**ON BEHALF OF THE REPUBLIC OF AZERBAIJAN**

**DECISION**

**OF PLENUM OF THE CONSTITUTIONAL COURT**

**OF THE REPUBLIC OF AZERBAIJAN**

*On complaint lodged by E. Alizadeh and others concerning verification of conformity of judicial acts to laws and Constitution of the Republic of Azerbaijan*

**11 May, 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, E. Mammadov (Reporter Judge), I. Najafov, S. Salmanova and A. Sultanov,

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

in accordance with Article 130.5 of the Constitution of the Republic of Azerbaijan (hereinafter the Constitution) has examined in open court session via the procedure of constitutional proceeding the constitutional case on complaint lodged by Eldar Mamed oglu Alizadeh, Zarifa Boyukaga gizi Ganbarova and Nabat Huseynkhan gizi Ramazanova concerning verification of conformity of judicial acts to laws and Constitution of the Republic of Azerbaijan.

Since it is not listed among the matters under which the hearing can be postponed (Article 47 of the Law of the Republic of Azerbaijan “On Constitutional Court”) the claim of petitioners, which was lodged after admission of complaint for examination by Constitutional Court, was not satisfied. At the same time as a matter of exception the Plenum of Constitutional Court postponed the hearing from 18 April to 28 April 2004 because of non-coming of petitioners.

Taking into notice the letter of the Chairman of Supreme Court of the Republic of Azerbaijan N 8m-512”a”/03 from 30 March 2004 on non-coming of petitioners to session despite the written notification as well as non-participation of respondent’s representative, the constitutional case has been examined without participation of parties.

Having heard the report of judge E. Mamedov and studied the materials of the case the Plenum of the Constitutional Court

**DETERMINED AS FOLLOWS:**

From the petitions of E. Ali-zade and others it gets evident that “Assistance to protection of the rights of homeless and indigent habitants of Baku” public association was established on 04 April 2001. On 09 April 2001 the founders having submitted the relevant documents to Ministry of Justice of the Republic of Azerbaijan requested to register this association. 39 days later, i.e. on 18 May 2001 founder’s documents were returned because of non-indicating of the activity field in Statute of association as it is required by Article 6 of the Law of the Republic of Azerbaijan “On Non-governmental Organizations (Public Associations and Foundations)”.

In the petitions it was also pointed out that although Articles 6 and 13 of mentioned Law do not require the indication of special information as to activity field of non-governmental organizations (NGO) the founders respecting the requirements of Ministry of Justice again submitted documents to Ministry on 04 June 2001. This time the Ministry having held the documents more for than 3 months on 10 September 2001 returned them again because of non-indicating in the Statute the terms of office of the Revision Commission of association that contradicts to Article 25.1 of the mentioned Law. Taking into note this shortcoming the founders having made the relevant corrections, on 2 October 2001 submitted the documents to Ministry third time. 279 days later, i.e. on 05 July 2002 the documents were again returned to founders because of non-conformity of Statute to Article 10.3 of the mentioned Law. Having removed this shortcoming and in spite of submission of documents forth time to Ministry of Justice on 29 July 2002 the public association was registered.

The founders considering the Ministry of Justice as deviating from registering of “Assistance to protection of the rights of homeless and indigent habitants of Baku” public association complained four times with different petitions to the Yasamal district court of Baku. In those petitions they asked for realization of the right to assembly and asked to eliminate the obstacles in state registration of association made by officials; to declare the actions of Ministry of Justice as illegal; to oblige the Ministry to register the public association. Along with this in one of the petitions the founders of public association requested to adopt the resolution on payment of compensation in amount of 25 000 000 AZ manats for moral damage, and in other petition they asked to adopt special decision with respect to the Chief of the Department for State Registration of Legal Entities at Ministry of Justice.

As it gets evident from the materials of civil case N 2-1112/02 (hereinafter the numbers of cases are indicted as they were numerated by first instance court) the Yasamal district court having examined the petition submitted by N. Ramazanova, E. Zeynalov, Z. Ganbarova and E. Ali-zade on 15 July 2002 issued the ruling to reject, because of being ill-grounded, the petitioners’ claims to declare the decision of Ministry of Justice of 05 July 2002 N 11/762 on state registration of public association as illegal. By its ruling of 19 September 2002 the Judicial Board on Civil Cases (thereafter JBCC) of the Court of Appeal upheld without any changes and without satisfying the appeal complaint lodged by petitioners. The latter ruling was upheld without changed by the decision of JBCC of the Supreme Court dated of 20 November 2002.

