ON BEHALF OF THE REPUBLIC OF AZERBAIJAN
D E C I S I O N

**OF THE PLENARY SESSION OF THE CONSTITUTIONAL
COURT OF THE REPUBLIC OF AZERBAIJAN**

**On interpretation of some provisions of Articles 157 and 158
of the Civil Procedure Code of the Republic of Azerbaijan**

14 March 2018 Baku city

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

attended by the Court Clerk Faraid Aliyev,

Representatives of the interested parties - Mahir Mammadov, Head of the Scientific-Analytical Sector of the Office of the Commissioner for Human Rights (Ombudsman) of the Republic of Azerbaijan; Kamala Pashayeva, Adviser of the Department for Administrative and Military Legislation of Milli Mejlis of the Republic of Azerbaijan,

Experts - Elshad Nasirov, Senior Lecturer of the Academic Board of the Constitutional Law of the Baku State University,

Specialists - Ikram Shirinov, Judge of the Baku Court of Appeal; lawyer Mukhtar Mustafayev, Member of the Presidium of the Bar Association of the Republic of Azerbaijan,

In accordance with the Part VII of Article 130 of the Constitution of the Republic of Azerbaijan, examined in the open court session via special constitutional proceedings, the case on inquiry of the Commissioner for Human Rights (Ombudsman) of the Republic of Azerbaijan on verification of conformity of Articles 157 and 158 of the Civil Procedure Code of the Republic of Azerbaijan (hereinafter referred to as the Civil Procedure Code) to Part I of Article 13, parts I, III and V of Article 25, Parts I and III of Article 28, Part II of Article 29, Article 59, Parts I and II of Article 71, Parts I and III of Article 149 of the Constitution of the Republic of Azerbaijan (here­inafter referred to as the Constitution).

Having heard the report of Judge R. Gvaladze, the reports of the legal representatives of the interested parties, specialists and experts, examined the materials of the case, the Plenum of Constitutional Court of the Republic of Azerbaijan

DETERMINED AS FOLLOWS:

Commissioner for Human Rights (Ombudsman) of the Republic of Azerbaijan having applied to the Constitutional Court of the Republic of Azerbaijan (hereinafter referred to as the Constitutional Court) asked for verification of conformity of Articles 157 and 158 of the Civil Procedure Code of the Republic of Azerbaijan (hereinafter referred to as the Civil Procedure Code) to Part I of Article 13, Parts I, Ш and V of Article 25, Parts I and III of Article 28, Part II of Article 29, Article 59, Parts I and II of Article 71, Parts I and III of Article 149 of the Constitution of the Republic of Azerbaijan (hereinafter referred to as the Constitution).

In the inquiry, it has been provided detailed information on Articles 157 and 158 of the Civil Procedure Code, Article 162, which provides for the cancellation of securing of claim, and Article 163, which provides for the procedure of complaint from ruling on securing of claim and noted that the incorrect application of those articles sometimes in practice leads to a violation of some constitutional rights of individuals and legal enti­ties. According to the respondent's opinion, there is a need for a legal assessment by the Constitutional Court in order to eliminate contradic­tions, to clarify them, to form a uniform court practice, and thereby ensure the rights and legitimate interests of individuals and legal entities more efficiently.

The Plenum of Constitutional Court considers it necessary to note that the issues raised by Commissioner for Human Rights (Ombudsman) of the Republic of Azerbaijan are important for the formation of a uniform court practice and aimed at ensuring human and civil rights and freedoms.

On the basis of the substance of the request, the Plenum of Constitutional Court considers it necessary to interpret several provisions of the civil procedural legislation relating to securing of claim.

According to Article 60.1 of the Constitution, legal protection of rights and liberties of every citizen is ensured.

According to the legal position established by the Plenum of Constitutional Court, the right to judicial protection is fundamental human and civil rights and freedoms, as well as ensures other rights and freedoms enshrined in the Constitution (decision of the Plenum of Constitutional Court on the complaint of M.Huseynov of March 4, 2015).

As regards the content of the right to judicial defense, it defines the right of everyone to appeal to the court for the restoration of violated rights and freedoms on the one hand, and on the other hand, determines the duty of courts to examine these appeals within a reasonable time and to make a fair decision on them, determines the duty of their timely execution (decision of the Plenum of Constitutional Court on the complaint of V.Ozerov of 15 April 2011, decision of the Plenum of Constitutional Court on the complaint of J.Ismay?lzade of 6 June 2014 and decision of the Plenum of Constitutional Court of 4 June 2014 on interpretation of Article 231.4 of the Civil Procedure Code of the Republic of Azerbaijan).

