**ON BEHALF OF THE REPUBLIC OF AZERBAIJAN**

**DECISION**

**OF THE PLENUM OF THE CONSTITUTIONAL COURT**

**OF THE REPUBLIC OF AZERBAIJAN**

*On complaint lodged by executive power of Narimanov district of Baku city*

*concerning verification of conformity of court decision to Constitution and legislation of the Republic of Azerbaijan*

**23 April, 2004 Baku city**

The Plenum of the Constitutional Court of the Republic of Azerbaijan composed of Chairman F.Abdullayev, Judges F.Babayev, B.Garibov, R.Gvaladze (Reporter Judge), E. Mammadov, I. Najafov, S. Salmanova and A. Sultanov,

joined in the proceedings by the Court Clerk I. Ismayilov;

with the attendance of representative of complainant (executive power of Narimanov district of Baku) A.Q.Habilov

in accordance with Article 130.5 of the Constitution of the Republic of Azerbaijan has examined in open court session via the procedure of constitutional proceeding the constitutional case on complaint lodged by executive power of Narimanov district of Baku concerning verification of conformity of the court decision to Constitution and legislation of the Republic of Azerbaijan.

Although the representative of Economical Court of the Republic of Azerbaijan had been informed about the date and place of hearing, he didn’t come to the hearing and it was held without his presence

Having heard the report of Judge R. Gvaladze, listening to complainant’s representative A.Q.Habilov and having studied the materials of the case, Plenum of the Constitutional Court

**DETERMINED AS FOLLOWS:**

Local economical court № 1 of the Republic of Azerbaijan made a resolution in September 19, 2003, sending the case to Narimanov district court for consideration. The case aroused from the claim of Department for the Management and Privatization of State Property of Ministry of Economical Development against executive power of Narimanov District of Baku city. Department for the Management and Privatization of State Property of Ministry of Economical Development demanded to recognize the orders of executive power of Narimanov district of Baku city invalid.

But, the plaintiff filed an appeal to Economical Court of the Republic of Azerbaijan and it made a resolution in October 10, 2003 repealing the resolution of local economical court № 1 and sending the case back to that court for consideration.

The executive power of Narimanov district of Baku city filed an appeal from the resolution of Economical Court of the Republic of Azerbaijan made in October 10, 2003 to Economical Court of the Republic of Azerbaijan and a cassation complaint to Supreme Court of the Republic of Azerbaijan.

But according to letter № 556/III – 227 of Judge of Economical Court of the Republic of Azerbaijan to executive power of Narimanov district of Baku city, the disputed case is being considered in merits by the court of first instance, so it is impossible to send the case to court of cassation instance.

Local Economical Court made a decision in November 14, 2003 satisfying the claim of plaintiff and recognizing the orders № 503 given in August 25, 2005 and № 532 given in August 28, 2003 of executive power of Narimanov district of Baku city invalid.

This decision was left unchanged by the decision of Economical Court of the Republic of Azerbaijan made in January 30, 2004.

The executive power of Narimanov district submitted a complaint to Constitutional Court of the Republic of Azerbaijan arguing that Economical Court of the Republic of Azerbaijan violated a right to address to court and requesting to repeal the court decisions relying on Article 34.4.2 of Law on Constitutional Court of the Republic of Azerbaijan.

The Presidium of Constitutional Court of the Republic of Azerbaijan would like to mention the following regarding this complaint.

Part I of Article 60 of Constitution of the Republic of Azerbaijan determines that judicial protection of rights and freedoms of every person is ensured.

A right to judicial protection is accepted as a right for fair court examination in international legal documents.

Part I of Article 6 of European Convention on Protection of Human rights and Fundamental Freedoms states that 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.

European Court of Human Rights (before it was a Commission of Human Rights) taking into consideration the importance of this provision for the existence of democratic society proposed to interpret it broadly. The narrow interpretation of this provision wouldn’t fit to tits purpose and goals (case of DE Cubber vs. Belgium).

A right to fair court examination includes three elements:

1) Existence of independent, impartial and legitimate courts

2) Existence of broad jurisdiction for courts so that they can solve all the issues concerning the claim or criminal charge

3) Existence of opportunity for every person to address to courts

Absence of one of these elements, as well as absence of the right to address courts makes the right to fair court examination meaningless.

In the case of Eyren vs. Ireland, European Court of Human Rights stated that a right to address the courts includes the determination of person’s rights and responsibilities and consideration of his/her case by the independent and impartial courts.

A right to address the courts regards to all the levels of court proceedings.

As it was already noted, Economical Court of the Republic of Azerbaijan repealed the decision of the court of first instance regarding the case jurisdiction and sent the case back to that court by its decision in October 13, 2003. It was stated in that decision that according to Article 405.1 of Civil Procedure Code, within three months cassation complaint can be filed.

As it is obvious from the receipts № 619200 an № 619201 of “Azerpocht” state organization given in December 11, 2003, executive power of Narimanov district of Baku city has sent a cassation complaint to Economical Court and Supreme Court of the Republic of Azerbaijan from the above mentioned decisions and complaints were delivered on that day.

