 22.2, the name and the first paragraph of Article 29 of the Law “On Freedom of Religion” implement the Committee. Power of this administrative authority covers the territory to which jurisdiction more than one court extends. In that case, at solution of an issue of judicial jurisdiction from the territorial point of view, during contest of the administrative act adopted by Committee it is necessary to be guided by Article 8.1.2 of the Administrative Procedural Code of the Republic of Azerbaijan (hereinafter referred to as the APC).

Consent to import of religious literature is granted based on the conclusion of examination of religious studies which is carried out by the Committee. Thus, the Article 7.8 of the Provision “On State Committee of the Republic of Azerbaijan on Work with the Religious Organizations” approved by the Decree of the President of the Republic of Azerbaijan dated July 20, 2001 No. 544, the ensuring of conducting theological examination of religious literature, objects and other materials of religious contents is attributed to obligations of the Committee.

From the point of view of a subject of administrative disputes and a circle of subjects of the considered claims, Article 2.2 of the APC regulates the issue of jurisdiction. In the Code, for each type of the claim special and various procedural rules (Articles 32, 33, 34, 36, 39, 70, 72, 73 and 74 of the APC) are established. Thus, the correct identification of a matter in issue and type of the claim is one of important conditions during administrative legal proceedings.

In addition, the APC precisely regulates in a procedural order an issue of jurisdiction of administrative disputes from the point of view of feature of the administrative act. Thus, Article 8.1.2 of the APC establishes that actions against administrative acts, which were adopted by administrative body covering more than one court jurisdiction, shall be reviewed by the court at the place of permanent residence or temporary living place of a person, whose rights (interests protected by law) were interfered with.

In other case, claims for contest are considered by territorial court in the location of the administrative authority that adopted the challenged administrative act. In this case, objective exact assessment of feature of the administrative act, will serve for detection of judicial jurisdiction on the territory.

From this point of view, the Plenum of the Constitutional Court in connection with the issue that is brought up in the inquiry, considers necessary to pay attention to the legal nature of the administrative act.

The administrative-legal act is meant as the act governing the administrative relations or resolving a specific administrative matter (dispute) establishing the new legal status of legal subjects adopted administratively by authority or officials (within management process), adopted for implementation of functions of management and achievement of goals.

On the one hand the administrative-legal act regulates uncertain legal relationship, that is, determines obligatory rules of conduct for an unrestricted circle of individuals and legal entities, and with another - performs private legal regulation, that is, resolves the specific issues and disputes arising in the plane of the public law.

The structure of managerial legal relationship that are created by the administrative act consists of two basic elements. The body adopting the act as the subject and the person concerning whom the act was adopted act as the object of legal relationship. Thus, the administrative act is declaration of will that is adopted by authorized administrative authority unilaterally, serves for public concerns in the sphere of the common (public) law and which execution is important.

It should be noted that in the Law of the Republic of Azerbaijan “On Administrative Procedure” (hereinafter referred to as the Law “On Administrative Procedure”), the concept “administrative act” covers in itself only private acts. Thus, according to Article 2.0.2 of the Law “On Administrative Procedure” the administrative act is the decision, the order or an imperious measure of any nature, adopted by administrative authority with the purpose of settlement or solution of a certain (specific) issues in the sphere of the public law and generating certain consequence in law for the individuals or legal entities to whom it is addressed.

Analyzing the essence of the specified article, it is possible to come to such conclusion that the administrative act is characterized by the following signs:

- to be adopted by administrative authority;

- to settle the certain (specific) issues relating to the sphere of the common (public) law;

- to create certain consequence in law for legal entity or individual to whom this act is addressed;

- to become an imperious measure.

Thus, the administrative act adopts by authorized subjects of public management in the order established by the legislation.

It should be noted that establishment by the legislator of features of such act is caused by public and state interests, goes to the solution of the certain issue or a dispute which has arisen on the plane of the public relations.

In this regard, according to the legal position formed in the decision of the Plenum of the Constitutional Court dated October 4, 2012 “On interpretation of Article 2 of the Administrative Procedural Code of the Republic of Azerbaijan and Article 25 of the Civil Procedural Code of the Republic of Azerbaijan from the point of view of jurisdiction of procedures on cases on administrative offences” the general (public) legal relationship in the sphere of management arises owing to state managements or to local government being directly connected with duties and powers of administrative body in the course of implementation of activity of government. It, in turn, means in itself adoption of administrative acts by administrative bodies for the solution of the certain (concrete) issues concerning the sphere of the general (public) law.

The administrative act creates consequence in law, that is, changes a legal status of legal entity or individual to which (whom) it is addressed, assigns to it obligations and liabilities and creates conditions for implementation of right and by that, acts as the actual basis of forming of legal relations, change or the termination of the existing relations. At the same time, the administrative act can establish the status of various legal subjects differently. Apparently, the administrative act in a constitutive form creates, cancels or changes the rights and obligations, and in a declarative form - an additional legal basis for the interested person.

According to a document form, the administrative act is the decision, the order or other kind of the act adopted by appropriate subjects of public management within the powers established by the legislation.

The Plenum of the Constitutional Court considers important to note that in case of transfer of signs of the measures of the power recognized by the administrative act in Article 2.0.2 of the Law “On Administrative Procedure” their names and the list were not precisely specified. However, from a disposition of article it is possible to come to such conclusion that if the document of any state body, irrespective of its name, reflects in itself the listed signs of this article, then it shall be considered as the administrative act.

