**ON BEHALF OF THE REPUBLIC OF AZERBAIJAN**

**DECISION**

**OF THE PLENUM OF CONSTITUTIONAL COURT**

**OF THE REPUBLIC OF AZERBAIJAN**

*On interpretation of some provisions of Article 13 of the Administrative Procedure Code of the Republic of Azerbaijan*

**17 September 2014                                                                        Baku city**

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

attended by the Court Clerk Faraid Aliyev,

representatives of interested parties – Imanverdi Shukurov, Judge of the Court of Appeal of Sheki city; Fuad Mamedov, Senior Advisor of the Department for Administrative and Military Legislation of Milli Majlis of the Republic of Azerbaijan;

expert – Elshad Nasirov, Senior Lecturer of the Constitutional Law Board of Law Faculty of the Baku State University;

specialists – Nahib Nabizade, Judge of Supreme Court of the Republic of Azerbaijan, Ulvi Mailov, Judge of the Court of Appeal of Baku city;

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 the Court of Appeal of Sheki city on interpretation of some provisions of Article 13 of the Administrative Procedure Code of the Republic of Azerbaijan from the point of view whether rendering of assistance to participants of process when replacing wrong types of the claim with corresponding ones belongs to the duties of court of appeals instance.

having heard the report of Judge Sudaba Hasanova, the reports of the legal representatives of the subjects interested in special constitutional proceedings and specialists, conclusions of expert, examined the materials of the case the Plenum of Constitutional Court of the Republic of Azerbaijan

**DETERMINED AS FOLLOWS:**

In the inquiry it is specified that the Open Joint Stock Company “Bank of Azerbaijan” filed the claim against the defendant - Sheki Territorial Administration of the State Register of Immovable Property at the State Committee on Property Issues of the Republic of Azerbaijan (hereinafter referred to as the Sheki territorial administration of SSRIM), the third parties N. Guseynov and T. Nasrullayeva concerning recognition as invalid of extract dated October 1, 2011 addressed to N. Guseynov on the shell nuts shop and ancillary buildings located in the village of Ondjali of Gakh district. Administrative-Economic Court of Sheki city by its decision dated March 14, 2013 did not satisfy the claim.

The Administrative-Economic Board of the Court of Appeal of Sheki city (hereinafter referred to as the AEB of Court of Appeal of Sheki city) by its decision of September 4, 2013 upheld that decision.

The Administrative-Economic board of the Supreme Court of the Republic of Azerbaijan (hereinafter referred to as the AEB of the Supreme Court) by its Decision dated January 29, 2014 cancelled the decision of AEB of Court of Appeal of Sheki city and returned the case to the same court for reconsideration.

The AEB of the Supreme Court proved the decision by the fact that the court of appeal instance did not fulfill “a duty of court to render assistance”, specified in Article 13 of the Administrative Procedure Code of the Republic of Azerbaijan (hereinafter referred to as the APC) and instead of rendering to the claimant assistance in detection of the documents that became the basis for issue of the extract, which is a matter in issue, considered the claim requirement in an original form, recognized it as unreasonable and without having rendered thereby to the claimant of assistance in refining of the requirement, made a mistake in an issue of jurisdiction.

Court of Appeal of Sheki city with the purpose of elimination of the uncertainty which developed in court practice in connection with the specified issue asked the Constitutional Court of the Republic of Azerbaijan (hereinafter referred to as the Constitutional Court) to interpret the Article 13 of the APC from the point of view of whether the obligation to render assistance to participants of process at replacing wrong types of the claim belongs to jurisdiction of court of appeals instance.

First of all, the Plenum of the Constitutional Court considers necessary to note that the subject of the claim specified in the inquiry constitutes recognition as invalid of extract on the property right issued by the Sheki territorial administration of SSRIM. The Plenum of the Constitutional Court in the decision “On interpretation of Article 2.1 of the Law of the Republic of Azerbaijan “On State Register of Immovable Property” and Articles 2.2. and 2.2.1 of the Administrative Procedure Code of the Republic of Azerbaijan as of May 19, 2014 established that cases of this category shall be considered under civil legal proceedings. In this context, the need for interpretation of any article or a provision of the APC on this case disappears. However, in view of importance for court practice of issue, which is brought up in the inquiry of the Court of Appeal of Sheki city, the Plenum of the Constitutional Court, considers it expedient to give interpretation to the matter and notes the following.

The Constitution of the Republic of Azerbaijan (hereinafter referred to as the Constitution), along with ensuring of the human and citizen rights and freedoms as the supreme objective of the state also guaranteed their legal protection (Articles 12, 60 and 71 of the Constitution). The right for legal protection affirmed in the Article 60 of the Constitution, being the independent right, at the same time acts as the guarantor of other rights and freedoms of the person and citizen affirmed in the Constitution.