Execution of court's decision, which has entered into legal force, is of particular importance as part of the right to appeal to the court. Thus, the timely and incorrect implementation of court's decision makes exercise of the right to judicial protection ineffective and makes decision made by court insignificant. In accordance with the requirements of the constitu­tional and international legal acts, justice should ensure that the rights are effectively restored as a result of the effective execution of court decisions (Decision of the Plenum of Constitutional Court on interpretation of Articles 7, 10, 24 and 26 of the Law of the Republic of Azerbaijan "On Execution" from the point of some provisions of the Civil Procedure Code of the Republic of Azerbaijan of 2 September 2015).

Article 2.1 of the Code of Civil Procedure, based on the requirements of the Constitution, states that tasks of court proceeding in respect of civil cases and economic disputes shall consist of endorsement of rights and privileges of any physical person and legal entity rising out of the Constitution of the Republic of Azerbaijan, laws and other normative legal acts of the Republic of Azerbaijan.

Civil procedural legislation provides for the compulsory execution of judicial acts which has entered into legal force and, in some cases, pro­vides for the possibility of taking appropriate measures to ensure the future execution of judicial acts. Measures for securing of claim petition are of particular concern.

The institute of security of a claim is one of the key elements of the administration of justice and acts as a guarantee of future execution of court decision.

Demand for securing of claims has arisen from the time the disputes began to be resolved procedurally. In order to secure a claim, the Roman law required the respondent to introduce a person who would be able to come to the court and participate until the judge took the decision. Absence of such guarantees could have resulted in the respondent's deten­tion personally.

According to civil legislation, which was in force until the Soviet era, in order to secure a claim, imposition of arrest upon movable property, the imposition of prohibition on immovable property, not to leave the coun­try, bail and other assurance types could be applied.

The socialist regime actually denied the existence of a market econo­my and this led to a reduction of the importance of the rules regarding security for a claim for civil court proceedings. It should be noted that, according to the requirements of the Civil Procedure Code, valid until 2000, the court could take measures to secure a claim on its own initia­tive.

In accordance with Article 157.1 of the Civil Procedure Code in force, upon applications of a person participating in case the judge shall be enti­tled to take all measures for securing of a claim. Securing of a claim shall be permitted at any stage of proceeding.

Claims are not only imposed on the plaintiff's initiative and only with respect to the defendant. Therefore, in Article 157 of the Civil Procedure Code, the scope of bodies entitled to appeal to the court with an applica­tion to take action to secure a claim has been defined by the phrase "per­son involved in a case". Taking into account the substance of a measure for securing of a claim and the procedural objective, parties, third parties, applicants, interested persons, social organizations, state authorities and other institutions entitled to appeal to court for protection of disputed or violated rights (Article 46 of the Civil Procedure Code).

A petition on securing of a claim must be submitted to a court that has accepted the case for proceeding as a separate written document. In accor­dance with Article 149.4 of the Civil Procedure Code, an appeal about taking measures for securing of a claim petition can also be filed in the claim petition.

Taking measures to secure a claim shall not be permitted until the case has been accepted for proceeding and after passing of a court decision on the substance of the case. This rule does not apply to cases when a deci­sion of first instance court is appealed.

According to Article 159.1 of the Civil Procedure Code, petition on securing of a claim shall be heard by judge reviewing a dispute immedi­ately from the date of receipt of the petition. Pursuant to merits of this Article, the petition on securing of a claim shall be heard not later than the day following the day of its arrival at the court.

Hearing of the case without informing the participants of the case (ex parte) is based on the fact that the measure for securing a claim is an "unexpected effect" for the other party.

According to Article 127.2 of the Constitution, in consideration of legal cases judges must be impartial, fair, they should provide juridical equality of parties, act based on facts and according to the law.

Any type of action to secure of a claim limits the rights of the individ­ual for whom it has been applied and other persons and sometimes caus­es them substantial damage. Therefore, having regard to the principle of procedural law equality established in the Constitution, the person partic­ipating in the case should reason the need to take measures for securing of a claim sufficiently. However, excessive duty regarding submission of evidence should not be given to the applicant who has the petition to secure a claim. Simply, the judge must come to the conclusion that the evidence provided in the participating person's argument proves that there are grounds for taking such measures. Any information indicating the unjustness of the respondent, for example, the correspondence of the par­ties, the acts of the defendant, which are intended to explicitly delay the process, the actions intended to formalize the property and the funds on other persons, the announcement of the sale of the property, etc. can be attributed to such evidence.