The administrative act on its form can be written or oral. According to Article 57.3 of the Law “On Administrative Procedure” in cases, directly stipulated by the legislation of the Republic of Azerbaijan, and also in the urgent cases connected with prevention or elimination of the danger able to do harm to the state or public concerns, the administrative act can be adopted in the oral or other simplified (clear) form.

The Law “On Administrative Procedure” makes the following demands for adoption of the administrative act:

- the administrative act which is taken out based on discretionary powers shall answer the purpose of given power (Article 14.2);

- the principle of equality before the law shall be observed (Article 12.1);

- the principle of harmony shall be observed (Article 17);

- if by the law it is not provided or other form is not allowed, the administrative act is adopt in writing (Article 57.1);

- the administrative act shall be rather clear and understandable on content (Article 58.2);

- in the administrative act individual or legal entities to whom they are addressed the settled or resolved issues shall be specified precisely (Article 58.3).

In the administrative act shall be reflected the name of the body which adopted the administrative act; the name and a legal address of the legal entity or a surname, a name, a middle name and the address of physical person to whom the administrative act is addressed; name of the administrative act, date and place of its adopting, registration number; a surname, a name, a middle name and the signature of the responsible official of the administrative authority which adopted the administrative act or members of collegial administrative authority; data on possible legal remedies against this act, terms of use of these legal remedies and body (bodies, including court) in which the interested person can make the complaint (claim) with respect thereto; a seal of the administrative authority which adopted the administrative act (Article 59.1 of the Law “On Administrative Procedure”).

The written or fixed in writing administrative act is subject to reasons in writing. At basing the actual and legal facts of the case, proofs confirming or rejecting these circumstances, and also laws and other regulatory legal acts to which references were made in case of adoption of the administrative act, shall be noted (Article 61 of the Law “On Administrative Procedure”).

It should be noted that non-compliance by administrative authority with requirements, above-mentioned articles of the Law “On Administrative Procedure” in case of creation of the administrative act, could become the reason of invalidity of the administrative act. Anyway, the administrative authority that is drawing up the administrative act that can change the status of legal entity or individual to any consequence in law concerning it, in case of creation of this act, shall observe the requirements of the legislation.

Along with it, administrative acts can be classified by the different bases. Thus, depending on influence on a legal status of the interested person, administrative acts can be both favorable, and adverse. With respect thereto, it should be noted that if from the legislator the satisfaction of appeals of individuals or legal entities is carried to powers of any state body, then the satisfaction can be regarded as the favorable administrative act, in opposite - as the adverse administrative act.

Administrative acts would be legal and illegal, depending on that correctly or incorrectly the norm of law is constituted.

In administrative procedure, depending on purpose, the legislation especially differentiates intermediate administrative acts. The intermediate administrative act is the act adopted by administrative authority in connection with the organization and implementation of specific procedure. Depending on the basis of submission of the complaint, the intermediate administrative act may be divided into the following groups:

- intermediate administrative acts against which it is possible to appeal;

- intermediate administrative acts against which it is impossible to appeal.

Intermediate administrative acts against which it is possible to appeal are established by the Law «On Administrative Procedure. According to Article 71.3 of this Law the complaint to the intermediate administrative act can be made in an independent order in administrative authority, to higher on subordination, or other body, authorized to consider the claim, only in cases:

- in connection with powers;

- in connection with branches;

- in connection with refusal of provision to the interested person of materials of proceeding for acquaintance or information on case;

- in other cases which are directly provided by the law.

According to Article 65 of the Law “On Administrative Procedure” the written administrative act is recognized as invalid if it is unknown by what administrative authority it is adopted, the administrative act adopted by the administrative authority which does not have appropriate authority, the administrative act which according to the legislation can be adopted only in the form of a certain official document (provision of the official document), but does not meet these requirements, the administrative act demanding from the interested person of making of the actions capable to result in administrative or criminal liability; the administrative act which cannot be executed for the actual reasons; the administrative act if it is not clear to whom it is addressed. The invalid administrative act is considered as unusable (insignificant) and does not create any legal consequences from the moment of its adopting.

Taking into consideration the above, the Plenum of the Constitutional Court comes to conclusion:

- according to Article 2.0.2 of the Law “On Administrative Procedure” the letter or other official document adopted by administrative authority with the purpose to settle or resolve a certain (specific) issue in the sphere of the common (public) law and generating certain consequence in law for the individual or legal entity to whom it is addressed, shall be considered as the administrative act. For any document that is regarded as the administrative act, in addition to a form also contents of the administrative act shall be provided;

- the provision “consent of appropriate authority of executive power” of Article 22.2 of the Law “On Freedom of Religious” implies adoption of any decision answering to the criteria specified in part one of this decision.

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:**

1. According to the Article 2.0.2 of the Law “On Administrative Procedure” the letter or other official document adopted by administrative authority with the purpose to settle or resolve a certain (specific) issue in the sphere of the common (public) law and generating certain consequence in law for the individual or legal entity to whom it is addressed, shall be considered as the administrative act. For any document that is regarded as the administrative act, in addition to a form also contents of the administrative act shall be provided.

2. The provision “consent of appropriate authority of executive power” of the Article 22.2 of the Law “On Freedom of Religious” implies adoption of any decision adequate to the criteria specified in the first part of this decision.

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.