Everyone may appeal to court in the administrative manner against the actions and inaction of public authorities, political parties, legal entities, municipalities and their officials (Article 60.2 of the Constitution).

According to Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as the Convention) in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

The constitutional principles of implementation of justice and these, which act in a quality of one of the main mechanisms of the guarantee enshrined in the Constitution and the Convention, being enshrined in the Civil Procedural Code of the Republic of Azerbaijan (hereinafter referred to as the CPC) and APC, are directed to effective protection of the rights and freedoms of everyone enshrined in the Constitution.

The Plenum of the Constitutional Court considers that in connection with the inquiry, it is necessary to study an essence and features of verification by courts of the highest authority of legality and validity of judicial acts in civil-procedural and administrative-procedural legislations.

According to Article 2.1 of the CPC, tasks of court proceeding in respect of civil cases and economic disputes consist of endorsement of rights and privileges of any individual and legal entity rising out of the Constitution of the Republic of Azerbaijan, laws and other normative legal acts. All individuals and legal entities, in accordance with procedure specified by law, shall be entitled to exercise the right to appeal to court for protection of their rights and freedoms, as well as for protection of guaranteed by law interests. Waiver of the right of appeal to court is invalid (Articles 4.1 and 4.2 of the CPC).

It should be noted that adoption of the Law of the Republic of Azerbaijan “On Administrative Proceeding” (hereinafter referred to as the Law “On Administrative Proceeding”) and APC is directed to effective protection of the rights and the interests of citizens protected by the law, and ensuring of wider transparency of activities of administrative authorities. Addition to these legal acts of provisions on administrative legal proceedings and making serious distinctions between civil and administrative legal proceedings is one of the main innovations of the procedural legislation.

One of characteristic features of the administrative-procedural legislation is that the administrative relations (public relations) arise in the field of government and local self-government. One of the parties in these relations is the executive body, municipality and any subject authorized by the law to adopt the administrative act. Participants of these relations are initially not equal; one of them is the carrier of sovereignty and possesses powers of authority concerning other party that is individual and legal entity. Irrespective of an origin of an administrative dispute, as a rule, the individual or legal entity becomes the party that took a legal action.

Just for this reason, for more effective ensuring of protection of legitimate interests of the individuals and legal entities, the legislator established consideration of administrative disputes by specialized courts in the order of administrative legal proceedings. This innovation in the legislation is the important step taken in the direction of implementation of the constitutional requirements connected with a judicial guarantee of the rights and freedoms and serves for efficiency of judicial protection.

The main objective facing the APC in the sphere of public legal relations consists in protection of the rights, freedoms and legitimate interests of individuals, and also the rights and interests of legal entities against the violations of public authorities, local government bodies, their officials and other subjects at execution of functions in the field of public administration.

According to Article 1.2 of the CPC, the provisions of Civil Procedure Code of the Republic of Azerbaijan shall be applied in judicial proceeding with respect to cases on administrative disputes, unless other rules are specified by this Code and if they do not contradict with procedural principles prescribed by the present Code.

Examination of provisions of the CPC and APC reveals that in both codes there are some general principles of corresponding proceedings. Independence of judges, equality before the law and court, obligations on proving, the adversarial principle, the principles of publicity of court hearing and the principle of dispositivity belong to these principles (Articles 7, 8, 9, 10, 77 of the CPC and 10, 11, 14, 15, 17 of the APC).

At the same time, along with the general principles of both proceedings, the APC has specifically different principles. Thus, if according to the CPC, the court examine and use evidence submitted only by parties, while according to the APC the court is bound to investigate all factual merits that are significant in proper settlement of a dispute, having been not content with explanations, applications and proposals of participants of judicial procedure, the evidence provided by them and other materials available in case (Articles 14.2 of the CPC and 12.1 of the APC). Along with that, according to Article 12.2 of the APC the court is obliged to independently gather other necessary evidence on its own initiative or based on the motion by participants. Court may request additional information and evidence from the parties.

Other feature in distinguishing administrative legal proceedings from civil legal proceedings is the obligation of court to support, provided in Article of 13 of the APC. According to this article, the court is bound to support the participants of procedure in eliminating formal offences committed with regard to claims filed, specifying unclear claims, replacing improper claims with acceptable ones, supplementing incomplete factual information, as well as providing explanations, which are significant in determining and evaluating the merits of the case.

Administrative proceeding in court of first instance is regulated by norms of Chapter VIII of the APC. This chapter includes the norms regulating bringing an action, contents of petition, filing of claim, preparatory proceeding, the responsibilities of court and participants of proceeding with respect to objective investigation of merits of a case and other legal proceedings. Among these regulations is the Article of 48 of the APC that establish obligations of court and participants of process in connection with an objective investigation of merits of a case, requires respect for principle of “objective investigation of merits of a case in court” of given Code, with the purpose to increase effectiveness of legal proceedings and to ensure acceleration of proceeding.

