**ON BEHALF OF THE REPUBLIC OF AZERBAIJAN**

**THE DECISION**

**OF THE PLENUM OF THE CONSTITUTIONAL COURT**

**OF THE REPUBLIC OF AZERBAIJAN**

*On interpretation of Articles 76, 78 and 112 of the Family Code of the Republic of Azerbaijan*

**27 July 2016                                                                        Baku city**

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

attended by the Court Clerk – Faraid Aliyev,

the representative of interested subjects – Zamiq Rasulov, Judge of Astara Regional Court and Magamed Bazigov, Senior Advisor of the Department for Social Legislation of Milli Majlis of the Republic of Azerbaijan;

        the experts – Judge of the Supreme Court of the Republic of Azerbaijan and Abiddin Huseynov, 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 Jabrail Regional Court on interpretation of Articles 76, 78 and 112 of the Family Code of the Republic of Azerbaijan.

Having heard the report of Judge Isa Najafov, the statements of representatives of interested subjects, the experts opinion and having considered materials of the case, Plenum of the Constitutional Court

**DETERMINED AS FOLLOWS:**

The Jabrail Regional Court appealed to the Constitutional Court of the Republic of Azerbaijan (hereinafter referred to as the Constitutional Court) with the inquiry concerning the possibility of application of the Law of the Republic of Azerbaijan “On Living Wage” (hereinafter referred to as the Law “On Living Wage”) and the Law of the Republic of Azerbaijan “On Living Wage of the Republic of Azerbaijan on 2016” with respect to alimentary relations provided in the Articles 76, 78 and 112 of the Family Code of the Republic of Azerbaijan (hereinafter referred to as the Family Code).

In the case materials it is shown that claimant F.Aslanli, having appealed to Jabrail Regional Court asked to collect from the defendant V. Siyabli in her advantage the alimony for keeping the son M. Siyabli, having increased them to the amount of 117 AZN. The basis for the address was the decision of the same court as of May 23, 2013 where from the defendant on keeping of their son until he reaches maturity the size of the alimony in amount of 50 AZN had been determined. Considering that for this period market prices had been raised, and, as a result, keeping of the child became complicated, the claimant had asked to adopt the decision in her advantage.

In his turn, the defendant has appealed to court with the response statement where he asked to determine the size of the alimony for child support based upon deduction of ¼ part of his earnings and other income. During judicial proceedings he submitted the case suspension petition and the appeal to the Constitutional Court concerning a possibility of application of the Law “On Living Wage” to the alimentary relations specified in the Articles 76, 78 and 112 of the Family Code. On April 7, 2016 the court satisfied petition.

According to Jabrail Regional Court, the living wage and the alimentary relations create uncertainty in practice and therefore complicates the protection of the rights and freedoms of the parties in court.

Thus, courts, considering the cases connected with determination of the alimony take as a basis not the requirements of the family legislation concerning financial and family opportunities, but the provision of the Law “On Living Wage”.

According to inquirer if parents have no income or if it is lower than a living wage, then forcing them to compelled additional earnings can lead to negative consequences. Thus, in jurisprudence there are cases when parents not have opportunities to pay the alimony and because of not execution of the judgment were brought to administrative and criminal responsibility.

In connection with the question raised in the inquiry, the Plenum of the Constitutional Court considers important to note the following.

On the basis of parts I and II of Article 17 of the Constitution of the Republic of Azerbaijan (hereinafter referred to as the Constitution), the family as a basic element of society is under special protection of the state. Parents must take care of their children and their education. The state controls implementation of this responsibility.

According to parts III and IV of the Constitution the maternity, paternity and childhood are protected by the law. Care and education of children constitute both right and responsibility of parents.

In our country the important measures in areas of the rights specified in the Constitution as well as freedoms of person, development of society and personality have been taken. On July 21, 1992 the Republic of Azerbaijan ratified UN Convention “On the Rights of the Child”, in 1993 has adopted the World Declaration “On Survival, Protection and Development of Children”, and also a number of Conventions of the International Labour Organization and other important international acts.

According to Article 18.1 of the Convention “On the Rights of the Child”, the States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern.

