**ON BEHALF OF THE REPUBLIC OF AZERBAIJAN**

**DECISION**

**OF THE PLENUM OF CONSTITUTIONAL COURT**

**OF THE REPUBLIC OF AZERBAIJAN**

*On interpretation of Articles 228.2 and 228.2 of the Civil Code of the Republic of Azerbaijan and Articles 30.1 and 30.2 of the Housing Code of the Republic of Azerbaijan*

**16 December 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, Rafael Gvaladze, Isa Najafov and Kamran Shafiyev;

attended by the Court Clerk Elmaddin Huseynov,

representatives of interested parties – Jeyhun Gadimov, Judge of Surakhany District Court; Magomed Bazigov, Senior Advisor of the Department for Social Legislation of Milli Majlis of the Republic of Azerbaijan;

expert – Server Suleymanli, Deputy Dean of Law Faculty, Docent of Civil Law Board of the Baku State University, Doctor of Law;

specialists – Asad Mirzaliyev, Judge of the Supreme Court of the Republic of Azerbaijan; Ragib Gurbanov, Judge of the Court of Appeal of Baku city;

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 the Surakhany District Court on interpretation of Articles 228.2 and 228.2 of the Civil Code of the Republic of Azerbaijan and Articles 30.1 and 30.2 of the Housing Code of the Republic of Azerbaijan.

having heard the report of Judge Rovshan Ismaylov, 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:**

The Surakhany District Court having applied to the Constitutional Court of the Republic of Azerbaijan (hereinafter referred to as the Constitutional Court) asked for interpretation of Articles 228.2 and 228.2 of the Civil Code of the Republic of Azerbaijan (hereinafter referred to as the Civil Code) and Articles 30.1 and 30.2 of the Housing Code of the Republic of Azerbaijan (hereinafter referred to as the Housing Code).

 In the inquiry it is specified that Sh. Gyulyaliyev having filed a lawsuit in court against M. Gyulyaliyev and T. Gyulyaliyeva, asked to adopt the decision on the termination of right of use the apartment and eviction of defendants from this apartment with payment to M. Gyulyaliyev of compensation in the amount of 5000 manats, and without compensation payment to T. Gyulyaliyeva.

The Surakhany District Court at consideration of the case has come to such conclusion that before determination of a issue of a possibility of the termination of the right of use by defendants of the disputed apartment, it is necessary to study a question of existence of the right of use these living spaces. Thus, if there is no right, then it cannot be terminated.

From the inquiry it is evident that right of use of the disputed apartment at M. Gyulyaliyev as member of the family of the claimant, arose on the basis of the Housing Code of the Republic of Azerbaijan acting till October 1, 2009. T. Gyulyaliyeva moved to the respective apartment in 2011 that is when in force was the Civil Code acting since September 1, 2000 and the Housing Code acting since October 1, 2009.

Inquirer having open an essence of Articles 30.1 and 30.2 of the Housing Code considers that even if the corresponding persons were moved to living space as members of the family of the owner, nevertheless recognition of them by the owner as family members is not necessary. Also the legislator has not established what criteria have to be assumed as a basis at the solution of an appropriate question. From Article 30.1 of the Housing Code it is not clear whether expression “other relatives” covers only of blood relatives or also the relatives relations with whom have arisen later.

From the inquiry it is follows that the Housing Code, differently from provisions of the Article 228 of the Civil Code, does not provide the emergence of a right of use of living spaces from availability of notarized written agreement with an owner and registration of right of use with the state registry of real estate.

Considering that both Codes are in force, the Surakhany District Court considers that there was a need of interpretation of a question of obligation of availability of the written agreement certified by a notarial order connected with the right of use which arose based on Articles 30.1 and 30.2 of the Housing Code, and also registration of the appropriate right in the state registry of real estate.

Inquirer also notes that though the possibility of the termination of right of use by living space by the member of the family of the owner also is not directly enshrined in the Housing Code, it also is not forbidden. In the Housing Code, the termination of right of use by living space by the member of the family of the owner with payment of compensation to him is also not forbidden.

The questions which are brought up in the inquiry are actually connected with limits of implementation of the property right of the person to living space affirmed in Article 29 of the Constitution of the Republic of Azerbaijan (hereinafter referred to as the Constitution), and also with a legal basis of emergence of right of use of living spaces of the owner by members of his/her family.

For consideration of these questions the Plenum of the Constitutional Court first of all considers important the consideration of limits of possible restrictions for the property right.

According to Article 29 of the Constitution everyone has the right to property. No form or kind of property shall have any advantage. The property right, including the private property right, is protected by law. Every individual may possess moveable and immoveable property. The property right consists of the owner's right to possess, use and dispose of the property, individually or jointly. No one is dispossessed without a decision of the court. Complete confiscation is inadmissible. The alienation of property for state needs is allowed only after a fair reimbursement of its value.

Content of the property right should be understood taking into account the provisions of Article 13 of the Constitution. Property, which is important institute of civil society, one of important factors of components development of economy. Therefore, by Article 13 of the Constitution the property declared as inviolable and protected by the State. The property right acts as the basis of freedom of each individual in society and is a necessary condition for development of the personality.

