**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*

**3 February, 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;

and representatives of applicants N. Nurulov and Z.Z. Nurulova- A. Mammadov;

in accordance with section V, Article 130 of the Constitution of the Republic of Azerbaijan, the decision of the Board on Civil Cases of the Supreme Court of the Republic of Azerbaijan from June 4, 2004 under the claim of N. Nurulov and Z.Z. Nurulova was reviewed for compliance with Constitution and Legislation of the Republic of Azerbaijan.

On the basis of the letter No. 2n-15 of the Deputy Chairman of the Supreme Court of the Republic of Azerbaijan from January 13, 2005, the constitution case was processed without participation of respondent party.

Having heard the report of judge F. Babayev, and information from applicant representative A. Mammadov and studied the materials of the case the Plenum of the Constitutional Court

**DETERMINED AS FOLLOWS:**

Plaintiffs Nail and Zeytuna Nurulovs have raised the claim in the court, that apartment 14, at house 14 of Neighborhood 6017 Maktabli str., Badamdar settlement of Baku city was granted them by the decision No. 1886 from June 13, 1994 of the Parliamentary Members Council of the Sabayil District, informed about their need to leave Baku in 1996 to visit their ill grandmother living in Kazan city, upon return finding that their apartment is illegally taken by the refugee from Zangilan Region, Ali Mukhtar Maharramov and his family members and requesting the decision for their removal from the apartment.

In accordance with decision of Sabayil District Court of Baku City from November 3, 2003, the claim against A. Maharramov and others for their removal from the apartment was satisfied, and Sabayil District Executive Power was assigned to arrange the temporary accommodation for respondents.

Board on Civil Cases of the Appeal Court of the Republic of Azerbaijan in its decision No. 1265 from March 11, 2004 has left the decision of previous instance unchanged.

In accordance with decision of Board on Civil Cases of the Supreme Court of the Republic of Azerbaijan the above decision of the Appeal Court was left unchanged, but execution of the decision was postponed until the release of Zangilan region from occupation.

In the letter of Chairman of Supreme Court from August 23, 2004 it was indicated that there is no need for additional cassation complaint to the Plenary Session of the Supreme Court.

Applicants in the complaint submitted to Constitution Court have requested the review of the decision of Board on Civil Cases of the Supreme Court of the Republic of Azerbaijan from June 4, 2004 for compliance with Constitution and legislation of the Republic of Azerbaijan.

The complaint was based on the fact that the decision of cassation instance court has affected their rights on inviolability of house and violation of rights on house stipulated under Articles 33 and 43 of the Constitution of the Republic of Azerbaijan.

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

It was stipulated under Article 33 of the Constitution of the Republic of Azerbaijan that everybody is entitled to inviolability of his residence. In accordance with provisions of Article 43 of the Constitution nobody can be deprived of his residence illegally. The main idea of these provisions is also that nobody shall be entitled to enter the apartment without consent of the owner, otherwise than in conditions stipulated under the legislation or court order.

Rights and freedoms stipulated under Constitution of the Republic of Azerbaijan suppose the main aspect of the fair trial as per Article 60 of Constitution. In accordance with provisions of Articles 125 and 127 of Constitution such guarantee is not limited only to the right of individual to apply to court and get the application processed, but also fair, indifferent decision based on equality of parties in the face of law, based on facts and legislative provisions.

In order to avoid remaining in force of illegal and ungrounded court decisions, the legal mechanism of the Republic of Azerbaijan stipulates the authorities, rights and responsibilities of each of the court instances.

One of the aspects of fair court processing is also the execution of court decisions. In accordance with Article 129 of the Constitution, court decisions are made in the name of state and their execution is mandatory.

Legislation also stipulated the provisions for the authorities entitled to stop or postpone the execution of court decisions, in order to provide the protection of rights and interests of individual for this issue.

In accordance with Article 231.1 of the Civil Procedures Code the judge processing the case, under the application of parties to the case, within consideration of their economic conditions and other factors shall be entitled to provide certain postponement for execution of decision or partial execution of the decision, as well as to change the method and procedures for its execution. As can be observed from the text of Article the decision on postponement of the execution of decision may be applied only by first or appeal instance courts, which proceed on essence of the case.

Meanwhile in accordance with Article 16 of the Law “On execution of Court decisions”, within the execution procedure the court officer on the basis of application of the demander or debtor, may postpone the execution of the decision for the maximum period of 10 days.

In any other case legislation allows the postponement on execution of the decision only by the judge, who proceeds the case in accordance with Article 231 of Civil Procedures Code.

In articles 17-19 of same Law are stipulated provisions for postponement of execution, stoppage of execution and conditions for stoppage and postponement of decision execution. In accordance with Law stoppage of execution is allowed within the execution process. This in turn shall be implemented within the terms and basis stipulated under the above articles.

In Article 413 of Civil Procedures Code are described the terms and procedures for stoppage of execution of court decision by cassation instance court. In accordance with these provisions if parties to the case have families with many children, lost the ability to work or bread-winner, have got into complicated financial position due to illness or loss of physical ability, lost the residence place and do not have the opportunity to move to another place, cassation instance court by the application of parties to the case shall be entitled to stop the execution of the first or appeal instance court only until the completion of cassation procedures.

The cassation instance court acting on the claim of N. Nurulov and Z. Nurulova in its decision did not take into consideration provisions of Article 143 of the Civil Procedures Code and has adopted the decision that is not stipulated under the civil procedures code and stopped the execution of decision.

The Plenary Session of Constitution Court shall note that Article 143 of the Civil Procedures Code does not stipulate the stoppage or postponement of execution of court decisions by cassation instance.

Besides, in stoppage of execution of the court decision, Board on Civil Cases of the Supreme Court of the Republic of Azerbaijan upon the review of cassation application submitted by Nurulovs should have complied with provisions of Article 13 of the Civil Procedures Code on provisions and requirements for applicable legal acts by court resolution of civil cases. Cassation instance court in adopting the disputable decision has exceeded its authority.

Article 416 of the Civil Procedures Code stipulates the limits of case review by the cassation instance. In accordance with this Article the cassation instance court shall review the correct application of material and procedural legal norms by appeal court.

Article 417 of the Civil Procedures Code stipulates the authorities of cassation instance court. These authorities do not include the rights for cancellation of execution of court decisions. Especially it should be noted, that there is not such an institution stipulated under the Civil Procedures Code. Therefore, adopting of decision not stipulated under the legislation affects the rights of individual for fair trial as stipulated under Article 60 of Constitution.

In accordance with above, the Plenary Session of the Constitution Court has drawn the decision, that due to violation of provisions of Articles 413 and 417 of the Civil Procedures Code, and Articles 33, 43 and 60 of the Constitution of the Republic of Azerbaijan the decision of the Board on Civil Cases of the Supreme Court from June 4, 2004, protested by Nurulovs shall be deemed invalid and the relevant aspect of the case shall be reviewed additionally in accordance with procedures of legislation.

Being guided by the parts V, IX, X of the 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. Decision of the Board on Civil Cases of the Supreme Court of the Republic of Azerbaijan from June 4, 2004 made under the claim of N. Nurulov and Z. Nurulova shall be as null and void on the basis of violation of provisions of Articles 413 and 417 of the Civil Procedures Code, and Articles 33, 43 and 60 of the Constitution of the Republic of Azerbaijan with Part I of Article 60 of the Constitution 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. This decision shall come into force from the date of its publication.

3. The decision is subject to publication in the newspapers “Azerbaijan”, “Xalq qezeti”, “Bakinskiy rabochi” and in the “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.