ON BEHALF OF THE REPUBLIC OF AZERBAIJAN

DECISION

# OF THE CONSTITUTIONAL COURT

# OF THE REPUBLIC OF AZERBAIJAN

## On Articles 67 and 423 of the Civil Procedure Code of the Republic of Azerbaijan

## 11 June, 2002 Baku city

The Constitutional Court of the Republic of Azerbaijan composed of Kh.Hajiyev (Chairman), Judges: F.Babayev, B.Garibov, R.Gvaladze, S.Salmanova (Reporter Judge), A.Sul­tanov, E.Mamedov,

joined in the proceeding by: the Court Clerk I.Ismayilov;

the legal representative of the party that submitted a petition: B.Asadov, Judge of the Supreme Court of the Republic of Azerbaijan;

the legal representative of the respondent party: E.Askerov, employee of the Administration of Milli Majlis of the Republic of Azerbaijan;

the expert: M. Aliyev, the lecturer of the Civil Procedure, Labour and Environ­mental Law Board of the Law Faculty of Baku State University;

in accordance with Article 130.3 of the Constitution of the Republic of Azerbaijan has examined via special constitutional proceeding in open court session the petition submitted by Supreme Court of the Republic of Azerbaijan of May 2, 2002. N 8-4/2002 concerning verification of conformity of the provision “the complaint may be submitted by person who participates in examination of a case with advocate” of Articles 67 and 423 of the Civil Procedure Code with Articles 60 and 71.2 of the Constitution of the Republic of Azerbaijan.

Having heard the report of Judge S. Salmanova, the statements of the legal representatives of the subjects on special constitutional proceedings: B.Asadov, and E.As­kerov, opinion of the expert M. Aliyev, the Constitutional Court of the Republic of Azerbaijan

**DETERMINED AS FOLLOWS**:

Taking into account the difficulties available in judicial practice as to the access of persons participating in civil proceedings to the court of cassation, in its petition Supreme Court of the Republic of Azerbaijan asks to verify the conformity of Articles 67 and 423 of the Civil Procedure Code stating that “the complaint may be submitted by person who participates in examination of a case with advocate” with Articles 60 and 71.2 of the Constitution of the Republic of Azerbaijan.

The official texts of the Articles 67, 416, 423, 424 and 433 of the Civil Procedure Code of the Republic of Azerbaijan, Article 20 of the Law of the Republic of Azerbaijan ”On Advocacy” certified by Administration of the Milli Majlis of the Republic of Azerbaijan are enclosed to materials of case.

Using the international instruments and the Constitution of the Republic of Azerbaijan, providing for the guarantees of human rights and freedoms as well as the relevant case-law of the European Court of Human Rights, the Constitutional Court notes as follows:

According to Article 67 of the Civil Procedure Code in courts of cassation instance, upon lodging the additional cassation complaints with courts of cassation instance against the acts of court seeking the re-examination of a case based on the newly revealed circumstances the persons-parties in this case shall be enabled to take part in this re-examination only if accompanied by an advocate. According to Article 423 of the same Code the additional cassation complaint may be submitted by person participating in case with advocate.

Article 12.1 of the Constitution envisages that the highest priority objective of the state is to ensure the rights and freedoms of a person and citizen.

According to Article 71.2 of the Constitution no one may restrict implementation of rights and freedoms of a human being and citizen.

The state guarantees protection of rights and freedoms of all people (Article 26.2 of the Constitution). Among these guarantees there is also enshrined the guarantee to legal protection of human rights and freedoms.

Article 60 of the Constitution, which ensures the legal protection of rights and freedoms of every citizen (para I), provides also for the right to challenge to judicial bodies the decisions and activity (or inactivity) of state authorities and officials (para II).

With the view to achieve these purposes the legislator determines the Procedure rules as to verification of the legality and validity of decisions adopted by the inferior instance courts by higher instance courts.

Chapter 43 of the Civil Procedure Code envisages the right to challenge the court decision and its examination via the procedure of cassation.

Challenging the court acts via the procedure specified in the Civil Procedure Code and verification of a case by higher instance court on the basis of the submitted complaint proceeds from the meaning of Article 60 of the Constitution as the integral element of the legal protection. According to Article 416 of the Civil Procedure Code the court of cassation instance shall verify the correct application by a court of substantive and Procedure norms of law. According to Articles 424 and 433 of this Code the Plenum of the Supreme Court shall examine the cases relating exceptionally to the legal matters as well as the court acts, which had entered into legal force, on the basis of newly reveled circumstances. In this connection with the view to ensure the qualified and thorough protection of the rights of persons involved in a case in Article 67 of the Civil Procedure Code it is stipulated that in courts of same instance persons participating in case shall act in court only if accompanied by an advocate. These provisions of the Civil Procedure Code are in correspondence to the requirements of Article 61 of the Constitution. According to para I of the same Article everyone shall have the right to get qualified legal assistance.

Effective restoration of the rights by independent court on the basis of fair trial is enshrined in a number of international instruments including Article 14 of International Covenant on Civil and Political Rights, Articles 7, 8, 10 of the Universal Declaration of Human Rights and Article 6 of the European Convention on Human Rights.

