**ON BEHALF OF THE REPUBLIC OF AZERBAIJAN**

**DECISION**

**OF THE PLENUM OF THE CONSTITUTIONAL COURT**

**OF THE REPUBLIC OF AZERBAIJAN**

*On complaint lodged by I.Aliyev concerning verification of conformity of the decision of the Supreme Court of the Republic of Azerbaijan of February 14, 2003*

*to laws and Constitution 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 (Reporter Judge), E. Mammadov, I. Najafov, S. Salmanova and A. Sultanov,

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

representatives of applicant T. Aliyeva and T. Solatanov,

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 Aliyev Islam concerning verification of conformity of the decision of the Plenum of Supreme Court of the Republic of Azerbaijan of February 14, 2003 on recognition of the right of Aliyeva Lala to use country-lot and abolition of the lease contract against L.Aliyeva and others, to laws and Constitution of the Republic of Azerbaijan.

Based on the letter of the Chairman of Supreme Court of the Republic of Azerbaijan N 8m-2/03 of June 4, 2004 the constitutional case has been examined without participation of respondent party.

Having heard the report of judge R. Gvaladze, applicant’s representative T. Soltanov and having studied the materials of the case, Plenum of the Constitutional Court

**DETERMINED AS FOLLOWS:**

By the resolution of Nasimi district court of Baku city of March 6, 2002 the claim of L.Aliyeva against Union of the Development and Exploitation of Country Farming (UDECF) concerning recognition of the right to country-lot was not satisfied, but the claim of I.Aliyev against L.Aliyeva and others concerning consideration as null and void of the leasing and privatization contract concluded by L.Aliyeva was satisfied.

By resolution of the Judicial Board on Civil Cases (JBCC) of the Court of Appeal of the Republic of Azerbaijan of June 12, 2002 the resolution of the court of first instance was left without modification.

By decision of JBCC of the Supreme Court of September 20, 2002 the abovementioned resolution of the court of appeal instance was left without modification.

By the decision of the Plenum of Supreme Court of the Republic of Azerbaijan of February 14, 2003 the decision of JBCC of Supreme Court and in connection with this the resolution of JBCC of the Court of Appeal were changed, the claim of L. Aliyeva was satisfied and her rights to country-lot N 231 “a” at Bilgah country estate were recognized, and the obligation to conclude leasing contract with L.Aliyeva on that country-lot and to cancel leasing contract N 20491 of January 8, 1991 concluded with I.Aliyev was imposed to UDESF.

I.Aliyev in his complaint asked for cancellation of the decision of the Plenum of Supreme Court considering it as unlawful and groundless. Complaint was grounded by the fact that the Plenum of the Supreme Court by violating of the requirements of Article 429 of the Civil Procedure Code (CPC) has assumed the authorities of the court of first instance and evaluated the factual circumstances of the case, modified the resolution of the court of appellate instance without having competence for it, and as a result has violated the right to legal protection stipulated by the Article 60 of the Constitution.

In connection with complaint the Plenum of the Constitutional Court notes that during examination of concrete cases the legal position on grounds, terms and rules concerning examination of cases at cassation and additional cassation proceedings has been formed.

The Plenum of Constitutional Court in its decision of April 12, 2004 “concerning verification of legality of decision of JBCC of the Supreme Court on complaint of E. Ibrahimov of June 11, 2003” noted: “The court of cassation instance shall examine correct application of material and procedural legal norms by court of appellate instance. Merely this duty of the court of cassation instance is clearly seen from Articles 407.1.4, 408.1.5 and 416 of CPC. According to the Article 407.2 reference in cassation complaint to proof of case circumstances, to non-discovery of significant factual circumstances which are important for conclusion the court came, or to non-conformity of case conclusions reflected in resolution or ruling to a case’s factual circumstances shall be inadmissible.

