**ON BEHALF OF THE REPUBLIC OF AZERBAIJAN**

**DECISION**

**OF THE PLENUM OF CONSTITUTIONAL COURT**

**OF THE REPUBLIC OF AZERBAIJAN**

*On verification of conformity of some provisions of Article 55 of the Administrative Procedure Code of the Republic of Azerbaijan with Article 60.1 of the Constitution of the Republic of Azerbaijan in connection with the complaint of  M.Mamedov*

**29 April 2014                                                                           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 Teymur Odjagverdov,

representative of applicant – Halida Bagirova,

representative of respondent party – Eldar Askerov, Senior Advisor of the Department for Administrative and Military Legislation of Milli Majlis of the Republic of Azerbaijan;

specialists – Zakir Guliyev, Judge of the Supreme Court of the Republic of Azerbaijan; Valeh Agayev, Judge of the Court of Appeal of Baku city; Elchin Usub, Member of Bar of the Republic of Azerbaijan, expert of the Organization of International Cooperation of Germany;

in accordance with the Article 130.5 of the Constitution of the Republic of Azerbaijan examined in open judicial session via special constitutional proceedings the case on complaint of Magomed Mamedov concerning verification of conformity of provision “given court ruling may not be appealed” of Article 55.5 of the Administrative Procedure Code of the Republic of Azerbaijan with Article 60.1 of the Constitution of the Republic of Azerbaijan.

having heard the report of Judge Rovshan Ismaylov, the reports of the representatives of applicant and respondent and specialists, examined the materials of the case the Plenum of Constitutional Court of the Republic of Azerbaijan

**DETERMINED AS FOLLOWS:**

M.Mamedov having applied to the Constitutional Court of the Republic of Azerbaijan (hereinafter referred to as the Constitutional Court) asked to recognize as invalid the provision “given court ruling may not be appealed” of Article 55.5 of the Administrative Procedure Code of the Republic of Azerbaijan (hereinafter referred to as the APC) because of its discrepancy with Article 60.1 of the Constitution of the Republic of Azerbaijan (hereinafter referred to as the Constitution) and with Article 6.1 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

In the documents attached to the complaint it is shown that by ruling of the Administrative Economic Court of Baku city No. 1 of October 18, 2013 the claim requirement of M. Mamedov against Customs Administration of motor transport of the State Customs Committee of the Republic of Azerbaijan and the Ministry of Finance of the Republic of Azerbaijan concerning the recognition of an obligation of payment of spare cash and the received money assigned to him by Customs Administration as illegal, the paid excess amount as harmful and collection from state treasury for benefit of the claimant of the paid state fee acknowledged as withdrawn and proceedings are stopped. Court having come to this decision was guided by Article 55.5 of the APC.

In this ruling it is specified that the judicial-merchandising examination of documents on case was appointed, then proceeding on case several times renewing and postponed. However, the claimant also was not attend the last court session and did not inform the court concerning the reasons of absence. Therefore, the court recognized the claim as withdrawn and stopped proceeding.

From materials of administrative case it is also shown that the claimant's representative accepted on September 16, 2013 the notice concerning the holding of judicial session on September 18, 2013, and on September 17, 2013 directed to the judge the written relation on an issue. Having attached this relation to case papers the court postponed a preparatory meeting on proceeding, and appointed a new session in a month, that is on October 18, 2013. The claimant and his representative at that day did not attend the judicial session and therefore the court stopped proceeding.

The applicant considers that court having applied Article 55.5 of the APC violated its right to access to a court. According to his conclusion in case of recognition of the third sentence of Article 55.5 of the APC as invalid because of its discrepancy with the Constitution, there is a contest right in court of appeal instance of the determination concerning cessation of proceeding, adopted because of recognition of the claim as withdrawn. Thereby violation of the right of the applicant to access to a court will be eliminated.

The applicant notes that adopting by courts of rulings concerning recognition of the claim as withdrawn does not deprive the claimant of the right to take again a legal action with the same requirement. However, because of the expiration of term provided in Article 38 of the APC the appeal to the court with the same requirement is lost its sense.

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

Violation of the right to appeal to court may arise at stipulated by the legislation direct prohibition or the wrong application of norms of law. The applicant specifies that the third sentence of Article 55.5 of the APC is a cause of infringement of his right to access to a court. According to a sense of this provision in case of refusal of the claimant of the claim or recognition of the claim by court as withdrawn the court adopt the ruling concerning termination of proceeding which may not be appealed.

