**ON BEHALF OF THE REPUBLIC OF AZERBAIJAN**

**DECISION**

**OF THE PLENUM OF THE CONSTITUTIONAL COURT**

**OF THE REPUBLIC OF AZERBAIJAN**

*On verification of conformity of para III, item 9 and para IV, item 7 of the Law of the Republic of Azerbaijan N 688-II QD of 11 June 2004 “On Introduction of Modifications into Some Legislative Acts of the Republic of Azerbaijan” to Article 130, para IX of the Constitution of the Republic of Azerbaijan*

**25 January, 2005 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;

attended by the representatives of parties: R.Rahimov, Head of Administration of Ombudsman of the Republic of Azerbaijan and S.Kerimov, Head of Administrative and Military Legislation Department of the Administration of Milli Mejlis of the Republic of Azerbaijan;

examined the conformity of para III, item 9 and para IV, item 7 of the Law of the Republic of Azerbaijan N 688-II QD of 11 June 2004 “On Introduction of Modifications into Some Legislative Acts of the Republic of Azerbaijan” to Article 130, para IX of the Constitution of the Republic of Azerbaijan.

Having heard the report of Reporter Judge E.Mammadov and statements of representatives of parties R.Rahimov and S.Kerimov, and studied the materials of the case the Plenum of the Constitutional Court

**DETERMINED AS FOLLOWS:**

By the Law of the Republic of Azerbaijan N 688-II QD of 11 June 2004 “On Introduction of Modifications into Some Legislative Acts of the Republic of Azerbaijan” some modifications were introduced into the legislation of the Republic of Azerbaijan. Thus, in the civil and criminal procedural legislation of the Republic of Azerbaijan there was set up the concept of proceedings on new circumstances connected with violation of human rights and freedoms.

This proceedings provides that the recognition of the decision of Supreme Court of the Republic of Azerbaijan (hereinafter referred as Supreme Court) or the judicial act that violates the right to access to court as contradicting to the Constitution and laws of the Republic of Azerbaijan (hereinafter referred as Constitution and laws) constitute one of the grounds for revision of the judicial acts on new circumstances connected with violation of human rights and freedoms.

According to modifications and additions, which were introduced to procedural legislation by Law, the Plenum of Supreme Court shall examine only circumstances on legal issues connected with execution of the decisions of the Constitutional Court of the Republic of Azerbaijan and European Court of Human Rights (Article 431-2 of the Civil Procedure Code of the Republic of Azerbaijan and Article 456.2 of the Criminal Procedure Code of the Republic of Azerbaijan).

The Ombudsman of the Republic of Azerbaijan (hereinafter referred as Ombudsman) having applied to the Constitutional Court of the Republic of Azerbaijan (hereinafter referred as Constitutional Court) alleges that the provisions of Para III, Item 9 and Para IV, Item 7 of the Law of the Republic of Azerbaijan N 688-II QD of 11 June 2004 “On Introduction of Modifications into Some Legislative Acts of the Republic of Azerbaijan”, which provide that regarding the execution of the decisions of Constitutional Court the Plenum of Supreme Court shall examine the circumstances only on legal issues, create the artificial obstacles for execution of the decision of Constitutional Court aimed at restoration of human rights and freedoms and thus asks for verification of the conformity of these to Article 130, para IX of the Constitution of the Republic of Azerbaijan.

In connection with petition in question the Plenum of Constitutional Court notes as follows:

The issues touched upon in the petition of Ombudsman of the Republic of Azerbaijan is connected with reflection in the legislation of the mechanism of judicial protection of human rights and freedoms envisaged in Constitution and international agreements which Azerbaijan Republic is a party to.

This petition is related to judicial guarantee of human rights and freedoms that is enlisted within fundamental rights and serves for clarification of principles concerning thorough judicial protection of human rights and freedoms related with clarification of a number of issues and administration of justice. Petition is also important from the point of view of clarification of questions, which can arise as a result of carrying out of proceedings on news circumstances connected with violation of human rights and freedoms.

