**ON BEHALF OF THE REPUBLIC OF AZERBAIJAN**

**DECISION**

**OF THE PLENUM OF THE CONSTITUTIONAL COURT**

**OF THE REPUBLIC OF AZERBAIJAN**

*On complaint lodged by G.A. Mustafayeva concerning verification of conformity of the decision of the Board on Civil Cases of the Supreme Court of the Republic of Azerbaijan to Constitution and legislation of the Republic of Azerbaijan*

**17 June, 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, I. Najafov, S. Salmanova (Reporter Judge) and A. Sultanov,

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

Applicant, Gullu Ali Mustafayeva

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 G.A. Mustafayeva concerning verification of conformity of court decisions to Constitution and legislation of the Republic of Azerbaijan.

Based on the letter No. 8m-19/04 of the Chairman of Supreme Court of the Azerbaijan Republic dated June 03, 2004, the case proceeded in absence of the respondent representatives.

Having heard the report of Judge S. Salmanova, information from applicant A.G. Mustafayeva and having studied the materials of the case, Plenum of the Constitutional Court

**DETERMINED AS FOLLOWS:**

In her complaint G. Mustafayeva has indicated that had married Farrukh Elman Mustafayev on March 11, 2000, moved to the disputed house located at 126, 5/9 Daira str., H. Aslanov settlement of Baku, birth of the child from this marriage on July 12, 2001, break of marriage on August 28, 2002, satisfaction of her claim for moving into same house by the decision of Khatai District Court from December 25, 2002, change of this decision by the Appeal Court of the Republic of Azerbaijan on June 9, 2003 and obliging the payment of compensation of 2000 (two thousand) dollars USA (by manat exhange rate).

Applicant later has submitted the complaint to the cassation instance against the decision of the Appeal Court, however her complaint was not taken into consideration and Board on Civil Cases of the Supreme Court of the Republic of Azerbaijan has left the decision unchanged only on the basis of the respondent party’s complaint, and later when she submitted the complaint to the Plenary Session of the Supreme Court she has received the response, that there were no grounds for additional proceedings on the case.

The applicant has noted that she is not in agreement with amount of compensation established as there is a large area land and additional facilities in the disputed house, that non-compliance was in place with “Article 228 of the Civil Code of the Republic of Azerbaijan and Part I of Article 123 of the Housing Code of the Republic of Azerbaijan” in part of execution of the decision of Constitution Court of the Republic of Azerbaijan from July 27, 2001, violation of constitutional rights and has requested the acceptance of the case for another review.

Plenary Session of the Constitution Court of the Republic of Azerbaijan has noted the following.

In accordance with part I, Article 43 of the Constitution of the Republic of Azerbaijan nobody can be deprived of his living place illegally.

In accordance with part I, Article 60 of Constitution, court justice on rights and freedoms of any individual is guaranteed.

This right is also reflected in the number of international treaties to which Azerbaijan Republic is a signatory.

 In accordance with part one of Article 6 of European Convention on Human Rights and Main Freedoms, everybody is entitled for fair and open trial within the reasonable timeframe on determination of his rights and responsibilities or in the event when any sort of claim against him is raised, via application to independent court institution.

In accordance with Article 25 of the General Statement on Human Rights it is stipulated that every person is entitled to food, clothing and housing, medical and social services, decent living standards, and to be secured in the event of unemployment, illness, invalidity, widowness, aging or other uncontrolled events, which resulted in depriving from the housing.

In accordance with Article 11 of International Pact on economic, social and cultural rights, citizens of countries, which are signatories of this Pact shall be entitled to food, clothing and housing, continuous improvement of living standards, and satisfactory level of living. Participant countries by this accept the importance of the international cooperation on this field and obliged to take actions for provision of this right.

Khatai District Court of Baku City in its decision from December 25, 2002 under the claim of G. Mustafayeva against F. Mustafayev and others for her moving with her baby to the house, was based on Articles 53 and 123 of the Housing Code.