As it gets evident from the materials of civil case N 2-1423/02 the Yasamal district court examined via special claim proceedings the petition submitted by N. Ramazanova, E. Zeynalov, Z. Ganbarova and E. Ali-zade and referring to Article 259.0 of Civil Procedural Code (thereafter CPC) issued the ruling to leave it without consideration. This ruling was upheld by the ruling of JBCC of the Court of Appeal dated of 01 November 2002 and the latter’s ruling was upheld without any changes by the ruling of JBCC of Supreme Court dated of 10 January 2003.

 As it gets evident from the materials of civil case N DO 4873/02 being guided by Article 153.3 of CPC the Yasamal district court on 18 December 2002 issued the ruling refusing to satisfy the petition submitted by N. Ramazanova, E. Zeynalov, Z. Ganbarova and E. Ali-zade and returning the petition on case. This ruling was upheld by the ruling of JBCC of the Court of Appeal dated of 05 March 2003 and the latter’s ruling was upheld without any changes by the ruling of JBCC of Supreme Court dated of 26 September 2003.

As it gets evident from the materials of civil case N DO 247/03 again being guided by Article 153.3 of CPC the Yasamal district court having examined the petition of N. Ramazanova, E. Zeynalov, Z. Ganbarova and E. Ali-zade on 26 February 2003 by its ruling refused to satisfy the claim. This ruling was upheld by the ruling of JBCC of the Court of Appeal dated of 30 May 2003 and the latter’s ruling was upheld without any changes by the ruling of JBCC of Supreme Court dated of 3 September 2003.

With respect to complaints concerning four cases submitted by E. Ali-zade and others via the procedure of additional cassation there was given a reply that there was no ground for their examination at the Plenum of Supreme Court.

E.M. Ali-zade and others having submitted the complaints to Constitutional Court requested to restore the violated rights caused by non-registration of “Assistance to protection of the rights of homeless and indigent habitants of Baku” public association.

Taking into account the provisions of Article 127.10 of the Constitution the proceedings in Constitutional Court shall be held in state language while garanteeing the right of participants of legal proceedings who do not speak the language of proceedings to get acquainted with materials of proceedings, to take part in legal proceedings using interpreter and to make statements in in their native language. Article 130.5 of the Constitution concerning the right to challenge the judicial acts implies the acts of the ordinary courts only. On these reasons a part of E. Ali-zade and others’ complaint as to examination of conformity of actions of the Constitutional Court with Articles 21 (state language) and 45 (right to use native language) is not subject to constitutional legal proceedings.

By the ruling of the Chamber of Constitutional Court of 23 February 2004 a part of E. Ali-zade and others’ complaint as to examination of conformity of judicial acts adopted by the Yasamal district court, Court of Appeal and Supreme Court with Articles 58, 60 and 71 was admitted to constitutional legal proceedings.

The Plenum of Constitutional Court considers necessary to note the below-mentioned as relating to constitutional case.

Right to assembly is a basic and integral human right. This right is stipulated by Article 58 and implies the right of everyone to create public association, right to enter (or not to enter) therein and to leave freely this association.

The constitutional right to assembly constitutes its conformity with the right to free association enshrined in Universal Declaration on Human Rights (Article 20), International Covenant on Civil and Political Rights (Article 22) and European Convention on Human Rights (Article 11).

Along with declaration of the right to assembly Article 58 of the Constitution provides for free activity of public associations. This guarantee also includes the freedom of internal organization activity (right to free adoption of own regulations; right to free election of governing bodies; right to independent possession of own property; right to determination and realization of activity program and etc.).

At the same time it should be taken into account that the right to assembly is not absolute and certain restrictions on its realization can be imposed. But the restriction of this right in international legal acts is admissible only in cases when it is necessary in democratic society and meets the high public necessity and correspond to objectives of law.

For instance, according to Article 11.2 of the European Convention of Human Rights and Basic Freedoms no restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

On this matter the European Court of Human Rights in case “Sidiropulos v. Greece” of 10 July 1998 has expressed the following legal opinion: ”The Court points out that the right to form an association is an inherent part of the right set forth in Article 11, even if that Article only makes express reference to the right to form trade unions. That citizens should be able to form a legal entity in order to act collectively in a field of mutual interest is one of the most important aspects of the right to freedom of association, without which that right would be deprived of any meaning. The way in which national legislation enshrines this freedom and its practical application by the authorities reveals the state of democracy in the country concerned. Certainly States have a right to satisfy themselves that an association’s aim and activities are in conformity with the rules laid down in legislation, but they must do so in a manner compatible with their obligations under the Convention and subject to review by the Convention institutions”.