According to Article 5 of Protocol 7 to the European Convention on Human Rights, spouses shall enjoy equality of rights and responsibilities of a private law character between them, and in their relations with their children, as to marriage, during marriage and in the event of its dissolution.

From Article 19 of the Law of the Republic of Azerbaijan “On the Rights of the Child” (hereinafter referred to as the Law “On the Rights of the Child”) follows that, parents have the equal rights and have equal obligations for education of the child. They are obliged to raise the child healthy, to bring up him on the basis of universal and national values, to prepare the child for independent life. Fundamental obligations of parents are ensuring development of abilities of the child, ensuring his material and moral requirements, protection of his rights and interests.

On the basis of the formed legal position of the Plenum of the Constitutional Court in the decision “On interpretation of Articles 132.1.1 and 132.1.2 of the Family Code of Republic of Azerbaijan” of October 5, 2012 it is said that implementation of the rights of the child, creation of conditions for formation of children as highly moral, comprehensive persons is one of the priority directions of a state policy of the Republic of Azerbaijan. The state policy concerning children is focused on ensuring of upbringing of each child in the corresponding material and living conditions, receiving of education, training on the basis of progressive requirements, formations as worthy citizen. Each child is entitled to live and be brought up in a family, to know his/her parents, to use their care, to live together with them. At the same time, the child has a right to be brought up by parents and a right for ensuring her/his interests, all-round development and respect of advantage.

For adoption of the correct decision on the issue raised in the inquiry, the Plenum of the Constitutional Court considers important to give interpretation to certain norms of the Family Code and the international legal acts in the above-stated context.

In the Family Code are affirmed the rights of children in a family, the protection of their interests and other issues connected with it and regulated by norms of law.

The Family Code according to the basic rights and freedoms of person and citizen specified in the Constitution establishes the principles of creation and strengthening of family relations, its dissolution, right and a duty of participants in this sphere, and also norms regulating the order of civil registration.

The Article 2.1 of the Family Code establishes rules and conditions of the conclusion of marriage, its dissolution and recognition of it as invalid, governs the property and personal non-property relations arising between family members (spouses, parents and children) or in cases and limits, stipulated by the legislation, between other relatives and other persons, and also determines rules of acceptance on education of the children who were left without guardianship of parents.

In Chapter XI of the Family Code it is said about the rights of children in a family. Here the right of the child to live and be brought up in a family, the right of the child for communication with parents and other relatives, the right of the child to express the opinion, property and other rights of the child is specified.

According to Articles 49.2 and 49.3 of the present Code each child has the right to live and be brought up in a family, to know the parents and to use their care, to live together with parents, except for cases when it contradicts his interests. The child has the right for education by the parents, the right for ensuring the interests, all-round development and respect of the advantage.

It should be noted that in the family legislation the recognition of children as free subjects proceeds from requirements of the Constitution, the Convention “On Rights of Children” and a number of international legal acts.

The Family Code, based on the constitutional principles on care of children, has established the obligation of keeping of children by parents. Thus, in Articles 75.1 and 75.2 of the present Code it is said that parents are obliged to support the children. Parents independently establish an order and a form of keeping of children.

Apparently, the legislator has established keeping of children until full age as a duty of parents, and an order and a form of contents has defined as independent. However, to the parents avoiding keeping of the children the coercive measures can be applied with the purpose of implementation of this duty in a judicially.

On the basis of Chapter XVI of the Family Code parents can conclude the agreement on keeping of children of minor age (agreement on payment of the alimony). In case if parents do not support their children, the relevant means (alimony) shall be kept back from parents judicially. In case of absence of agreement on payment of alimony, as well as in cases when parents (one of them) fail to provide children with maintenance and do not lodge a claim, relevant authority of executive power has a right to make such claim to against parents for collecting from them alimony for maintenance of minor children (one of them) (Articles 75.3, 75.4, 75.5 of the Family Code).

Apparently, in the family legislation payment of the alimony is established in two ways:

- voluntary - keeping of children by conclusion of agreement (agreement on payment of the alimony);

- compulsory - on the basis of the judgment.

Under the alimentary obligation, arising between parents and children, meant such legal relationship when one party for the maintenance of other party comes to the agreement or in the absence of the agreement between them the alimony are collected in a judicial proceeding according to the legislation.

