**ON BEHALF OF THE REPUBLIC OF AZERBAIJAN**

**DECISION**

**OF THE PLENUM OF THE CONSTITUTIONAL COURT**

**OF THE REPUBLIC OF AZERBAIJAN**

*Review of conformity of the Decree of the President of the Republic of Azerbaijan*

*No. 392 of 5 January 1993 and the Resolution of the Cabinet of Ministers of the*

*Republic of Azerbaijan No. 267 of 4 June 1993 to the Constitution*

*of the Republic of Azerbaijan*

**25 October, 2004 Baku city**

The Plenum of the Constitutional Court of the Republic of Azerbaijan in attendance of:

Judges F.Abdullayev (President Judge), F.Babayev, B. Qaribov (Reporting Judge), R.Qvaladze, I.Najafov, S.Salmanova and A.Sultanov and Court Secretary I.Ismayilov,

in presence of the representative of the inquiring party in the constitutional procedure Judge Sh.Hidayev of the Supreme Court of the Republic of Azerbaijan and

H.Jafarov, Chief of Administration and Chief of Organisational and Information Section and L.Ajalova from Legal Section of the Confederation of Professional Unions of Azerbaijan

based on the inquiry of the Supreme Court of the Republic of Azerbaijan of 3 September 2004 (ref.# 8-7/2003)

has examined in the open session under the special constitutional the constitutional case of conformity of the Decree of the President of the Republic of Azerbaijan No. 392 of 5 January 1993 and the Resolution of the Cabinet of Ministers of the Republic of Azerbaijan No. 267 of 4 June 1993 to the Constitution of the Republic of Azerbaijan. The respondent party requested to be excused from constitutional proceedings.

Having heard a report of Judge Qaribov, a statement from the representative of the inquiring party Judge Sh.Hidayev, information of L.Ajalova, studied materials and deliberated the case, the Plenum of the Constitutional Court of the Republic of Azerbaijan

**DETERMINED AS FOLLOWS:**

As shown in the inquiry of the Supreme Court of the Republic of Azerbaijan, on 5 January 1993 the President of the Republic of Azerbaijan issued the Decree No. 392 rescinding the Resolution No. 342a of the Soviet of Ministers of the Azerbaijan Soviet Socialist Republic of 30 April 1960 “On transfer of health resorts and holiday homes to the disposal of the Council of Professional Unions of Azerbaijan,” transferring the Resort Directorate of the Council of Professional Unions of Azerbaijan with all its health resorts, holiday homes, lodging houses, buildings under construction, economic units and organisations and all property belonging to them to the Ministry of Public Health of the Republic of Azerbaijan, and assigning the Cabinet of Ministers of the Republic of Azerbaijan to redeem investments made by the Council of Professional Unions of Azerbaijan (henceforth “CPUA”) in construction and development of the above facilities.

In connection with implementation of the above Decree, on 4 June 1993 the Cabinet of Ministers of the Republic of Azerbaijan passed the Resolution No. 267 rescinding the decision of the Collegium of the Ministry of Justice of the Republic of Azerbaijan of 3 November 1992 on state registration of Kurort Joint-Stock Company (henceforth “Kurort JSC”) as establishment of Kurort JSC via exchange of property between state-owned resort directorates had not been previously agreed with the Cabinet of Ministers of the Republic of Azerbaijan in contravention of the Resolution No. 313 of the Soviet of Ministers of the Azerbaijan Soviet Socialist Republic of 9 June 1990.

In the opinion of the inquiring party, the above Decree and Resolution contravene Articles 13 and 29 of the Constitution of the Republic of Azerbaijan establishing property rights and violate property rights of the Confederation of Professional Unions of Azerbaijan. Therefore, the inquiring party requests the Constitutional Court of the Republic of Azerbaijan to review conformity of the above normative legal acts to the Constitution of the Republic of Azerbaijan.

The Plenum of the Constitutional Court has the following to note in relation to this inquiry.

In accordance with Paragraph 1 of the Resolution No. 342a of the Soviet of Ministers of the Azerbaijan Soviet Socialist Republic (henceforth “the Azerbaijan SSR”) of 30 April 1960, all self-financed sanatoria (except for tuberculosis sanatoria), holiday homes, health resorts, polyclinics, lodging houses, resort hotels under purview of the General Directorate of Resorts, Sanatoria and Holiday Homes of the Azerbaijan SSR Ministry of Public Health, as well as newly constructed sanatoria (except for tuberculosis sanatoria), holiday homes and other sanatoria-resort facilities, together with all units, organisations and resort offices reporting to the General Directorate of Resorts, Sanatoria and Holiday Homes of the Azerbaijan SSR Ministry of Public Health, were transferred to the disposal of the Council of Professional Unions of Azerbaijan with the stated purpose of further improvement of organisation of vacationing and sanatoria-resort services for the benefit of working population.