Circumstances for restriction of the right to assembly is provided for by the Constitution and other laws.

Thus along with the human rights and freedoms according to Article 71.3 of the Constitution realization of this right may be partially and temporarily restricted on announcement of war, martial law and state of emergency, and also mobilization, taking into consideration international obligations of the Republic of Azerbaijan. In connection with this the legislative acts of the Republic of Azerbaijan including Article 17.8 of the Law “On State of Emergency”, Article 11.11 of the Law “On Martial Law” provide for relevant provisions.

According to Article 3.6 of the Constitutional Law of the Republic of Azerbaijan “On Regulation of Exercise of Human Rights and Freedoms” right to assembly may be subject to restrictions in the interests of national security, for the protection of health and morals, rights and freedoms of others, for the prevention of crime disorder and protection of public safety as well.

It should be noted that according to present legislation the public associations may be established without initial permission of state and self-government bodies. Once they are established they shall be registered.

According to Article 4 of the Law “On State Registration of Legal Persons” which was in force on 9 April 2001 i.e. at the time of submission of the documents of “Assistance to protection of the rights of homeless and indigent habitants of Baku” public association by its founders “such registration via the procedure specified by this Law has been entrusted to justice authorities”. Article 9 of the same Law, which covers the relations between parties provides that the competences of justice authorities compose of as follows: to accept the documents for their examination; to give to petitioner within 10 days the certification for state registration or to notify in written about rejection of state registration; to adopt the decision as to removal of shortcomings occurred in submitted documents for state registration and to adopt the decision within 5 days as to admission for state registration.

In accordance with Article 16.2 of the Law “On Non-governmental Organizations (Public Associations and Foundations)” the non-governmental organizations (NGO) shall get the status of legal entity only after their admission to state registration. According to Article 17.1 of the same law the admission to state registration shall be rejected in cases, where other NGOs are functioning under the same title or where the submitted documents for state registration contradict to the Constitution of the Republic of Azerbaijan, this and other laws of the Republic of Azerbaijan or where in the documents there had been indicated incorrect information.

The state registration by itself and the need to meet a number of formal requirements provided for by legislation cannot be assesed as restriction to free establishment of public association. However the lack of state registration can cause the loss of the rights inherent to legal entity and thus can question its legal personality. In this meaning the non-registration can cause the challenging of the violation of the founders’ right to assembly. In this case these persons using the right to challenge the decision on non-admission for state registration can continue the functioning of non-registered association.

The Plenum of Constitutional Court notes in particular that according to the requirements of present legislation, which provide for relevant type of rules of legal proceedings on every submitted document, the relevant actions and necessary decisions are to be done and adopted. At this, the provisions of Constitution, including the constitutional guarantees for human rights and freedoms which have highest and direct legal effect within the territory of the Republic of Azerbaijan, should be in the center of attention.

According to Article 60 of the Constitution everyone has a guarantee to protect his/her rights and freedoms in law courts. The prescription providing for the respect and protection of human rights and freedoms is envisaged in Article 71.1 of Constitution. At the same time it is a one of the major constitutional guarantees for protection of human and citizen’s rights and freedoms.

The Plenum of Constitutional Court also notes the respect to the requirements of Article 6 of the European Convention on Human Rights and Basic Freedoms, which in accordance with Article 148.2 of the Constitution is an integral part of legislative system of the Azerbaijan Republic, can give only positive results.

As in any other case, with the view of resolution of the dispute with respect to petition lodged by the founders against actions of Ministry of Justice as to non-registration of “Assistance to protection of the rights of homeless and indigent habitants of Baku” public association it would be important to correctly apply the material and procedural norms as well as the above mentioned remarks.

For resolution of the dispute related with non-registration of public association the provisions of Chapter 27 of Civil Procedure Code (CPC) devoted to the special claim proceeding and other general norms shall be assumed as a basis. Court shall create necessary conditions for all faceted, complete and fair hearing of case for the purposes of finding truth and shall thereafter evaluate norms of law to apply to such evidence. No evidence shall have a preliminarily established force for court (Articles 14.1 and 88 of CPC). Court resolution shall be legal and motivated, shall be based upon actual circumstances established with respect to case and relationships between the parties (Articles 217.1 and 217.3 of CPC). Burden of proof of circumstances being a basis for the adoption of acts and decisions of bodies of state authority, local self-governing bodies as well as other bodies shall be on the body adopting the act or decision (Article 287 of CPC). Court shall determine availability of circumstances related to violation of rights and freedoms of person, obstruction of realization of these rights and freedoms or illegal imposition of any obligation on person or illegally bringing person to liability (Article 297.1).