Article 99 of the Family Code states that in case of absence of the agreement on payment of the alimony, the family members specified in Chapters XIII-XVI of the present Code have the right to appeal to court with the requirement on collecting the alimony.

In the family legislation two ways of collecting the alimony in a judicial proceeding are established:

- collecting in the established size of funds from monthly earnings (income) of the person obliged to pay the alimony;

- in a firm sum of money.

On the basis of Article 76.1 of the Family Code, in the absence of the agreement on payment of the alimony, the alimony for children is collected by court from their parents monthly in the following size:

- on 1 child — the fourth part of earnings and (or) other income of parents;

- on 2 children — the third part of earnings (other income);

- on 3 and more children — a half of earnings (other income).

On the basis of the requirement of Article 78.1 of the Family Code in case if there is no agreement between parents on payment of the alimony for minor children, and also in cases if the parent obliged to pay the alimony has irregular, changing, earnings (income) or if this parent receives earnings (income) in whole or in part in nature or in foreign currency or if he has no earnings or other income, and also in other cases when collecting the alimony in the share relation to earnings (income) of the parent is impossible, difficult or significantly violates the interests of one of the parties, then court have the right to determine by the petition of the person demanding collecting funds for keeping of children the size of the alimony in the firm sum of money collected monthly or at the same time in a firm sum of money and in shares according to Article 76 of the Family Code.

In this article the legislator has defined several bases of collecting the alimony in a firm sum of money for keeping of children in the absence of the agreement of parents on their payment:

- if the parent obliged to pay the alimony has irregular, changing, earnings (income);

- if the parent receives earnings (income) in whole or in part in nature or in foreign currency;

- if he has no earnings or other income;

- if collecting the alimony in the share relation to earnings (income) of the parent is impossible, difficult or significantly violates the interests of one of the parties.

At existence of one of the above-mentioned bases, the court can determine the size of the alimony in the firm sum of money collected monthly. If the court defines collecting the alimony in a firm sum of money, but not in a share part to earnings (income), then the basis for adoption of such decision has to be proved by court in the decision.

One of the important requirements determined by the legislator in the above-stated article is that collecting the alimony in a firm sum of money is possible only on the basis of the petition which is filed a lawsuit by the person demanding them. That is, the legislator neither on the initiative, nor according to the petition of the defendant has no right to resolve an issue of collecting the alimony in a firm sum of money.

Apparently, from the norms specified in the Family Code, the order of collecting the alimony have an imperative uniform.

At the same time, at determination of the size of the collected alimony defined in each of two ways, the family legislation has established to court certain rights and duties. Thus, based on Article 76.2, specified in Article 76.1 of the Family Code the size of shares can be reduced or increased by court taking into account marital and financial position of the parties, and also of other circumstances deserving attention.

Article 78.2 of this Code states that the size of a firm sum of money is defined by court proceeding from the greatest possible preservation to the child of the previous level of his maintenance with financial and marital status of the parties and other circumstances deserving attention.

In this article the legislator for definition of collecting the size of a firm sum of money has put a number of questions before court, demanding trial at the solution of the matter;

- financial and marital status of the parties;

- the circumstances deserving attention;

- preservation to the child of the previous level of his maintenance.

According to the legislation the court during trial has to define financial position of the parties, their income (for example, payment of a tax as taxpayer), other sources of the income, education, specialty, the former place of work, housing level (an accommodation condition), the analysis of a condition of property (personal and real estate), ability of the person to provide himself, etc.

During trial the court has to define a condition of marital status of the parties whether persons have entered repeated marriage, presence of children in a new family, existence of other payments for the alimony, whether the collected size of the alimony will lead to essential decrease in level of maintenance of other children, etc.

Also during trial, the court has to pay attention to working capacity and the state of health of the parties, keeping dependent on other persons (disabled parents, etc.), etc.

Having determine the previous level of maintenance the child, the court has to take into account that, on the basis of Article 13 of the Law «On Rights of the Child”, the child has the right for material security in a size, not less than living wage established by the legislation of the Republic of Azerbaijan. In this regard, the court needs to consider in what sorts educational institution the child gets an education (paid or free), former rules of rest, the rule of leisure, sports, music, the state of health and other issues.