Along with it, despite the importance of noted right, it is not obligatory and can be limited. It is necessary to take into consideration that besides that the property bears important function in implementation of special interests of the individual, it has also important social function in socially directed state on the basis of contents of Article 15 of the Constitution (decision of the Plenum of Constitutional Court of December 12, 2011 “On interpretation of Articles 107.2.1 and 107.5.1 of the Civil Code of the Republic ofAzerbaijan”).

At the same time it is also necessary to consider that along with fixing of the property right, the Constitution are also sets the limits (borders) of its general and special restrictions (Article 13.3, Article 29.2, Article 71.2 of the Constitution, Article 3.3 of the Constitutional Law of the Republic of Azerbaijan “On regulation of implementation of the human rights and freedoms in the Republic of Azerbaijan”).

Therefore, property right shall meet the requirements of legality, be applied for the purpose of protection of the rights and freedoms of other persons, to be proportional and not to change an essence of the granted constitutional right.

The possibility of such restrictions and its character, including the adequate standard of living must be conditioned by protection of important constitutional values… The reflection of social protection of citizens and care of worthy level of living among the constitutional purposes of the state in the social sphere and establishment in the Constitution of the fact that nobody can be illegally deprived of the apartment about importance and the constitutional importance of state policy in the sphere of the housing relations. Thus, the constitutional basis for decisions made on the state’s housing policy from the constitution in accordance with the conditions, it can act as the basis for the limitation of the right to property. In any case, such a restriction on the individual owner of the goal, reasonable, proportionate and should not impose an excessive burden (decision of the Plenum of Constitutional Court of December 21, 2012 “On interpretation of Articles 1, 5 and 12 of the Law of the Republic of Azerbaijan “On Privatization of Housing Stock in the Republic of Azerbaijan”).

The European Court of Human Rights expressed similar legal position concerning the property right affirmed in Article 1 of the Protocol No. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms. Thus, according to case law of Court the first and most important requirement of Article 1 of Protocol No. 1 is that any interference by a public authority with the peaceful enjoyment of possessions should be lawful. The principle of lawfulness also presupposes that the applicable provisions of domestic law are sufficiently accessible, precise and foreseeable in their application. Any interference into the right or freedom recognized by the Convention must pursue a legitimate aim. The principle of a “fair balance” inherent in Article 1 of Protocol No. 1 itself presupposes the existence of a general interest of the community. Both an interference with the peaceful enjoyment of possessions and an abstention from action must strike a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. In particular, there must be a reasonable relationship of proportionality between the means employed and the aim sought to be realized by any measures applied by the State, including measures depriving a person of his or her possessions (decisions of Grand Chamber of June 22, 2004 on case of Broniowski vs. Poland and of March 29, 2006 on case of Scordino vs. Italy).

 Based on these legal positions it should be noted that regulation by the legislation of the property right to living space should be fulfilled based on fair and reasonable balance of the rights and interests of all participants of the corresponding legal relationship including members of the family of the owner of living space. For achievement of this constitutional purpose such regulation also should make possible application of the differentiated (various) approach for the purpose of establishment and a research by courts of the actual circumstances of specific case, accounting of different circumstances that arose or can arise based on those circumstances and the final result of prevention of unreasonable and excessive restriction of constitutional rights and freedoms. Moreover, fair and reasonable balancing of interests of participants of the corresponding legal relationship has to be carried out on the basis of the acting system of legal regulation taking into account norms of all branches of the right (decision of the Plenum of Constitutional Court dated 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”).

For achievement of these purposes, it is necessary to define the legal grounds establishing volume of the mutual rights and duties concerning living spaces between the owner of these living spaces and members of his family, including emergence of basis at members of the family of the right of use of living spaces.

In the context of the questions, which are brought up in the inquiry it should be noted that there are several possible bases of emergence of right of use the living spaces (for example, availability of the corporeal right, contractual relations between the owner and other persons, the family relations).

In this sense, it should be noted that the word “use” is widely used in the Civil Code in the provisions connected with various institutions. For example, in the Civil Code this concept occurs in connection with interpretation of a concept of the property right which is the corporeal right, in the provisions of Chapter 11 connected with the servitude, in the provisions of Chapter 33 connected with the lease and in connection with the agreement on free use in Chapter 36.

The right of use in itself does not establish belonging of the concrete right to corporeal right or law of obligation. In spite of the fact that these rights from the point of view of a legal essence strongly differ from each other, their general sign consists that use of the word “use” provides only power of the owner to use a subject. However, from the content of these rights it is evident that conditions of a possibility of use of each of them of a subject, volume of use, from the legal point of view the order and conditions connected with emergence and the termination of use, in other words a legal regime of power of use are differ from each other.

Therefore, in spite of the fact that these rights provide power of use of a subject of their owners, nevertheless it is impossible to call any of the property rights providing this opportunity as “right of use”. Otherwise, feature of distinction and definition, which is the main function of names of property rights, can be eliminated. In this case, it will be impossible to establish that right is provided. Eventually, expression “right of use” expresses in the civil legislation a type (form) of implementation of one certain right, but not any a type of property rights.