According to Article 157.2 of the Civil Procedure Code, implementa­tion of measures for securing a claim for the purposes of further securing future execution of decision shall constitute a temporary action and shall not predetermine passing of a decision on case in its merits.

As can be seen from the content of the article, securing a claim is a procedural measure to ensure the future execution of a court decision in civil cases. Therefore, when considering the claim, the court should be sure that failure to comply with this or other assurance claim may further complicate or impede the execution of the decision.

The provision of "constitute a temporary action" enshrined in Article 157.2 of the Civil Procedure Code implies that, where a claim is rejected, measures for securing a claim adopted by court shall remain effective until the decision enters into force. However, court shall have the right simultaneously with or following its decision issue a ruling on cancella­tion of measures for securing a claim (Article 162.3 of the Civil Procedure Code). In case of satisfaction of claims, measures for securing a claim shall remain valid until execution of court decision (Article 162.4 of the Civil Procedure Code).

According to the findings of the Plenum of Constitutional Court, secur­ing a claim must meet three main criteria, which are the procedural meas­ures to ensure the future execution of the decision that will be made in civil cases:

* these measures should be implemented within a very short time, if there are grounds for their application;
* these actions should be temporary;
* the measures applied should be commeasure to the claims submitted.

The principle of proportionality in Article 71.2 of the Constitution has been expressed as "limitation of rights and freedoms should be propor­tionate to the expected outcome of the state".

Creation of the principle of proportionality is associated with the tradi­tions of roman-german constitutionalism.

Previously, in the 1950s and 1960s, the concept of proportionality was reflected in a number of cases heard by the European Court of Justice. This concept was adopted by European law and practice on the basis of the German constitutional right after the war. As a matter of principle, it emerged in Prussian administrative law in the late XVIII - the first half of the XIX century.

The proportionality test that is generally developed in the German pub­lic law and continues to evolve in European law involves a consistent solution of the following issues:

1. whether the interference of state bodies in the exercise of individual rights (freedoms);
2. whether such interference is envisaged by domestic law;
3. is the purpose of the interference legitimate;
4. the desired purpose can be achieved through the use of such inter­vention, in other words, the tool used is useful for achieving the legitimate aim;
5. is there any other, equally useful, but less exhausting, in other words the means used is necessary to achieve legitimate aim;
6. the tool used is acceptable (narrowly proportionate).

Broadly speaking, the principle of proportionality necessarily involves three key elements:

* this principle regulates issues of restrictions of human and civil rights and freedoms;
* right can only be restricted by law;
* the degree of restriction of the right as a means of reaching the aim should be appropriate and should not be excessive.

The principle of proportionality is reinforced in the practice of the European Court of Human Rights (hereinafter referred to as the European Court) and is actively used by the latter to determine the possibility of restriction of rights and freedoms set forth in the Convention for the Protection of Human Rights and Fundamental Freedoms.

The European Court stated in its judgment of "Hakansson and Sturesson v. Sweden" of 21 February 1990 that Article 1 of Protocol No. 1 of the Convention requires that reasonable proportionality of the means employed and the aim sought to be realized. The requisite proportionali­ty will not be found if the person concerned has had to bear "an individ­ual and excessive burden".

Special attention is paid to the concept and substance of this principle with using the principle of proportionality by the Plenum of Constitutional Court. The substance of the principle of proportionality in the decisions of the Plenum is explained on the basis of the direct interpretation of the Constitution and the laws, as well as the legal precedents enforcement in the judgments of the European Court.

Decision of the Plenum of Constitutional Court on complaint of Clark Gordon Morris of 26 May 2017, the Court clarified the principle of pro­portionality clearly, explained the legislative provisions that should be taken into account when applying restrictions, and emphasized the impor­tance of compliance with the principles of proportionality, compliance with legitimate aim when such restrictions have been applied. It was stat­ed in the judgment that, when considering the case in accordance with the legislation, the court should evaluate the grounds for the determination of the limitation, the debtor's objections against it on its own beliefs, exam­ine the case in a fair, complete and full manner, substantiate its findings in the relevant court act.