In the decision of the Plenum of the Supreme Court On practice of application by courts of the legislation at hearing of cases connected with divorce, definition with which of parents the minor children after the divorce will live and collecting the alimony at parents for keeping of children” of March 28, 2016 has been explained that the child has the right for material security in a size, not less than living wage established by the legislation of the Republic of Azerbaijan (Article 13 of the Law “On Rights of the Child”).

When determining by court of the size of the collected alimony the main criterion is the maximum preservation of the previous level of maintenance the child, and also definition of marital and financial position of both parties. In this case, courts have to consider financial position of a family during their cohabitation together with the child or voluntary payment of funds of one of the parties for keeping of the child during separate accommodation and the level of providing the child until suspension of payment of means. Also additional material expenses of means, such as visit by the child of educational preschool institutions, study groups on music, dances, drawing, sports sections and others have to be considered.

If deduction of a certain size of the alimony in the share relation to earnings from the person who have constant place of work (an income source) can significantly violate the interests of one of the parties (for example, the person in favor of whom the alimony is collected is a disabled person, has the disease excluding an opportunity to be engaged in work or has that person in dependence), then the court has the right to determine the size of the alimony in a firm sum of money. In such case, despite of low wage of this person the such circumstances as, expenditure by the person of means much exceeding a limit of his salary have to be considered (for example, the monthly payment of money for the credit in bank surpassing the size of a monthly salary or after divorce payment in a big size of money from the salary on keeping of the child before submission of the claim for collecting the alimony). At determination of size of the alimony, it is necessary to consider presence at a person of other children to whom he by a court decision pays the alimony. Presence at the person obliged to pay the alimony on the basis of the judgment of other children to whom he did not pay alimony, and also his other additional expenses (a credit debt, a payment for rent, etc.) should not be accepted as the absolute basis for reduction of the size of the alimony. During hearing of cases, connected with collecting of alimony if by court it is established that the person from whom the alimony will be exacted, already pays the alimony for keeping of other child, on the basis of the new judgment this circumstance can become the reason for reduction of this alimony and by it to infringe his interests (this child), in this regard the person in favor of whom the alimony is already paid has to be attracted to participation in case.

On the basis of the formed legal position in a number of decisions of the Plenum of the Constitutional Court, the court, having specified the facts of the case and proofs forming the conclusion, arguments on which was based for a rejection of any proofs, and laws by which was guided established in the decision has to prove it from the legal point of view. In the decision the court should not be satisfied only by citation of each of proofs including interpretation of contents of testimonies of witnesses; testimonies have to be compared, acceptance or a rejection of the available proofs has to be accurately reasonable (decision of the Plenum of the Constitutional Court of May 31, 2006 in connection with S. Aliyeva's complaint).

Proceeding from provisions of the civil procedure legislation, each party has to prove those circumstances on which it refers as to the basis of the requirements and objections. If consideration of case on the basis of the available proofs is represented impossible, the court can suggest the parties to submit necessary additional proofs. The evidence is produce by the persons participating in case to the court of the first instance. The person who is participating in case and not having an opportunity independently obtain the necessary evidence from the persons who are participating or not participating in case or body at which it is, has the right to appeal to court with the petition for reclamation of these proofs. In the petition it has to be specified what circumstances important for case can be established by these proofs, have to be specified signs and the location of proofs. The court if necessary submits to the participating person inquiry for obtaining the proof. The person who has proofs claimed by court sends them directly to court or transfers from hand to hand to the person having the corresponding inquiry for their transfer to court. The court accepts and takes into consideration only proofs being of relevance to facts and circumstances established by parties to case. The court estimates proofs according to the legal norms applied to those proofs after the objective, impartial, comprehensive and their full investigation. No proof has a preliminarily established force for court (Articles 77.1, 77.3, 78.1, 78.2, 80, 88 of the Civil Procedure Code of the Republic of Azerbaijan (hereinafter referred to as the Civil Procedure Code).

Thus, considering the cases connected with collecting of alimony, the court has to determine their size, based on requirements of the Family Code and follow the above-stated norms of the civil procedure legislation.