In order to determine whether there is any of the aspects, which are provided for in Article 297.1 of the CPC, in the petition lodged by “Assistance to protection of the rights of homeless and indigent habitants of Baku” public association the courts should have studied and assesed from the legal point of view the evidences submitted by petitioner with the purpose to substantiate its interests and the evidences presented by defendant to protect its position. Besides, the actions (inactions) of the officials who implement the registration based on the legislation that regulates the registration of public associations, the normative acts, which admit the restriction of the right to assembly as well those, which ensure this right should have been assessed.

The ruling of 15 July 2002 of the Yasamal district court on rejection of civil case N 2-1112/02 because of groundlessness of complainant’s petition was adopted without implementing by court its duty – those are complete and objective examination of actual circumstances of case and evaluation of evidences. This situation does not conform to provisions of Articles 14.1, 88, 217.1, 217.3, 287 and 297.1 of CPC.

The court of appellate instance as a court of full authority has a competence to verify observance of material and procedural norms by the court of first instance on the base of evidence present in case or additionally submitted evidence on merits (Articles 372.1 and 372.7 of CPC).

Court of appellate instance may: keep resolution unchanged and appellate complaint without satisfaction; partially or completely repeal resolution and issue new resolution in court of first instance on the basis of established circumstances or additionally submitted evidence; change resolution; partially or completely repeal resolution, terminate proceeding in respect of case or keep petition without consideration (Article 384 of CPC).

The followings shall be grounds for repeal of resolution of the court of first instance: violation or incorrect application of material or procedural norms of law; non-clarification of all factual circumstances important for court reached conclusion; non-proof of circumstances important for case established by court of first instance; non-correspondence of results indicated in resolution of court of first instance to circumstances of the case (Article 385.1 of CPC).

However the court of appellate instance by non-correct application of Articles 372.1, 372.7, 384 and 385.1 left valid the ruling adopted by court of first instance, which does not meet the requirements of law and thus violate the legal procedural norms.

Court of cassation instance shall verify correct application by court of appellate instance of material and procedural norms of law (Article 416 of CPC). With the exception of adoption of new judicial ruling on merits the court of cassation instance has in accordance with Article 417 sufficiently broad competences as a court of appellate instance.

Violation or incorrect application of material and procedural norms of law shall be a ground for repeal of resolution or ruling of court of appellate instance. At the same time violation or incorrect application of procedural norms of law shall be a ground for repeal of resolution or ruling only where the said violation has resulted or can result in issuance of incorrect resolution (Articles 418.1 and 418.3 of CPC).

In spite of provisions of Articles 416, 417, 418.1 and 418.3 of CPC the court of cassation instance by non-applying them and leaving valid the ruling of the court of appellate has not fulfilled its competences prescribed by legislation.

In connection with other judicial acts adopted on various petitions submitted by complainants out of civil case N 2-1112/02 connected with non-registration of “Assistance to protection of the rights of homeless and indigent habitants of Baku” public association the Constitutional Court considers necessary to note as follows:

As it gets evident from the materials of civil case N 2-1423/02 one part of the same judicial acts was issued based on the provisions of Article 259.0.1 of CPC. But this norm (court shall suspend petition without consideration when a complainant appealing to court failed to follow an out-of-court (pretension) procedure for settlement of certain categories of cases specified by law or agreed between parties and where, further, an opportunity for applying such a procedure has been lost) is not relevant to cases on the disputes concerning decisions and actions (inactions) of the officials of relevant bodies and organizations. In spite of the requirements of Articles 372.1, 372.7, 384, 385.1, 416, 417, 418.1 and 418.3 the same judicial mistake has been left out of attention of higher judicial instances.

From materials of civil cases N DO 4873/02 and DO 247/03 it gets evident that because of non-exhaustion of all remedies the courts being guided by Article 153.3 of CPC issued on the same grounds the judicial acts on inadmissibility of claim on civil cases N 2-1112/02 and 2-1423/02 on the dispute between the same parties and with the same subject matter.