 According to Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, 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.

With the view to examine thoroughly the issues touched upon in petition it is necessary fist of all to study the right to fair trial envisaged in legislation including the provisions enshrined in Articles 60, 125, 127, 129-131 of Constitution.

For instance, according to constitutional guarantee of human rights and freedoms the settlement of relevant conflicts and disputes shall be implemented only by courts within the principles and procedures established by legislation.

Such universal values as supremacy of law and justice, domestic law, which is the reflection of people’s will in state, as well as the principles of judicial proceedings and international law applicable in contemporary democratic society are of high importance.

By implementing their functions in due manner, in accordance with legislation and within reasonable time as well as by avoiding any partiality, preferences, discrimination and distinctions, which are not envisaged in legislation, displaying respect to all persons taking part in proceedings, respecting the equality of parties and litigation, examining a circumstance thoroughly and on the basis of evidences the judges should ensure everyone’s right to fair trial.

The society’s respect and trust to judiciary is a guarantee of court’s efficiency. The courts should enjoy the respect of not only parties to certain judicial proceedings but also of society in general.

The trust to courts is closely connected with impartiality of judges that proceeds from judicial independence. On one hand the impartiality expresses a personal impartiality of judge as an individual examining a circumstance. On the other hand it is the court’s “face” connected with the belief to justice that exists in democratic society.

In the number of its decisions (Delcourt vs Belgium of 17 January 1970, Piersack vs. Belgium of 1 October 1982, De Cubber vs. Belgium of 26 October 1984) the European Court of Human Rights noted that alongside with administration of justice the restoration of justice should be clearly evident.

In Azerbaijan Republic the judicial power shall be implemented by Constitutional Court and the higher courts as Supreme Court and appeal instance courts as well as other ordinary and specialized courts via relevant judicial proceedings and other procedures specified in legislation.

According to the Law of the Republic of Azerbaijan “On Courts and Judges” the ordinary courts shall, via the procedure and in circumstances specified in legislation, administer justice on civil and administrative delinquencies and criminal cases. The rules of judicial proceedings implemented in those courts have been established in Civil Procedure Code, Administrative Delinquencies Code and Criminal Procedure Code respectively.

Ordinary courts establish the facts of cases under their examination (this is implemented by first and appeal instance courts) and by applying material and procedural rules adopt relevant judicial decisions. These decisions can be revised by higher courts in circumstances and via the procedure specified in legislation. As the decision of any other court the decisions of Supreme Court (cassation and additional cassation instance) can be revised. For this purpose there has been envisaged relevant rules in the legislation of the Republic of Azerbaijan.

And the Constitutional Court is the supreme body of constitutional justice. As opposed to other courts all its competences are fixed in Constitution (Articles 86; 88 para I; 102; 104, paras II-III; 107, para I; 130, paras III-X and 153). The rules of administration of constitutional justice are envisaged in the Law of the Republic of Azerbaijan “On Constitutional Court” and the Rules of Procedure of Constitutional Court.

One of the competences of Constitutional Court consists of implementation of constitutional review over normative acts of legislative and executive bodies as well the acts adopted by municipalities and courts. In connection with additions and modifications introduced into Constitution on 24 August 2002 the new Law “On Constitutional Court” was adopted on 23 December 2003. After Law entered into force the Constitutional Court started studying the constitutional complaints (individual complaints) as to violation of human rights and freedoms by normative acts of legislative and executive bodies as well the acts adopted by municipalities and courts.

In connection with implementation of constitutional justice there are several peculiarities of constitutional proceedings. For instance, Constitutional Court does not examine criminal and civil cases and the cases concerning administrative delinquencies. It examines only from the legal point of view all complaints submitted in accordance with Articles 34.4-34.7 of the Law of the Republic of Azerbaijan “On Constitutional Court” and is not entitled to check the factual aspects of the cases examined by ordinary courts.