Considering the above, the Plenum of the Constitutional Court comes to a conclusion that on the basis of Articles 76.2 and 78.2 of the Family Code, at determination of size of shares of the collected alimony, first of all, it is necessary to consider the financial and marital status of the parties, other circumstances deserving attention and the previous level of maintenance of child.

Along with it, Article 112.1 of the Family Code states that in the absence of the agreement on payment of alimony, after establishment in a judicial proceeding of the size of the alimony has changed the marital or financial position of one of the parties, the court has the right to change the established size of the alimony upon the demand of any of the parties or to release the person obliged to pay the alimony from their payment taking into account other interests of the parties deserving attention.

The Plenum of the Constitutional Court considers that at hearing of cases connected with change of the size of collected alimony (increase or reduction), being guided by the created legal position of the present Decision, it is necessary for court which determine the size of the collected alimony, to consider the possible changes in marital or financial position of one of the parties, his influence on the level of maintenance the child, and also financial position of the person obliged to pay the alimony.

As for the possibility of application of the Law “On Living Wage” to provisions contained in the Articles 76, 78 and 112 of the Family Code governing the alimentary relations the Plenum of the Constitutional Court notes the following.

According to Article 1.1 of the Family Code, the family legislation of the Republic of Azerbaijan consists of the Constitution of the Republic of Azerbaijan, the present Code, other relevant acts adopted according to the present Code and international treaties which the Republic of Azerbaijan is a party too.

Article 4 of the same Code states that to the mentioned in Article 2 of the present Code and not settled by the family legislation property and personal relations between family members are applied the norms of the civil legislation that are not contradict to the essence of family relations.

If the relations between family members are not settled by the family legislation or the agreement of the parties, and in the absence of the norms of civil law which are directly governing the specified relations then to such relations if it does not contradict their essence, the norms of family and (or) civil law governing the similar relations are applied. In the absence of such rules of law, the rights and duties of family members are defined according to the general principles of the family and civil legislation, and also the principles of humanity and justice (Article 5 of the Family Code).

Based on it the court has to determine the size of the alimony first of all on the basis of requirements of the norms of the Family Code governing the specified relations.

According to Article 13.1 of the Civil Procedure Code, the court resolves disputes on the basis of the Constitution of the Republic of Azerbaijan, legal acts adopted by a referendum, laws, decrees of the President of the Republic of Azerbaijan, resolutions of the Cabinet of Ministers of the Republic of Azerbaijan, normative legal acts of bodies of central executive authorities, and also international treaties which the Republic of Azerbaijanis a party too.

From the point of view of the fact that in connection with divorce the care of the child lies on one of parents, care of him, care about his health, education, development and other types of cares, then the sum specified in the acts defining a living wage brought closer to the minimum expense on life can be withheld from other parent as the alimony. Thus, the absence of official work or earnings is not exempted the parent obliged to pay the alimony from a duty of maintenance and material security of the child.

On the basis of the above the Plenum of the Constitutional Court comes to the following conclusion:

- in absence of agreement on payment of alimony, the court on the basis of Articles 76.2 and 78.2 of the Family Code and the legal position specified herein, shall give the assessment of financial and marital status of both parties, the previous level of maintenance of child and other circumstances deserving attention.

- at giving an assessment to the specified circumstances, the court also shall take into account the Article 13 of the Law «On Rights of the Child”, which states that a child is entitled to have material security in a size not less than living wage established by legislation of the Republic of Azerbaijan.

Being guided by the Article 130.6 of the Constitution of the Republic of Azerbaijan and the Articles 60, 62, 63, 65-67 and 69 of the Law of the Republic of Azerbaijan “On the Constitutional Court”, the Plenum of the Constitutional Court of the Republic of Azerbaijan

**DECIDED:**

1. In absence of agreement on payment of alimony, a court on the basis of Articles 76.2 and 78.2 of the Family Code of the Republic of Azerbaijan and the legal position specified herein shall give the assessment of financial and marital status of both parties, the previous level of maintenance of child and to other circumstances deserving attention.

2. At giving an assessment to the specified circumstances, the court also has to take into account the Article 13 of the Law “On Rights of the Child” which states that the child has the right for material security in a size not less than living wage established by the legislation of the Republic of Azerbaijan.

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 body or official.