Apparently, the ruling concerning termination of proceeding is adopted in two cases: in case of refusal of the claimant of the claim or recognition of the claim by court as withdrawn. The applicant considers that ruling concerning termination of proceeding as a result of recognition of the claim by court as withdrawn adopted according to provisions of Article 55.3 of the APC, violates his right to access to a court.

For this reason, the subject of this constitutional case constitutes the third sentence of Article 55.5 of the APC in part connected with ruling concerning termination of proceeding because of recognition of the claim as withdrawn.

According to Article 60.1 of the Constitution, legal protection of rights and liberties of every citizen is ensured. This article of the Constitution guarantees legal protection of rights and freedoms of the citizens fixed by the Constitution, and the rights and freedoms provided in laws and other normative legal acts of the Republic of Azerbaijan. The judicial guarantee defines on the one hand, the right of an access to a court for the purpose of restoration of the violated rights and freedoms of everyone, and on the other hand an obligation of courts to consider these addresses and to adopt on them the fair decision (decision of the Plenum of Constitutional Court of April 15, 2011 “On verification of conformity of decision of the Judicial Board on Civil Cases of the Supreme Court of the Republic of Azerbaijan of 2 July 2009 to Constitution and laws of the Republic of Azerbaijan in connection with the complaint of V.Ozerov”.

In this sense the special value has the right to appeal to court. Thus, violation of noted right, in general, does insignificant implementation of the right to legal protection. This right shall be interpreted from the point of view of the principles of the constitutional state, it provides the availability of effective and real opportunities of parties for protection of the rights with ensuring of their access to open and clear equitable remedies.

Despite of importance of the specified right, nevertheless, it is not absolute; however, the measures limiting this right have to be applied to achievement of the legitimate purposes, without mentioning its main essence, to meet the criteria of proportionality.

The right to access to a court also follows from content of Article 14 of the International Covenant “On civil and political rights”. In General comments of Human Rights Committee of the UN No. 32 of 2007 concerning this article it is specified that if restriction of the right to access to a court by the member state is not proved by the legislation, won't observe such legal purposes as proper administration of justice, or possibilities to appeal to court of the person will be limited in the limits capable to cause a serious loss to an essence of this right, then it can become the cause of infringement of Article 14.

European Court of Human Rights (hereinafter referred to as the European Court) in its decision on case of Golder vs. The United Kingdom of February 21, 1975 indicated that the right of access constitutes an element which is inherent in the right stated by Article 6 para. 1. Certainly, the right of access to the courts is not absolute but may be subject to limitations; these are permitted by implication since the right of access “by its very nature calls for regulation by the State, regulation which may vary in time and in place according to the needs and resources of the community and of individuals” (decision of May 28, 1985 on case of Ashingdane vs. The United Kingdom). In laying down such regulation, the Contracting States enjoy a certain margin of appreciation, but the final decision as to observance of the Convention’s requirements rests with the Court. It must be satisfied that the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Furthermore, a limitation will not be compatible with Article 6 para. 1 (art. 6-1) if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved" (Fayed v. the United Kingdom decision of September 21, 1994; Bellet vs. France, decision of December 4, 1995).

According to provisions of Article 55.5 of the APC, the court before adoption of ruling concerning termination of proceeding shall come to a conclusion concerning recognition of the claim as withdrawn. According to content of Article 55.3 of the APC, it should be arranged by ruling. From the point of view of the law, and also according to the second sentence of Article 55.5 of the APC, these various on content and from the procedural point of view but connected with each other two rulings can be expressed by one document. However, both rulings and the legal consequence following from them shall be reflected in substantive provisions of single ruling in separate points.

Ruling in Article 55.3 of the APC (concerning recognizing as withdrawn) and ruling in Article 55.5 of this Code (concerning termination of proceeding) resolve two different issues of recognition of the claim. Then, as in Article 55.5 of the APC the legislator clearly and accurately established impossibility of access only of ruling concerning termination of proceeding because application of this order is not provided in connection with determination in Article 55.3 of this Code, this order does not regulate the right of the person to access to the courts under Article 55.3 of the APC and should not influence on volume of this right.

Therefore the third sentence of Article 55.5 of the APC cannot be regarded as the norm violating the right for access to the courts (under Article 55.3 of the present Code) following from Article 60.1 of the Constitution.