Examination by Constitutional Court of complaints as to correspondence of judicial acts to Constitution and laws is connected with correct application and interpretation of normative acts by courts. Within constitutional court proceedings there are resolved not only such issues as ensuring the supremacy of Constitution but also the existence of restriction of rights and freedoms and possible limits of such restrictions.

When examining complaints the Constitutional Court studies whether: the mistake committed constitutes the foundation of the challenged judicial act; there was any arbitrariness in court’s actions; court’s legal motivation transgressed Constitution, laws or the limits of legal analogy etc.

Responding to these or other questions, in case if there are reveled that the judicial acts roughly violate legislation and thus contradict to Constitution and laws, the Constitutional Court protects human rights and freedoms and eliminates the restrictions, which were ill-grounded from the point of view of Constitution. The Plenum of Constitutional Court adopts decision as to violation of Constitution and laws by challenged act and does not assess the factual aspects of case. However, alongside with this the reference made in the decision of Constitutional Court to the factual aspects established by ordinary courts does not imply the check-up of factual aspects or fact-finding.

The mentioning of this point is extremely important because for assessment by Constitutional Court of the legal aspects of a dispute concerning violation of human rights and freedoms, correspondence of a judicial act to Constitution or laws, the reference to and the taking into account of the factual aspects of civil, criminal or any other case is inevitable.

Of course, in this situation Constitutional Court should pay attention to the issue whether ordinary courts established those factual aspects in correspondence with legislation. For instance, the establishment by ordinary courts of facts without respecting the rules of procedural legislation certifies that a judicial act violates the right to judicial protection (fair trial) and can influence on legal circumstances of the dispute examined by Constitutional Court.

After examination of a case by Constitutional Court on merits the Plenum of Constitutional Court adopts a decision. In case where the challenged act does conform to Constitution or laws then in accordance with Article 130, para X by the decision of Constitutional Court that act or its some provisions become null and void. In such case the Constitutional Court shall determine itself from what date those acts become null and void (Article 67 of the Law “On Constitutional Court”). The judicial acts recognized as not conforming to the Constitution and laws of the Republic of Azerbaijan shall not be executed as well as relevant judicial cases shall be re-examined in accordance with procedure specified by procedural legislation of the Republic of Azerbaijan (Article 66.4 of the Law “On Constitutional Court”).

Legislator conferred the implementation of proceedings on new circumstances connected with violation of human rights and freedoms to the Plenum of Supreme Court. The case shall be examined by Plenum within three moths after decision of Constitutional Court is submitted to Supreme Court and one of the decisions provided for in Articles 431-4.2.1-431-4.2.3 of the Civil Procedure Code of the Republic of Azerbaijan (hereinafter referred as CPC) or 458.0.1 or 458.0.2 of the Penal Procedure Code shall be adopted.

The concept of proceedings on new circumstances connected with violation of rights and freedoms is new for procedural legislation. This concept is directed at elimination via judicial procedure of violations established in judicial acts and restoration of violated rights and freedoms in correspondence with the decision of Constitutional Court.

It is necessary to take into account that the Constitutional Court’s legal nature and its competences do not permit to restore the violated rights and freedoms from procedural point of view. In this connection the legislator confers this competence to ordinary courts. With respect to this issue, the competences conferred to those courts have some frameworks and this does give any ground for appropriation of Constitutional Court’s competences, rejection of its legal positions or non-execution of its decisions.

After establishment within constitutional proceedings of violation of human rights and freedoms and recognition by Constitutional Court of judicial acts as contradicting to Constitution and laws the violated rights and freedoms should be restored in ordinary courts. In this situation such issues as taking into account the legal positions of Constitutional Court; the essence of decision adopted by the Plenum of Supreme Court; to which stage the case shall be referred for new revision; the respect to procedural time-limits are of highest importance.