The Decree of the President of the Republic of Azerbaijan No. 392 of 5 January 1993 “On transfer of the sanatoria-resort complex to the Ministry of Public Health of the Republic of Azerbaijan” (henceforth “the Decree”) rescinded the Resolution No. 342a of the Soviet of Ministers of the Azerbaijan Soviet Socialist Republic of 30 April 1960 “On transfer of health resorts and holiday homes to the disposal of the Council of Professional Unions of Azerbaijan” and determined the transfer of the CPUA Resort Directorate with all its health resorts, holiday homes, lodging houses, buildings under construction, economic units and organisations and all property belonging to them to the Ministry of Public Health of the Republic of Azerbaijan. The Decree also assigned the Cabinet of Ministers of the Republic of Azerbaijan to redeem investments made by CPUA in construction and development of the above facilities.

The Resolution of the Cabinet of Ministers of the Republic of Azerbaijan No. 267 of 4 June 1993 “On implementation of the Decree of the President of the Republic of Azerbaijan “On transfer of the sanatoria-resort complex to the Ministry of Public Health of the Republic of Azerbaijan” rescinded the decision of the Collegium of the Ministry of Justice of the Republic of Azerbaijan of 3 November 1992 on state registration of Kurort Joint-Stock Company (henceforth “Kurort JSC”) as establishment of Kurort JSC via exchange of property between state-owned resort directorates had not been previously agreed with the Cabinet of Ministers of the Republic of Azerbaijan in contravention of the Resolution No. 313 of the Soviet of Ministers of the Azerbaijan Soviet Socialist Republic of 9 June 1990. The Resolution also assigned the Ministry of Finance and the Ministry of Public Health with the task of preparing, in agreement with the Confederation of Professional Unions of Azerbaijan, a proposal for redeeming investments made by CPUA in construction and development of the facilities being transferred to the Ministry of Public Health and ordered the Ministry of Public Health to institute the Unit of Sanatoria and Resort Facilities.

Determination of whether CPUA had possessed property rights over the facilities at its disposal with the purpose of resolution of the subject matter of the inquiry requires analysis of legislation in force prior to issuance of the Decree.

It should be noted that CPUA’s possession of property rights over holdings transferred to it in implementation of the above the Resolution of the Azerbaijan SSR Soviet of Ministers is confirmed by other normative legal acts. Notably, even prior to enactment of the Constitutional Act of State Independence of the Republic of Azerbaijan (henceforth “the Constitutional Act”) on 18 October 1991, the state recognised property of professional unions. Article 97 of the Civil Code of the Republic of Azerbaijan (the Azerbaijan SSR) enacted on 11 September 1964 (which lost effect by the Law enacted on 28 Mat 2000) stated that professional unions and other public associations own, use and dispose of property in their possession under property rights as defined in their association charters (statutes) . The right of disposal over assets in property of professional unions and other public associations belongs exclusively to a proprietor.

The same Code also prescribes imperative legal norms in relation to protection of property of professional union organisations. Article 99 Section I of the Code states that no claims of creditors can be directed against buildings, facilities, equipment and other fixed assets of enterprises, sanatoria, holiday homes, culture palaces, clubs, stadia and pioneer (scout) camps owned by professional unions and other public associations as well as their cultural and education funds. Another protection of property rights provided by the Code is that it places no limitations on uses of property.

At the same time, Article 242 Section 5 of the Code of Labour Laws enacted on 10 December 1971 (which lost effect by the Law enacted on 1 February 1999) provides that professional unions manage state public insurance as well as own sanatoria, health resorts, holiday homes, cultural, education, tourist and sport facilities.

Article 22 of the Constitutional Act establishes three forms of property: public, private and collective. Private and collective property is allowed and protected by law; law regulates their transfer and use within certain legally defined bounds. Private and collective property can not be arbitrarily expropriated. Only in instances defined by law private and collective property can be expropriated to the benefit of the Republic of Azerbaijan with compensation to owners (Article 22 Sections 1,2,3).

Furthering property-related provisions of the Constitutional Act, the Law of the Republic of Azerbaijan on Property (which lost effect by the Law enacted on 23 April 2002) establishes in Article 6 that property rights of can never be terminated against the will of a proprietor except with the purpose of covering liabilities of a proprietor in cases and the manner provided in laws of the Republic of Azerbaijan and the Nakhchivan Autonomous Republic. The same Law also contains provisions regulating disputes that arise in connection with annulment of state acts breaching rights of a proprietor (Article 24).