However, as indicated the applicant, in practice after recognition of the claim by court as withdrawn as a result of application of Article 55.5 of the APC, the evaluation of the repeated appeal to same court in connection with the same dispute as the only possibility of the right to access leads to violation of this right. Thus, in these cases because of the expiration of limitation period established in Article 38 of the APC the repeated claim shall be rejected. It make the given possibility as insignificant.

Considering the legal position expressed in this decision concerning Article 55.5 of the APC, the Plenum of the Constitutional Court considers necessary to examine the Article 55.3 of the APC from the point of view of the right of access to the court, and also a possibility of contest in court of appeal of the ruling, which is adopted on the basis of this article.

According to Article 55.3 of the APC if the claimant, having ignored court's request, consecutively avoids the court proceeding on the case within more than 30 days, the claim should be considered as withdrawn. In this case, court adopts a ruling on considering the claim as withdrawn.

Recognition of the claim as withdrawn is a passive type of abandonment of claim and in legal theory is called as function of abandonment of claim. The abandonment of such type of claims does not require making by claimant of active actions (ruling of the Plenum of the Constitutional Court of July 8, 2013 “Concerning claim of Pasha Orudjev”).

“The Court considers that this right of access to a court includes not only the right to institute proceedings but also the right to obtain a “determination” of the dispute by a court. It would be illusory if a Contracting State's domestic legal system allowed an individual to bring a civil action before a court without ensuring that the case would be determined by a final decision in the judicial proceedings” (decision of the European Court of March 1, 2002 on case of Kutić vs. Croatia).

As it was already noted, the compliance of this restriction with the Constitution it is possible to establish after the analysis of achievement of the legitimate purposes and proportionality of restriction.

According to a sense of Article 55.3 of the APC, the evasion of the claimant from legal proceedings can lead to adopting of the corresponding ruling because of the actual loss by him of procedural interest. For a basis here is undertakes the purpose of proper implementation of justice. This purpose represents the constitutional value and therefore, it shall be recognized as legitimate.

As for proportionality of restriction it should be noted that the legislator considering requirements of this criteria, caused the adoption of ruling concerning recognition of the claim as withdrawn by several rules. Thus, before adoption of such ruling the court shall make the demand. It is necessary to consider that the requirement is carries the prevention purpose. That is, the court following from the behavior of the claimant already sees that the claimant lost the procedural interest connected with a dispute therefore evades from proceeding, and informs the claimant concerning the illegality of such behavior.

Considering a possibility of confrontation of the claimant with serious consequences, and also importance of the right of access to a court in democratic society, the court can make this demand to the claimant in case of possession of strong and reliable evidences concerning his behavior.

Besides, for achievement of the purposes, the demand shall meet the requirement to the following conditions:

- it shall be specified what specifically the court waits from the claimant (for example, to provide the relevant documents and other proofs or to prove the claim and so forth);

- there shall be obvious a putting of the demand by court (the corresponding judge) therefore it shall be certificated by the signature of the judge;

- the requirement shall be bring (provided) to the claimant in the order it can be proved;

- at referring to the relevant articles of the law shall be clearly consequence in law of non-execution by the claimant of the requirement are expressed (recognition of the claim as withdrawn and an obligation on payment of procedural expenses).

If the claimant, having ignored court's request, consecutively avoids the court proceeding on the case within more than 30 days, the claim shall be considered as withdrawn.

Violation of the above rules by court can lead to restriction in a disproportionate form of the right of access to a court.

Thus, at the correct and exact application in the order established by the Plenum of the Constitutional Court, the Article 55.3 of the APC does not break the right of access to a court following from Article 60 of the Constitution.

As for that whether the right of submission of the appeal complaint to the ruling which is adopted according to Article 55.3 of this Code is fixed in APC, it should be noted that except for criminal cases on other cases the Constitution has directly not guaranteed the right of the repeated appeal to courts of the highest authority. At the same time if the legislator has established the right of contest in an appeal order of acts of courts of the first instance, then this right falls under protection of Article 60 of the Constitution whereby the right of access to a court of appeal instance has to be protected by the state.

According to the main order established in Article 81.1 of the APC if the law did not provide other order, the ruling can be appealed. Unlike the ruling concerning termination of proceeding, the legislator did not establish impossibility of contest of the ruling, which is adopted based on Article 55.3 of the APC. On the other hand, in Article 83.3 of the APC the Article 55.3 of the APC is not specified in the list of the rulings that are not the subject of appeal.