In its case of Ryabykh v. Russia of 24 July 2003, the European Court of Human Rights notes: “Legal certainty presupposes respect for the principle of res judicata (…), that is the principle of the finality of judgments. This principle insists that no party is entitled to seek a review of a final and binding judgment merely for the purpose of obtaining a rehearing and a fresh determination of the case. Higher courts' power of review should be exercised to correct judicial errors and miscarriages of justice, but not to carry out a fresh examination. The review should not be treated as an appeal in disguise, and the mere possibility of there being two views on the subject is not a ground for re-examination. A departure from that principle is justified only when made necessary by circumstances of a substantial and compelling character.”

With the view of legal assessment of the essence of decision that can be adopted by the Plenum of Supreme Court, the Plenum of Constitutional Court considers as expedient to refer, within proceedings on new circumstances connected with violation of rights and freedoms, to some provisions envisaged in domestic legislation and accepted indisputably.

Decision of the Plenum of Constitutional Court adopted as a result of examination of constitutional case reflects the conclusion, which the Court came to. Consisting of introduction, descriptive motivation and conclusion this decision is an integral document (Articles 63.1 and 65.1 of the Law of the Republic of Azerbaijan “On Constitutional Court”). Decision of the Plenum of Constitutional Court reflects the Court’s legal positions regarding the dispute connected with legal issues. These positions are getting formed by means of taking into account the foundations of Constitution, its supremacy and direct effect, international instruments, which Azerbaijan Republic is a party to, as well as the primacy of human rights and freedoms.

According to Article 130, para X of Constitution, the laws and other acts, individual provisions of these documents, intergovernmental agreements of the Azerbaijan Republic cease to be valid in term specified in the decision of Constitutional Court of the Azerbaijan Republic, and interstate agreements of the Azerbaijan Republic do not come into force.

 Decisions adopted by Constitutional Court shall have binding force through out the entire territory of the Republic of Azerbaijan and after entry into force shall be executed without any reservation. These decisions shall be final and cannot be cancelled, modified or officially interpreted by any body or official. Officials who do not comply with resolutions of Constitutional Court shall bear the responsibility via the procedure specified by the legislation of the Republic of Azerbaijan (Articles 66.1, 63.4 and 66.2 of the Law of the Republic of Azerbaijan “On Constitutional Court”).

 The high legal force of the decision of Constitutional Court covers its all parts including the legal positions, which constitute its foundation. However, sometimes the legal positions of Constitutional Court have independent importance. Since the force of Constitutional Court’s legal position is equal to the legal force of its decisions and is of general character, it should cover not only the circumstance that constituted the subject of constitutional case but also the similar circumstances, which occur to be a source of law in jurisprudence.

 In general, it is necessary to take into account that the approval by Constitutional Court of the fact that it corresponds or does not correspond to Constitution can be accepted as a special fact of pre-judicial importance not only for a body, which adopted that act but also for other law-making or judicial bodies.

 With respect to law-making bodies the prejudicial importance of the decisions of Constitutional Court consists of inadmissibility of adoption of an act similar to the normative legal act recognized by Constitutional Court as contradicting to Constitution. The prejudicial importance of the fact of recognition by Constitutional Court of any provision of normative legal act as contradicting to Constitution makes impossible the application by courts of similar provisions envisaged in other acts.

In this connection another aspect of this issue is that the establishment by Constitutional Court of conformity or non-conformity of judicial act to Constitution produces the prejudicial importance not only for courts, which examined certain case but also for those courts, which examine other cases.

The provisions, which were introduced into procedural legislation, stating that the Plenum of Supreme Court shall, in connection with execution of decision of Constitutional Court that examined the constitutional case on merits, revise on legal points the case cannot derogate the high legal force of Constitutional Court’s decisions. From the point of view of hierarchy of the legal force of acts included into the system of legislation these provisions are located below the legal norms concerning the binding nature of the decisions of Constitutional Court. According to provisions of Articles 147 and 149 of Constitution, Constitution possesses highest and direct legal force, it is binding all over the territory of the Republic of Azerbaijan and no law can contradict to it. In this case the norm of law should be applied only in accordance with constitutional norm.