Plenum of the Constitutional Court considers that non-observance of Articles 14.1, 88, 217.1, 217.3, 287, 297.1, 372.1, 372.7, 384, 385.1, 416, 417, 418.1 and 418.3 of CPC by court of ordinary jurisdiction on civil case N 2-1112/02; the application of non-applicable Article 259.0.1 on civil case N 2-1423/02, including non-observance of Articles 372.1, 372.7, 384, 385.1, 416, 417, 418.1 and 418.3 of CPC; the reference to issued judicial acts on non-fulfillment of requirements of legislation under civil cases N 2-1112/02 and 2-1423/02 in the adopted judicial acts under N DO 4873/02 and DO 247/03 restrict the right to judicial protection provided for by Article 60 of the Constitution and violate the guarantee for protection and observance of the human and citizen’s rights and freedoms determined by Article 71.1 of the Constitution.

Plenum of the Constitutional Court concluded as follows:

1) Decision of Judicial Board on Civil Cases (JBCC) of Supreme Court from 20 November 2002 under civil case N 2-1112/02 on petitions of N. Ramazanova, E. Ali-zadeh and others shall be considered as null and void because of its non-conformity with Articles 60 and 71.1 of the Constitution, Articles 416, 417, 418.1 and 418.3 of CPC. Judicial acts adopted by courts of first and appellate instance according to Articles 60 and 71.1 of the Constitution shall be considered as contradicting to Articles 259.0.1, 372.1, 372.7, 384 and 385.1 of CPC;

2) Decision of Judicial Board on Civil Cases (JBCC) of Supreme Court from 10 January 2003 under civil case N 2-1423/02 on petitions of N. Ramazanova, E. Ali-zadeh and others shall be considered as null and void because of its non-conformity with Articles 60 and 71.1 of the Constitution, Articles 416, 417, 418.1 and 418.3 of CPC. Judicial acts adopted by courts of first and appellate instance according to Articles 60 and 71.1 of the Constitution shall be considered as contradicting to Articles 259.0.1, 372.1, 372.7, 384 and 385.1 of CPC.

3) Decisions of Judicial Board on Civil Cases (JBCC) of Supreme Court accordingly from 26 September 2003 and 3 September 2003 under materials of civil cases DO 4873/02 and DO 247/03 on petitions of N. Ramazanova, E. Ali-zadeh and others shall be considered as null and void because of their non-conformity with Articles 60 and 71.1 of the Constitution. Judicial acts adopted by courts of first and appellate instance on materials of these cases (because of adoption referring to issued judicial acts on non-fulfillment of requirements of legislation under civil cases N 2-1112/02 and 2-1423/02) according to Articles 60 and 71.1 of the Constitution shall be considered as contradicting to Articles 259.0.1, 372.1, 372.7, 384 and 385.1 of CPC.

4) Judicial acts adopted on civil cases N 2-1112/02 and 2-1423/02, including DO 4873/02 and DO 247/03 shall not be executed and shall be re-examined via the procedure specified in legislation.

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:**

1. The decision of CCD of Supreme Court made in November 20, 2002, regarding the civil case № 1112/02 based on the petition of N.Ramazanova, E.Alizada and others shall be recognized as null and void because it contradicts to article 60 of Constitution, as well as to articles 416, 417, 418.1 and 418.3 of CPC.

Court decisions made by first instance courts and court of appellate instance regarding this case shall be considered contradictory to article 60 and I part of article 71 of Constitution, to articles 14.1, 88, 217.1, 217.3, 287, 297.1, 372.7, 384, 385.1 of CPC.

2. The decision of CCD of Supreme Court made in January 10, 2003, regarding the civil case № 2-1423/02 based on complaints of N.Ramazanova, E.Alizada and others shall be recognized null and void, as it contradicts to I part of article 71 of Constitution, to articles 416, 417, 418.1 and 418.3 of CPC.

Court decisions made by first instance courts and court of appellate instance regarding this case shall be considered contradictory to article 60 and I part of article 71 of Constitution, to articles 259.0.1, 372.1, 372.7, 384 and 385.1 of CPC.

3. The decisions of CCD of Supreme Court made in September 26, 2003 and September 3, 2003 regarding the civil cases № DO 4873/02 and DO-247/03, based on complaints of N.Ramazanova, E.Alizada and others shall be recognized null and void, as it contradicts to article 60 of Constitution and to I part of article 71 of Constitution.

Court decisions made by first instance courts and court of appellate instance regarding this case shall be considered contradictory to article 60 and I part of article 71 of Constitution.

4. Court decisions made regarding the civil cases № 1112/02 and 2-1423/02, as well as DO 4873/02 and DO-247/03 shall not be executed and shall be revised.

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

6. 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”.

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