In this context, the Plenum of the Constitutional Court considers deserving attention the position, taking place in practice of foreign body of the constitutional justice. Thus, Constitutional Court of Spain came to such conclusion that implementation of the right of access to a court can be caused by the procedural requirements established by the legislation; however courts shall apply these procedural rules in light of the purposes established by the legislation. At the same time, the courts are bound to apply the rules of procedure avoiding both excessive formalism that would impair the fairness of the proceedings and excessive flexibility such as would render nugatory the procedural requirements laid down in statutes (ruling of the Constitutional Court of Spain of December 19, 1994, No. 331/1994).

The European Court in connection with the right of access to a court has specified that in fact, the right of access to a court is impaired when the rules cease to serve the aims of legal certainty and the proper administration of justice and form a sort of barrier preventing the litigant from having his or her case determined on the merits by the competent court (decision of the European Court of September 17, 2013 on case of Eşim vs.Turkey).

Along with specified it is necessary to consider that not clear indication of norms of the APC allowing or forbidding contest of ruling specified in Article 55.3 of the APC should not exclude solutions of this legal issue by judicial interpretation.

Thus, the European Court repeatedly specified that however clearly drafted a legal provision may be, its application involves an inevitable element of judicial interpretation, since there will always be a need for clarification of doubtful points and for adaptation to particular circumstances. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity, and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice. A margin of doubt in relation to borderline facts does not by itself make a legal provision unforeseeable in its application. Nor does the mere fact that such a provision is capable of more than one construction mean that it fails to meet the requirement of “foreseeability” for the purposes of the Convention. The role of adjudication vested in the courts is precisely to dissipate such interpretational doubts as remain, taking into account the changes in everyday practice (decisions of Grand Chamber of June 7, 2012 on case of Centro Europa 7 S.R.L. and Di Stefano v. Italy, of February 17, 2004 on case of Gorzelik and others v. Poland, and of May 20, 1999 on case of Rekvényi vs. Hungary).

At the same time, in court practice the provisions of normative legal acts shall be applied according to their constitutional and legal sense (decision of Plenum of the Constitutional Court of October 8, 2013 “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”).

The Plenum of the Constitutional Court considers that according to above-noted and the requirements following from Article 60.1 of the Constitution the right of submission of the appeal complaint by the interested person has to be provided with system application of Article 55.3 of the APC with Articles 81.1 and 83.3 of the APC but not together with Article 55.5 of this Code.

Plenum of the Constitutional Court, taking into account the court practice and noting need of the principle of legal certainty, with the purpose of protection of awareness of persons on equitable remedies considers that courts in rulings adopted based on Articles 55.3 and 55.5 of the APC are obliged to explain clearly and unambiguously to the claimant a possibility of their contest. Considering this the legislator by Article 23.1 of the APC is established an order.

The similar position has been expressed in a ruling of the Plenum of the Federal Constitutional Court of Germany of April 30, 2003 No. 1 PBvU 1/02. In this ruling it has been specified that the principle of legal certainty is the important component of the principle of the constitutional state. The principle of legal certainty in the sphere of procedural law gives itself also as a postulate of clarity of legal remedies. The requirement of the principle of the constitutional state concerning the fact that activity of the state has to be measurable and in advance expected conducts to the requirement of the initial instruction to the persons protecting the rights of ways of verification of judgments. Citizens have to have a potential to estimate a possibility of use of remedies.

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

- According to sense of Article 60.1 of the Constitution the provision “given court ruling may not be appealed” of Article 55.5 of the APC cannot be regarded as the norm limiting the right of submission of the appeal complaint to the ruling adopted on the basis of Article 55.3 of this Code.

- According to Article 81.1 of the APC the right of submission of the appeal complaint to the ruling adopted based on Article 55.3 of this Code concerning recognition of the claim as withdrawn shall be provided.

Being guided by the Article 130.5 of the Constitution of the Republic of Azerbaijan and Articles 52, 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 sense of Article 60.1 of the Constitution the provision “given court ruling may not be appealed” of Article 55.5 of the Administrative Procedure Code of the Republic of Azerbaijan cannot be regarded as the norm limiting the right of submission of the appeal complaint to the ruling adopted on the basis of Article 55.3 of this Code.

2. According to Article 81.1 of the Administrative Procedure Code of the Republic of Azerbaijan the right of submission of the appeal complaint to the ruling adopted based on Article 55.3 of this Code concerning recognition of the claim as withdrawn shall be provided.

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.