The examination of case on legal points, within proceedings on new circumstances on violation of human rights and freedoms, by the Plenum of Supreme Court should not bring to appropriation of Constitutional Court’s competences or distortion (revision, enlargement, limitation or interpretation in any other form), damage the efficiency of constitutional justice and should be implemented in accordance with constitutional status of the court of cassation instance. Thus, Supreme Court and other courts should adopt decisions only within framework installed by Constitutional Court on a certain case. The legal issues specified in the decision of Plenum of Constitutional Court and allegedly violated rights and freedoms should constitute this framework.

This position is confirmed by modifications introduced into procedural legislation by the Law of 11 June 2004 “On Introduction of Modifications into Some Legislative Acts of the Republic of Azerbaijan” and other provisions enshrined presently in CPC. For instance, according to Article 431-4.2 of CPC, the Plenum of Supreme Court shall adopt a relevant decision prescribed by this Article in correspondence with the decision of Constitutional Court concerning violation of human rights and freedoms. As it is evident, the decision of Plenum of Supreme Court should correspond to the decision of Constitutional Court related to violation of human rights and freedoms and which served as a ground for proceedings on new circumstances.

Along with all this, taking into account that the Supreme Court is the higher court for ordinary and specialized courts on civil (including economic disputes), criminal cases, administrative delinquencies and other cases, which fall within their jurisdiction, it can be admissible for Supreme Court to examine the legal issues, in the framework of its procedural status, within proceedings on new circumstances connected with violation of rights and freedoms. However, when such issues are resolved in Plenum of Supreme Court (as well as during revision of a certain case in other courts) it is necessary always to pay attention to execution of the decision of Constitutional Court and provisions of legislation requiring for correspondence to it of adopted decision.

In general, on mentioned cases the Plenum of Supreme Court should, taking into account the decision of Constitutional Court, either fully or partially cancel the judicial acts recognized as null and void because of their non-conformity to Constitution or laws, decide what judicial act will be kept in force and refer a case to court for revision.

In this connection it is necessary to take into account that the holding of session of the Plenum of Supreme Court connected with execution of Constitutional Court’s decision is conditioned by the fact that the procedural legislation conferred the implementation of proceedings on new circumstances connected with violation of human rights and freedoms to Plenum of Supreme Court.

It should be also taken into account that the procedure of proceedings, which follow the recognition by Constitutional Court of judicial acts as contradicting to Constitution or laws and establishment that those acts violated human rights and freedoms, should be directed at elimination of violations and restoration of violated rights. It is inadmissible to revise a case in relevant judicial instances through worsening the legal status of persons whose rights and freedoms had been violated and involving them into delays. The occurrence of such circumstances should be assessed as violation of constitutional principles. At the same time the protection of other party’s rights and freedoms on the issue that constitutes a foundation of constitutional case, the clarification of all established matters of a case and the peculiarities of violation of the right to fair trial should be taken into account.

Plenum of Supreme Court should, in accordance with the decision of Constitutional Court, cancel the judicial act, which was adopted by means of violation of human rights and freedoms, and that was recognized by supreme body of constitutional justice as null and void and, at the same time, keep in force without any modification the judicial acts, which had been adopted on a case before. And the need for revision of a case by the first instance court can be invoked by violation of individual’s right to access to court.

With respect to the referring of a case to new judicial examination it is necessary to note that when deciding the issue as to new examination of a case it should be referred namely to that stage on which, according to the Constitutional Court’s conclusion, the rights and freedoms were violated. The referring of a case to more previous judicial stage and new examination of a case within proceedings, in which a court did not commit any mistake, do not comply with the concept of proceedings on new matters connected with violation of human rights and freedoms and do not serve for complete restoration of violated rights.