At the same time, Article 48.1 of the APC is an important norm that bears the supplementing function at implementation of obligations of court on granting the explanations and instructions provided in Article 13 of the same Code.

According to Article 48.1 of the APC, the presiding judge shall provide support to elimination of formal delinquencies, clarification of indefinite statements, filing motions on the essence of the case, supplementing incomplete factual information, submission of all written statements to be important in full identification and objective evaluation of merits of the case in next stages of the process.

It should be noted that duty of a judge to provide support is connected not only with elimination of formal violations; it can be also connected with clarification of actual circumstances. At implementation of this duty, the court has to follow the principle of equality of the parties.

According to Article 52 of the APC that is referred to as “Limits of judicial review”, court has no right to exceed a claim, even not related to wording of petition. This article specifies a principle of “ne ultra petita” and once again underlines action of the principle of dispositivity in administrative process. According to this regulation, court shall construct a process based on claim requirement and resolve a dispute, without going beyond their limits. In administrative process a court, on the one hand, shall be guided by principle of examining of facts of the case, and with another – the principle of dispositivity. This principle establishes limits of the principle of studying of the facts of the case for court.

In court of appeals instance, the proceeding according to the claim is regulated by norms of Chapter X of the APC. Article 81 of the APC provides the possibility of filling of appeal, the right of submission of the appeal and rule applied in administrative appeal proceeding. Requirements of this article shall be considered first of all for verification of a possibility of filing of the appeal in administrative legal proceedings.

One of the important rules determined by legislator and in connection with administrative appeal proceeding is provided in the Article 81.3 of the APC. According to this article, unless otherwise prescribed in this Chapter, appropriate procedural rules, including requirements with respect to form and content of the notice of appeal, as well as appropriate provisions on proceedings in court of appellate instance of the Civil Procedure Code of the Republic of Azerbaijan shall apply to administrative court proceedings with respect of appeal.

In Article 82 of the APC that provide the limits of re-consideration of appealed case of dispute it is specified that the court of appeals instance shall hear the case in its entirety on the merits within the limits of an appeal based on the legal issues, as well as evidences and facts (factual cases). Court of appeal instance shall accept newly submitted evidences (proofs) and facts (factual cases), in accordance with the requirements of Article 12 of this Code.

According to this norm, court of appeal instance within the demands made in the complaint, however as the full court, investigates all facts of the case and considers the merits of the case. It means that the court of appeal is not bound with the circumstances investigated by court of the first instance and verify a dispute subject in full and makes the decision on the basis of circumstances of the studied case and the formulated internal belief.

The basic rules of administrative-appeal proceeding are established in Article 87 of the APC, under the name “proceeding in court of appeal instance”.

During administrative appeal proceeding, the full and correct compliance, along with the principles of administrative proceeding, of provisions of Chapter X of the APC can serve for establishment of truth and timely recovery of the violated rights and freedoms.

In the decision of the Plenum of the Constitutional Court of May 20, 2011 concerning interpretation of provisions of Article 372 of the Civil Procedure Code of the Republic of Azerbaijan concerning the limits of appeal consideration from the point of view of requirements of Articles 372.1 and 372.7 of given Codes the complete and detailed interpretation of limits concerning appeal proceeding on civil cases is given. In the mentioned decision it is noted that institute of appeal was reflected in the civil procedure legislation of the majority of states and two kinds of it (full and partial) were provided.

Meaning of appeal proceedings provided for in the current procedural law during the full appeal (France, Italy) consists in new hearing on the merits. The purpose of full appeal consists in elimination of judicial errors and correction of defects committed by parties themselves. The parties have the right to submit new evidence that may change the case along with the evidence submitted to the court of first instance. In the result of such approach, the court of appeal has to settle the case in full in spite of full judicial proceeding in first instance and has no right to return it to the court of first instance for new consideration.

In case of partial appeal (Austria and Germany), the process of proof is concentrated in the court of first instance and the court of appeal having considered a case again on the basis of evidence submitted by the parties in first instance must eliminate its errors and defects.

In the decision of the Plenum of the Constitutional Court of August 27, 2012 on interpretation of Article 372.5 of the Civil Procedure Code of the Republic of Azerbaijan in comparison with Articles 155, 156 and 372.4 of given Code it is noted that restrictions at submission and verification of new and additional proofs in court of appeal testify concerning the absence of the full appeal in our country.

As opposed to the full appeal, at the infull appeal the court of appeal instance does not replace court of the first instance. Its task consists in consideration of a subject of the dispute exempted in the first instance from the circumstances which are not relating to merits of case and in volume of the appeal complaint in the first instance.