The importance of this principle has increased not only by the consti­tutional oversight body but also by using broadly by the general jurisdic­tion courts. This tendency is expressed by the fact that the courts refer to generally recognized principles and norms of international law, the legal position of Constitutional Court, and the integration of the applicable law into the uniform legal space during the justification of the decision with the norms of Constitution and the law.

One of the undeniable advantages of the Civil Procedure Code in force is the application of the principle of proportionality of measures for secur­ing of a claim to the claim filed by the claimant.

It has not been indicated in Article 158 of the Civil Procedure Code which measures for securing of a claim is proportional to a claim filed by the claimant. However, it is understood from the meaning of this article that when considering petitions for the application of securing measures, the court must examine whether the applicant's request for a specific measure of conformity is relevant to the claim filed and whether it is appropriate. Accordingly, having regard to the claim filed and the possi­ble court ruling regarding that claim, the court should be sure that the fail­ure to take any of the measures referred to in Article 158 of the Civil Procedure Code may make difficult or impossible the execution of the resolution.

The substance of the principle of proportionality of measures for secur­ing of a claim to the claim filed by the claimant is that the judge may impose arrest upon a respondant's property of an amount not exceeding the amount of claim, or forbid the conduct of certain actions within the limits of the requirement exclusively for the respondent or other persons.

In addition to the measures for securing of a claim set out in Article 158 of the Civil Procedure Code in force, the court may also take other meas­ures for securing of a claim.

As other measures, the suspension of the sale of property seized in the event of a claim for release of property, imposing certain obligations on the respondent on property protection, and so on can be shown.

Other measures should also comply with the objectives set out in Article 157 of the Civil Procedure Code in any case. For the purposes not provided for in this article, the court shall not accept the measures for securing of a claim.

The law provides that physical persons and legal entities shall be fined in favor of state (Articles 158.5.1 and 158.5.2 of the Civil Procedure Code) in case of violation of rules regarding prohibition of the conduct of certain actions by the respondent or other persons (Articles 158.1.2 and 158.1.3 of the Civil Procedure Code).

In addition, claimant shall have the right to require, under the court pro­ceeding, persons concerned to compensate losses caused by non-execu- tion of a ruling on securing of a claim (Article 158.6 of the Civil Procedure Code).

The Civil Procedure Code does not disclose the damage caused by non-execution of the ruling on application of measures regarding securing of claim.

The Plenum of Constitutional Court considers that in that case the norm of Article 21.2 of the Civil Code of the Republic of Azerbaijan may be used, because compensation for damages in the manner provided in this Article is a universal protection of civil rights. According to that arti­cle, damages are the expenses, incurred or to be incurred by which a per­son, whose right has been violated, incurred or will incur to restore the violated right or damage to his property (tangible loss) as well as profits,

which the person would have earned under ordinary conditions of civil relationships, if his rights have not been breached (lost profits).

Considering the above stated, the Plenum of Constitutional Court con­siders it necessary to mention the following:

- In accordance with the requirements of Article 127.2 of the Constitution, Articles 157 and 158 of the Civil Procedure Code, the courts should pay particular attention to sufficient justification of the application of the measures for securing of a claim in the application by the person involved in the case, should provide a comprehensive assessment of whether the evidence in the petition is justified, to examine the existence of a link between these measures and claim petition, should make a deci­sion ensuring that the proposed measure should be proportionate to claim submitted and securing legitimate interests of all parties involved in case.

Having regard to Article 130.7 of the Constitution of the Republic of Azerbaijan, and Articles 52, 60, 62, 63, 65-67 and 69 of the Law of the Republic of Azerbaijan "On Constitutional Court", the Plenum of the Constitutional Court of the Republic of Azerbaijan

DECIDED:

1. In accordance with the requirements of Article 127.2 of the Constitution, Articles 157 and 158 of the Civil Procedure Code, the courts should pay particular attention to sufficient justification of the application of the measures for securing of a claim in the application by the person involved in the case, should provide a comprehensive assessment of whether the evidence in the petition is justified, to examine the evidence of a link between these measures and claim petition, should make a decision ensuring that the proposed measure should be proportionate to a claim submitted and securing legitimate interests of all parties involved in case.
2. Decision shall enter into force on the day of its publication.
3. 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. Decision is final, it may not be cancelled, modified or inter­preted by any authority or individual.