Plenum of Supreme Court should cancel a judicial act, which was recognized by Constitutional Court as null and void, and open a way for new examination through relevant judicial proceedings. The revision of a case in judicial instances should be held within reasonable time and not exceed the time-limits provided for a judicial proceedings in procedural legislation. In such matters it is necessary to take into account that the litigations in courts are held in any way for long time and the settlement of a dispute promptly and in framework of law should contribute to elimination of matters, which damaged a justice, and to increasing of trust to courts.

When carrying out the proceedings on new circumstances in connection with violation of rights and freedoms the Plenum of Supreme Court and then other courts, which revise relevant cases should adopt a decision that would contradict to the decision of Constitutional Court aimed at restoration of violated rights and freedoms.

Plenum of Constitutional Court particularly notes that according to constitutional norm (Article 130, para IX) concerning high legal force of the decisions of Constitutional Court the adoption of new judicial acts similar to the judicial act recognized by Constitutional Court as contradicting to Constitution cannot on one hand derogate the effect of the decision of supreme body constitutional justice and on another hand gives a reason for submission of complaint to Constitutional Court via the procedure specified in Article 34 of the Law of the Republic of Azerbaijan “On Constitutional Court”.

Taking into account the above-stated the Plenum of Constitutional Court considers that the issue of correspondence of provisions, which are envisaged in procedural legislation of the Republic of Azerbaijan and challenged in petition, to Constitution should be resolved in framework of competences of the supreme body of constitutional justice and the Supreme Court as specified in legislation. These provisions can be recognized as conforming to Article 130, para IX of the Constitution of the Republic of Azerbaijan in matters where Plenum of Supreme Court:

1) holds the proceedings on new circumstances, in connection with violation of human rights and freedoms, in the framework of legislation of the Republic of Azerbaijan;

2) taking into account the binding nature of the legal positions of Constitutional Court’s decisions, including this decision, settles the legal issues, which are necessary for their unconditional execution;

3) does not admit any distortion (revision, enlargement, limitation or interpretation in any other form) of the decisions of Constitutional Court;

4) when arranging the revision of cases, adopts concrete decisions aimed at elimination, within the time-limits prescribed in legislation, of judicial mistakes committed within judicial proceedings, as specified in the decision of Constitutional Court, not only with the purpose of revision of cases by but also of sooner restoration of violated human rights and freedoms.

Being guided by paras VII, IX and X 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 Constitutional Court”, the Plenum of Constitutional Court of the Republic of Azerbaijan

**DECIDED:**

1. The provisions, which provide for examination of cases only on legal issues connected with execution by Plenum of Supreme Court of the decision of Constitutional Court, of para III, item 9 and para IV, item 7 of the Law of the Republic of Azerbaijan N 688-II QD of 11 June 2004 “On Introduction of Modifications into Some Legislative Acts of the Republic of Azerbaijan” shall be recognized as conforming to Article 130, para IX of the Constitution of the Republic of Azerbaijan in matters where Plenum of Supreme Court:

1) holds the proceedings on new circumstances, in connection with violation of human rights and freedoms, in the framework of legislation of the Republic of Azerbaijan;

2) taking into account the binding nature of the legal positions of Constitutional Court’s decisions, including this decision, settles the legal issues, which are necessary for their unconditional execution;

3) does not admit any distortion (revision, enlargement, limitation or interpretation in any other form) of the decisions of Constitutional Court;

4) when arranging the revision of cases, adopts concrete decisions aimed at elimination, within the time-limits prescribed in legislation, of judicial mistakes committed within judicial proceedings, as specified in the decision of Constitutional Court, not only with the purpose of revision of cases by but also of sooner restoration of violated human rights and freedoms.

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”, “Bakinskiy 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.