In this view, the executive power of Narimanov district of Baku city followed the provisions of Articles 402, 403.1, 405.1 and 406.1 of Civil Procedure Code and filed a cassation claim within the time limits and requirements determined by the law.

But the appellate court without waiting three months time limit for the cassation complaint has sent the case for the consideration in merits to court of first instance, thus violated the right of respondent to judicial protection and therefore deprived him from the right to address the court.

Afterwards that court instead of making a decision about return of cassation complaint relying on Article 408.3 of Civil Procedural Code has sent a letter № 556/III-227 to executive power of Narimanov district of Baku city in December 24, 2003, stating that it is impossible to sent the cassation complaint to Supreme Court.

Taking into consideration above mentioned, the Presidium of Constitutional Court comes to conclusion that court of appellate instance violated the right of the executive power of Narimanov district of Baku city to judicial guarantee of rights and freedoms determined in Article 60 of Constitution of the Republic of Azerbaijan by not following requirements of the Articles 402, 403.1, 405.1 and 408.3 of Civil Procedure Code.

The legal position of the Presidium of Constitutional Court is that instead of court acts (resolution or court ruling), preparation and sending any declaratory decisions, as well as a letters by the court or judge within circumstances, rules and time limits determined in procedural legislature can result with the recognition of such declaratory decision or letter as a court decision.

It should be mentioned that court rulings are independent judicial decisions according to civil procedural legislature. Results of solving issues by the courts rose during the proceedings are reflected in court rulings Court stops the proceedings and renews it, terminates proceeding or leaves the claim petition unconsidered by adopting court rulings (Articles 258-262 of Civil Procedure Code). Those court rulings sometimes have the same legal nature as the court resolutions. But the court rulings are very different from the court decision by their content and legal results.

According to Article 261.1 of Civil Procedure Code, act of court of first instance resolving case on its merits shall be made in form of resolution. Article 263.1 of the same code says that if the case is not solved in merits, then court acts will be in form of court rulings. In this view, the provisions regarding court rulings and court resolutions are determined in the separate chapters of Civil Procedural Code (chapters 17 and 21).

According to Article 267.1 of Civil Procedure Code, in cases specified by this Code, it shall be permitted to file a complaint from rulings passed in form of separate documents.

In Articles 45.2 and 404.2 of the same code it is determined that appellate and cassation complaints from the court rulings regarding the jurisdiction can be filed to upper courts.

According to requirements of civil procedural legislature, it is not permitted to consider the case in merits and make a decision without waiting for results of complaints from the court rulings. This requirement is determined in Articles 269.2 and 269.3 of Civil Procedural Code.

Therefore, complaints to upper level courts from the court rulings and resolutions can be regarding the issues that those courts can solve.

Economical Court of the Republic of Azerbaijan without consideration of time limits for the cassation complaint determined by legislature, has sent the case for the consideration in merits to court of first instance, thus violated the right of respondent to judicial protection and therefore deprived him from the right to address the court

The Presidium of Constitutional Court thinks that letter № 556/III-227 by the Judge of Economical Court of the Republic of Azerbaijan given in December 24, 2003 which violates one of the main elements of right executive power of Narimanov district of Baku city to judicial guarantee of rights and freedoms - a right to address the courts should be declared as null and void, as it contradicts to I part of Article 60 of Constitution of the Republic of Azerbaijan, to Articles 402, 403.1 and 405.1 of Civil Procedure Code of the Republic of Azerbaijan.

The Presidium of Constitutional Court also concludes that court acts made after the violation of constitutional rights of executive power of Narimanov district of Baku city should be declared as null an void. According to Article 66.4 of Law about Constitutional Court of the Republic of Azerbaijan, this case should be reconsidered within the requirements of civil legislature.

Being guided by the parts V, IX, X of the Article 130 of the Constitution of the Republic of Azerbaijan, as well as Articles 52, 62, 63, 65-67 and 69 of the law Azerbaijan Republic about Constitutional Court, the Presidium of the Constitutional Court

**DECIDED:**

A letter № 556/III-227 by the Judge of Economical Court of the Republic of Azerbaijan given in December 24, 2003 which violates one of the main elements of right executive power of Narimanov district of Baku city to judicial guarantee of rights and freedoms - a right to address the courts shall be declared as null and void, as it contradicts to I part of Article 60 of Constitution of the Republic of Azerbaijan, to Articles 402, 403.1 and 405.1 of Civil Procedure Code of the Republic of Azerbaijan..

Resolution made in November 14, 2003 by the local economical court № 1 and resolution made in January 30, 2004 by the Economical Court of the Republic of Azerbaijan shall be declared contradictory to the provisions of Constitution and Civil Procedural Code of the Republic of Azerbaijan and shall not be enforced. The case shall be reconsidered within the requirements of civil legislature.

2. The decision of the Constitutional Court of the Republic of Azerbaijan comes into force from the date of its publication.

3. The decision is subject to publication in the "Azerbaijan", “Respublika”, “Xalg gazeti”, “Bakinsky rabochiy” newspapers and “Bulletin of the Constitutional Court of the Republic of Azerbaijan”.

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