The Appeal Court of the Azerbaijan Republic by its decision of June 8, 2003 has applied Article 228.3 of the Civil Code and has changed the above decision of the Khatai District Court, and has required the payment of the amount of 2000 (two thousand) dollars USA by F. Mustafayev and others in the favor of G. Mustafayeva as a compensation for the termination of her resident rights.

In accordance with decision of Board on Civil Cases of the Supreme Court of the Republic of Azerbaijan from October 3, 2003 this decision was left unchanged.

From court decisions it was established that applicant has married F. Mustafayev on March 11, 2000 and since that date she moved to the disputed house and obtained the right of living there.

As it seen, legal relations between the parties were established before September 1, 2000.

In part one, Article 123 of the Housing Code it was indicated, if there were not provisions stipulated for the moving of family members, who previously had the right to leave with owner of the living space, they shall be entitled to use the living space with same rights. Persons indicated in Article 53 of this Code are considered the family members of the owner. Family members shall be entitled to move into the living space their children, who did not reach the adult age; moving of other family members is allowed only by the consent of owner. The right of such persons for using the apartment is maintained also upon the termination of family relations.

In accordance with Article 228.2 of the Civil Code the right of use of integral part of the resident house is formed from written document signed with the owner and approved by notary. Without an agreement on termination of the right of property use, the payment of compensation by owner may serve as grounds for such termination.

 In accordance with decision of Constitution Court of the Republic of Azerbaijan from July 27, 2001 “On interpretation of Article 228 of the Civil Code of the Republic of Azerbaijan and part one, Article 123 of the Housing Code”, all disputes on resident area use relations formed upon September 1, 2000 shall be resolved in accordance with Articles 228.1 and 228.2 of the Civil Code, and disputes on legal relations formed before this day shall be resolved in accordance with Article 123 of the Housing Code.

Khatai District Court of Baku City has made the decision indicated above on moving of G. Mustafayeva to her house on the basis of facts, provisions of legislation and interpretative decision of the Constitution Court.

The Appeal Court not refusing the fact of living of G. Mustafayeva in the disputed house from March 2000, on the basis of Part IX, Article 130 of the Constitution in contradiction with the above decision of the Constitution Court, which is obligatory for execution on the entire territory of the Republic of Azerbaijan, and instead of application of Article 123 of the Housing Code has applied the provisions of Article 228.2 of the Civil Code, and as a result has violated the rights for housing stipulated under the Constitution.

Although the Board on Civil Cases of the Supreme Court had to review the correct application of material and procedural norms by the appeal instance court, as per Article 416 of the Civil Procedures Code, did not fulfill this provision of legislation, and has left the decision of Appeal Court unchanged as it was indicated above.

Considering these, the Plenary Session of the Constitution Court of the Republic of Azerbaijan has drawn the conclusion that the decision of Board on Civil Cases of the Supreme Court from October 3, 2003 shall be cancelled due to non-compliance with part I, Article 43 and part I, Article 60 of Constitution and Articles 416, 418.1 of the Civil Procedures Code and case shall be reviewed additionally in accordance with provisions of legislation.

Using the guidance of parts V and IX of Article 130 of the Constitution of the Republic of Azerbaijan, Articles 52, 62, 63, 65-67 and 69 of the law of the Republic of Azerbaijan “On Constitution Court” the Plenary Session of the Constitution Court of the Republic of Azerbaijan

**DECIDED:**

1. To recognize the decision of Board on Civil Cases of the Supreme Court from October 3, 2003 under the claim of Gullu Adil Mustafayeva and Farrukh Elman Mustafayev and others as null and void because of its contradiction to Articles 43.1 and 60.1 of the Constitution of the Republic of Azerbaijan, and Articles 416, 418.1 of the Civil Procedures Code of the Republic of Azerbaijan and the case shall be processed on the basis of this Decision and via the procedure specified in the Civil Procedure Code of the Republic of Azerbaijan.

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.