Therefore, analysis of legislation in force at the time of issuance of the Decree shows that along with recognition of various property types (including property rights of the Council of Professional Unions of Azerbaijan over assets in its possession) by the state, laws of the time also defined effective protection mechanism against unlawful interference with and limitation of property rights (including if done by the state).

At the time of issuance of the Decree, the government of the Republic of Azerbaijan was based on separation of powers; the Constitution and laws of the Republic of Azerbaijan were the only laws of the land (Articles 13 and 15 of the Constitutional Act). Article 121.6 of the Constitution in force at the time stated that, the President of the Republic of Azerbaijan issues presidential decrees based on and with the purpose of enforcement of the Constitution and laws of the Republic of Azerbaijan, and that these decrees have obligatory effect throughout the territory of the Republic of Azerbaijan.

However, analysis of the Decree from the point of correspondence to the above-stated legal requirements shows that not only it lacks such conformity but it does also negate constitutional principles and guarantees related to property rights.

Article 32 of the Constitutional Act stated that it would form the basis for drafting of a new Constitution. The Preamble of the Constitution of the Republic of Azerbaijan acknowledges importation of the main principles from the Constitutional Act.

The Constitution of the Republic of Azerbaijan establishes inviolability of property and its protection by the state. Property can be public, private and municipal, with no preference granted to any of these types. Property rights, including to private property, are protected by law. No one can be deprived of property except by a valid decision of a court. Property can be expropriated for state or public needs on the condition of prior payment t of just compensation (Article 13 Section I and II and Article 29 Sections I, II and IV of the Constitution of the Republic of Azerbaijan).

One of the primary obligations of a social state based on the rule of law in the area of creation and further development of civil society and market economy consists of taking steps to ensure equality of property types and equal opportunities in property protection. From this perspective, regulation of property-related social relations is one of several prerogatives the state has for carrying out the above obligations. Social function of proprietorship is irrefutable, and this justifies state intervention in property relations on the condition that such intervention is dictated by pressing public need and done within the bounds of the law in implementation of constitutional principles.

According to Article 149 Section IV of the Constitution of the Republic of Azerbaijan, decrees of the President of the Republic of Azerbaijan shall not contravene the Constitution and laws of the Republic of Azerbaijan.

Negation of constitutional guarantees for protection of property rights and provisions of pertinent legislation by the Decree at hand should be qualified as violation of CPUA’s property rights. Therefore, this Decree can not be considered in compliance with the Constitution.

In this respect, the Plenum of the Constitutional Court notes that a normative legal act (including if passed by the Cabinet of Ministers) adopted on the basis and with the purpose of implementation of another normative legal act which has been deemed in contravention of the Constitution shall also be regarded unconstitutional. This is a requirement of Article 149 Section V of the Constitution of the Republic of Azerbaijan which states that resolutions of the Cabinet of Ministers of the Republic of Azerbaijan shall not contravene the Constitution and laws of the Republic of Azerbaijan and Decrees of the President of the Republic of Azerbaijan. Hence, the Resolution of the Cabinet of Ministers of the Republic of Azerbaijan No. 267 of 4 June 1993 “On implementation of the Decree of the President of the Republic of Azerbaijan “On transfer of the sanatoria-resort complex to the Ministry of Public Health of the Republic of Azerbaijan” is in contradiction with the above constitutional provision.

It should also be noted that legal relations with respect to land beneath properties granted to CPUA by the Resolution No. 342a of the Soviet of Ministers of the Azerbaijan SSR of 30 April 1960 are regulated by the Law of the Republic of Azerbaijan on Land Reform, the Land Code of the Republic of Azerbaijan and other laws.

Guided by Article 130 Sections III, IX and X of the Constitution of the Republic of Azerbaijan and Articles 52, 62, 63, 65, 66, 67 and 69 of the Law of the Republic of Azerbaijan on the Constitutional Court, the Plenum of the Constitutional Court

**DECIDED:**

1. As the Decree of the President of the Republic of Azerbaijan No. 392 of 5 January 1993 and the Resolution of the Cabinet of Ministers of the Republic of Azerbaijan No. 267 of 4 June 1993 contravene Articles 13 and 29 of the Constitution of the Republic of Azerbaijan, they shall be deemed void.
2. The Decision shall become effective from the day it is published.
3. The Decision shall be published in the newspapers Azerbaycan, Respublika, Xalq Qazeti and Bakinskiy Rabochiy and in the Bulletin of the Constitutional Court of the Republic of Azerbaijan.
4. The Decision is final and can not be annulled, amended or officially interpreted by whichever person or entity.