For instance, according to Article 8 of the Universal Declaration of Human Rights “everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted to him/her by the Constitution or law”.

According to these provisions there is provided for the existence of concrete guarantees for the implementation *in corpore* of the right to legal protection.

Implementation of fair trial on the basis of legal equality of parties and principle of adversary is the one of those guarantees of civil court proceedings envisaged in Article 127.

Since the equality of parties and principle of adversary as the basic principle of civil court proceedings is specified in Chapter I “Principal Rules” of the Civil Procedure Code it covers all stages of civil process.

 Scope of Procedure rights enjoyed within the court of cassation instance is less in comparison with the scope of Procedure rights enjoyed within the court of first instance. But when determining these rights there are borne in mind such provisions as the equality of citizens before law and court (Article 25), guarantee of protection of rights and freedoms by court (Article 60), holding the court proceedings on the basis of equality of parties and principle of adversary (Article 127) are envisaged in the Constitution. It means that at different stages of civil process also at the stage of cassation parties shall enjoy equal procedure rights.

Besides other necessary conditions of civil court proceedings the procedure equality implies also the enjoyment of the same rights.

It is nonrandom that in Article 25.3 of the Constitution it is noted that State guarantees equality of rights and freedoms of everyone irrespectively of financial position.

According to Article 61.2 of the Constitution, in specific cases envisaged by legislation legal assistance shall be rendered free at the governmental expense.

In Article 20 of the Law of the Republic of Azerbaijan “On Advocacy”, which based on these norms of the Constitution, it is stipulated that legal assistance shall be rendered to persons accused with commission of a criminal offence and other low-income persons seeking the legal assistance in court without any restrictions thereto at the governmental expense.

In civil Procedure legislation the free participation of an advocate is not excluded. For instance, according to Article 121.2 of the Civil Procedure Code where legal assistance to a party, in whose favor the resolution was delivered, had been provided for free of charge, the expenses shall be covered by another party for the benefit of legal counsel office.

At the same time the amount and procedure of the payment at the governmental expenses for legal assistance in civil court proceedings have not been clarified. In accordance with the legislation of the Republic of Azerbaijan the resolution of this issue falls within the competence of the Cabinet of Ministers.

Legal protection and legal assistance as a part of the right to a fair trial is openly and definitely maintained by the international bodies of justice

As it was mentioned, the right to a fair trial is envisaged in Article 6 of the European Convention on Human Rights. In its judgment of 9 July 1979 on case of *Airey vs Ireland*, the European Court on Human Rights noted that “…despite the absence of a similar clause for civil litigation, Article 6.1 may sometimes compel the State to provide for the assistance of a lawyer when such assistance proves indispensable for an effective access to court either because legal representation is rendered compulsory, as is done by the domestic law of certain Contracting States for various types of litigation, or by reason of the complexity of the procedure or of the case”.

In cases specified in the legislation the right to free legal assistance shall be first of all connected with the interests of a fair trial and this mainly relates to the guarantee of principle of equal abilities of the parties.

Where it is required by interests of a fair trial the right to free legal assistance of low-income persons is the right to defend freely the opinion that cannot be alternated. Where there emerge the legal problems on any issue, which requires certain professional skills, the State should ensure not only the constitutional right to get qualified legal assistance but it should also ensure such right to low-income persons in real situation.

In accordance with above-mentioned when applying provision “the complaint may be submitted by person who participates in examination of a case with advocate” of Articles 67 and 423 of the Civil Procedure Code one should take into account the provisions of Articles 25, 60 and 61 of the Constitution, Article 20 of the Law of the Republic of Azerbaijan “On Advocacy”. And based on the request of the person, who is deprived of financial means, participating in examination of a case and seeking the assistance of an advocate, the court should consider the matter as to the providing this person with advocate.

Being guided by Article 130.3 of the Constitution of the Republic of Azerbaijan, Articles 75, 76, 78, 80, 81, 83 and 85 of the Law of the Republic of Azerbaijan “On Constitutional Court”, the Constitutional Court of the Republic of Azerbaijan

**DECIDED:**

1. To recognize provision of Articles 67 and 423 “the complaint may be submitted by person who participates in examination of a case with advocate” of the Civil Procedure Code as conforming to Articles 60 and 71.2 of the Constitution of the Republic of Azerbaijan.
2. When applying provisions of Articles 67 and 423 “the complaint may be submitted by person who participates in examination of a case with advocate” there should be ensured the requirements envisaged in the Constitution of the Republic of Azerbaijan on the right to equality (Article 25), right to legal protection (Article 60) and right to legal assistance (Article 61) as well as the requirement of Article 20 on implementation of the right of low-income persons to legal assistance at the governmental expenses of Law of the Republic of Azerbaijan “On Advocacy”.
3. To recommend to the Cabinet of Ministers of the Republic of Azerbaijan to fix the amount and procedure of the payment at the governmental expenses for legal assistance in civil court proceedings.
4. The decision comes into force from the date of its publication.
5. The decision is subject to publication in the "Azerbaijan" newspaper and “Bulletin of the Constitutional Court of the Republic of Azerbaijan”.

The decision is final and cannot be cancelled, changed or interpreted by any body or official.