In this connection, it should be noted that the essence and volume of “right of use” of a component of the residential building provided in Articles 228.1 and 228.2 of the Civil Code are differ from an essence and the volume of “right of use” of living spaces provided in Article 30.2 of the Housing Code. Though both Codes also provide a possibility of use of living spaces, nevertheless the legal grounds providing this use are various.

From contents of Article 228 of the Civil Code, it becomes clear that in this article the right providing power of use of a component of the residential building is reflects all features provided by the civil legislation concerning the limited corporeal rights and therefore it is the limited corporeal right. Thus, the limited corporeal rights which become the reason of encumbrance of the property right to real estate as a rule arise based on the contract with the owner of the specified real estate (Article 144.1 of the Civil Code) and registration of real estate signed in a notarial order in the state registry (Article 14.3 of the Civil Code).

The limited corporeal rights registered in the state registry of real estate do not stop in case of alienation of the property right to real estate with which they are connected (Article 158.3 of the Civil Code). Also they can be put forward concerning any third parties (Article 158.4 of the Civil Code).

Thus, in the investigation of the fact that the property right providing a possibility of use of a component of the residential building by Article 228 of the Civil Code arises only based on the contract with its registration certified of a notarial order in the state registry of real estate and provides power of reclamation at any person of elimination of violation of this right, it in fact is the limited corporeal right.

In difference from it, the family relations specified in Articles 30.1 and 30.2 of the Housing Code as one of other bases of restriction of the rights of the owner of living space cannot be belonged to the corporeal rights. Thus, a legal basis for use of living spaces of the persons specified in Article 30 of the Housing Code are not the agreements signed with the owner of living space and the right, found due to the civil legal actions fulfilled on their basis, but namely implementation of the right which arose because of the family relations with the owner of living space.

Expression “the right of use of living space” by the member of the family of the owner of living space in Article 30.2 of the Housing Code provides a type (form) of implementation of the right of the living space that have evolved from the family relations with the owner that is relating to branch of family law. This right, being the right following from the general purposes of the family legislation connected with strengthening of a family and providing the strong family relations acts as a social guarantee of the rights of members of the family of the owner of living space. Emergence of this right is caused by existence of the family relations therefore in spite of the fact that it is belonging to branch of private law, it has also components of public law protecting institutes of a family, parents and children societies, necessary for normal existence.

Thus, in Article 30 of the Housing Code the origin and the termination of the right, which give to members of the family of the owner the grounds for use of living space belonging to owner, are regulated by the relevant norms of the family, but not civil legislation. Therefore, for origin and implementation of this right there is no need for the conclusion of the agreement in a notarial order and its registration in the state registry of real estate.

In the family legislation, it is established in what cases parents fulfill a duty on maintaining of children and other family members and in what cases children fulfill a duty on maintaining of parents and other family members (the relevant provisions of Chapters 13 and 15 of the Family Code of the Republic of Azerbaijan). According to it if according to the family legislation the person has the right to live with the owner of living space and to demand from the owner of living space to support him and lives together with the owner, this person enters a circle having covered by the concept “family members” provided in Article 30.1 of the Housing Code.

As continuation of it if according to the family legislation the person has no right to live together with the owner of living space and to demand from the owner of living space to maintain him, then on the basis of Article 30.2 of the Housing Code this person has no competence to use living space of the owner of living space.

It is necessary to consider that in Article 30.4 of the Housing Code is noted that in a case of termination of the family relations with the owner of living space right of use by these living space for the former family member does not remain if other is not established by the agreement between the owner of living space and the former family member. At the same time, if between the parties is established other agreement, then the possibility to use of these living space for the former family member will be regulated not by the norms regulating the family relations but based on the civil legislation (Article 30.7 of the Housing Code).

According to specified, the Plenum of the Constitutional Court comes to the following conclusions:

- expression “other relatives” established in the second sentence of Article 30.1 of the Housing Code covers the persons who according to provisions of Chapter 15 of the Family Code have the right to demand from the owner of living space to maintain them;

- due to the fact that by Article 30.2 of the Housing Code the origin and the termination of the right which is the basis for use by members of the family of the owner of the living space belonging to him are regulated by the relevant norms of the family, but not civil legislation, then according to Articles 228.1 and 228.2 of the Civil Code for origin and implementation of this right the conclusion of the agreement in a notarial order and its registration in the state registry real estate is not required.

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. Expression “other relatives” established in the second sentence of Article 30.1 of the Housing Code of the Republic of Azerbaijan covers the persons who according to provisions of Chapter 15 of the Family Code of the Republic of Azerbaijan have the right to demand from the owner of living space to maintain them.

2. Due to the fact that by Article 30.2 of the Housing Code of the Republic of Azerbaijan the origin and termination of the right which is the basis for use by members of the family of the owner of the living space belonging to him are regulated by the relevant norms of the family, but not civil legislation, then according to Articles 228.1 and 228.2 of the Civil Code of the Republic of Azerbaijan for origin and implementation of this right the conclusion of the agreement in a notarial order and its registration in the state registry real estate is not required.

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.