The Plenum of the Constitutional Court considers that provision with respect to courts considering administrative cases differently from courts of law of new powers with the purpose of increasing of efficiency of legal proceedings in legislation, ensuring more complete protection of violated rights and freedoms in reasonable time, including expansion of sphere of powers of courts of appeals instance on administrative appeal proceeding, and also the principles of the administrative-procedural legislation it is not necessary to perceive as transition in our country of institute of the appeal, for such cases, to the full appeal.

Article 82 of the APC providing borders of administrative appeal proceeding though provides consideration by court of appeal instance of cases connected with a dispute, in full and in essence within the claim and based on legal issues, and also proofs and the facts (the actual circumstances), at the same time specifies accounting of the new proofs (evidentiary facts) and the facts (actual circumstances) provided on the base of Article 12 of this Code.

Article 12 of the APC has obliged court of appeal instance to investigate all factual merits that are significant in proper settlement of a dispute, having been not content with explanations, applications and proposals of participants of judicial procedure but also independently gather other necessary evidence on its own initiative (Articles 12.1 and 12.2 of the APC).

Apparently from the analysis of Article 82 of the APC, in this article consideration of the case in full and in essence, on the basis of the produced new evidence (evidentiary facts) and the facts (the actual circumstances) is specified, and also a reference to Article 12 of this Code providing the principle of investigating merits of a case. However, Article 13 of the APC that obliging court to support the participants of process is not mentioned.

In view of specified and the fact that the legislator carries “an obligation of court to support” to Article 48 of the APC establishing obligations of court in connection with the objective consideration of the facts of the case in court of first instance, it is possible to come to such conclusion that the provision “replacing of improper claims with acceptable ones” of Article 13 of the APC, should not belong to appeal proceeding.

The Plenum of the Constitutional Court connects the lack of indication concerning by what instance the Article 13 of the APC shall be applied, vesting by the legislator to courts of appeal of power to consider as courts of first instance, along with appeal proceeding also the administrative disputes of a number of categories.

Besides, Plenum of the Constitutional Court, relying on specific features of administrative proceeding, does not exclude application in administrative appeal proceeding of the provisions stipulated in Article 13 of the APC that establish the support of participants of procedure in eliminating of formal offences committed with regard to claims filed, specifying unclear claims, replacing improper claims with acceptable ones, supplementing incomplete factual information, as well as providing explanations, which are significant in determining and evaluating the merits of the case. At the same time, application of the provision “replacing improper claims with acceptable ones” of the same article in administrative appeal proceeding is not admissible.

Thus, in view of the fact that the provision “replacing improper claims with acceptable ones” of Article 13 of the APC, in fact, can lead to emergence of new claim requirements and to replacement of a subject of action, to change of a circle of defendants in the claim, can not be combined with tasks of appeal proceeding and turn back violation of the rights of protection of other party of process that is the subject of the new claim.

At the same time, it should be noted that according to the requirement of Article 11 of the APC the administrative legal proceedings are fulfill on the basis of the principle of equality of all before the law and court. And replacement of a type of the claim in case of appeal proceeding can violate the right of participants of process to legal protection affirmed in Article 60 of the Constitution and to deprive them of an opportunity to challenge the violated rights in three-stage judicial hierarchy.

In Article 3.2 of the APC, it is specified that Actions concerning the disputes provided for in Chapters XV, XVI and XVII of present Code shall be considered by administrative-economic collegiums of the courts of appeal instance of the Republic of Azerbaijan as a court of first instance. This are a claims on cases concerning contest to the law of acts of normative nature, connected with political parties, mass media and protection of the electoral rights (participation in a referendum) which are considered in administrative and economic boards of courts of appeals instance of the Republic of Azerbaijan as a court of first instance. The provision “replacing improper claims with acceptable ones” of Article 13 of the APC also can be applied by courts of appeal as a court of first instance by hearing of cases on the specified disputes.

The Plenum of the Constitutional Court notes that an obligation of court to support, regulated by Article 13 of the APC, provides obligation to support participants of process by court, in connection with claims raised in administrative-economic courts as a court of first instance. Administrative-economic boards of courts of appeal, by hearing of cases according to the petition for appeal as appeal proceeding, shall verify the observance by courts of first instance of the requirement of Article 13 of the APC, as well as other principles of administrative legal proceedings.

Based on the above, the Plenum of the Constitutional Court comes to such conclusion that the provision “replacing improper claims with acceptable ones” of Article 13 of the APC extends to the administrative legal proceedings connected with consideration of the case in courts of first instance and shall be applied in administrative appeal proceeding.

Being guided by the Article 130.6 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. The provision “replacing improper claims with acceptable ones” of the Article 13 of the Administrative Procedure Code of the Republic of Azerbaijan shall extend to administrative legal proceedings connected with consideration of cases in courts of first instance and shall be applied in administrative appeal proceeding.

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 institution or official.