This circumstance is restricted by definition of the facts of cassation proceedings, as well as only by legal part of issue without touching upon the essence of the case, i.e. it is restricted by answer on issue concerning presence or absence of law violations in disputed resolution.”

As regards the grounds and rules of examination of cases on additional cassation proceedings the Plenum of Constitutional Court considers necessary to note again that examination of case on merits via the procedure of additional cassation means their re-examination at the court of cassation instance. As continuation of cassation proceeding, despite particular features the proceedings held via the procedure of additional cassation cannot exceed its limits. According to the decision of the Plenum of Constitutional Court of May 21, 2004 “On complaint lodged by Aydin Zalov concerning verification of conformity of the decision of the Supreme Court of the Republic of Azerbaijan of February 1, 2002 to the laws and Constitution of the Republic of Azerbaijan” as opposed to the courts of first and appellate instance the case shall not be examined on the merits in cassation and additional cassation order, i.e. further (new) evidences cannot be adopted, factual circumstances of the case cannot be investigated, evidences cannot be legally defined. Generally it is possible to adopt a decision on the case on the merits when besides the facts examined at previous judicial instances another (new) facts are investigated. In legislation this competence is entrusted only to the courts of first and appellate instance.

This point of view of the Constitutional Court is based on requirements of the civil procedural legislation.

Thus, according to Article 424.1 of the CPC the Plenum of the Supreme Court shall hear the cases relating exceptionally to legal matters.

Article 429 of the CPC defines the competence of Supreme Court to hear cases via the procedure of additional cassation. It is necessary to note that this Article and other norms do not provide for the competence of the Plenum of Supreme Court to adopt decision on the merits of case by definition of the facts.

Procedural legislation gives the right to the Plenum of Supreme Court to make changes to decision of the court of cassation instance (Article 429.0.2 of CPC).

In connection with this the Constitutional Court noted on abovementioned case of A.Zalov that from the point of view of the legal nature of the procedure of additional cassation in the frames of this proceedings the changes to decisions of the court of cassation should cover circumstances, which are not related to the merits of case. Thus, making changes to decision of the court of cassation instance does not conform to exceptional authority of the Plenum of Supreme Court to examine legal issues of cases. The Plenum of Supreme Court can make changes to decision of the court of cassation instance basing only on the circumstances defined at previous judicial instances. The Plenum of Supreme Court has not competence to make changes to decision of the court of cassation instance referring to circumstances, which are not defined at previous judicial instances on the merits of case.

And in the case of I.Aliyev the Plenum of Supreme Court in contradiction to the provisions of legislation and exceeding the limits of its competence adopted the new decision on merits referring to non-conformity conclusions indicated in the resolutions of the court of first and appellate instance to the factual circumstances.

Furthermore, in contradiction to the requirements of Article 429 of the Civil Procedure Code while being competent to make changes only to the decision of the court of cassation instance, the Plenum of Supreme Court changed also the resolution of the Court of Appeal on disputable case.

On the basis of the aforesaid the Plenum of Constitutional Court comes to conclusion that the decision of the Plenum of Supreme Court on disputable case provides the contradiction with the requirements of Articles 424.1 and 429 of CPC. In its turn this contradiction brings to violation of the principle of proper administration of justice defined by legislation and relevant court and stipulated by Article 60 of the Constitution, that constitutes the significant element of judicial protection of the human rights and freedoms.

Being guided by Articles 130.5 and 130.9 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 Constitutional Court”, the Plenum of Constitutional Court of the Republic of Azerbaijan

**DECIDED:**

Taking into account the non-conformity with the Article 60 of the Constitution and Article 424.1 and 429.1 of CPC the decision of the Plenum of Supreme Court of the Republic of Azerbaijan of February 14, 2003 on recognition of the right of Aliyeva Lala to use country-lot and abolition of the lease contract against L.Aliyeva and others shall be considered as null and void and shall be revised in order determined by civil procedural legislation.

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 interpreted by any body or official.