**ON BEHALF OF THE REPUBLIC OF AZERBAIJAN**

**DECISION**

# OF THE PLENUM OF THE CONSTITUTIONAL COURT

**OF THE REPUBLIC OF AZERBAIJAN**

*Review of the complaint by Kh.I.Qasimov concerning conformity of several court decisions to the Constitution and laws of the Republic of Azerbaijan*

**13 December 2005 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, R.Qvaladze, E.Mammadov (Reporting Judge), I.Najafov, S.Salmanova and A.Sultanov and Court Secretary I.Ismayilov,

in presence of the complainant Khanlar Qasimov, his representative A.Baghirov and the respondent, represented by N.Nasibov of the Court of Appeals of the Republic of Azerbaijan,

based on a complaint lodged by Khanlar Qasimov,

has examined in the open session under the special constitutional procedure in accordance with Article 130 Section V of the Constitution of the Republic of Azerbaijan the constitutional case of conformity of several court decisions to the Constitution and laws of the Republic of Azerbaijan.

Having heard a report of Judge Mammadov and statements from Khanlar Qaasimov, his representative A.Baghirov and the respondent representative N.Nasibov, studied materials and deliberated the case, the Plenum of the Constitutional Court of the Republic of Azerbaijan

**DETERMINED AS FOLLOWS:**

On 15 July 2004 L.Shikhlinskaya brought a suit to the Baku City Sabayil District Court requesting invalidation of residence rights of several respondents in the case and issuance of an order to evict them from their respective dwellings (houses, apartments) and terminate pertinent rental contracts. After the Sabayil District Court took the case, trial dates were postponed and reappointed several times.

On 24 March 2005 a judge in the case ruled to dismiss a claim by Khanlar Qasimov, one of the respondents in the case, to appoint the case to jurisdiction of a district court in a district where he resides. An appeal brought by Qasimov against this procedural decision was turned down by the Sabayil District Court on 28 March 2005. After that, the appeal complaint by Qasimov and an objection delivered by his representative A.Ismayilov to the full session of the Sabayil District Court were presented to the Court of Appeals of the Republic of Azerbaijan.

The Civil Collegium of the Court of Appeals of the Republic of Azerbaijan held a session on 15 April 2005 without investigating a cause of absence of the respondents in the appeal and ruled to:

* dismiss the appeal by Qasimov; and
* uphold the procedural decision of the Sabayil District Court concerning this appeal; but
* sustain an objection made by the complainant representative to the full session of the Sabayil District Court; and
* forward the case for a trial to the Baku City Yasamal District Court.

On 28 April 2005 the case was officially forwarded to the Yasamal District Court. During a court session at the Yasamal District Court Qasimov as the respondent in the case made a request to postpone proceedings in order to give him opportunity to study all case materials. The request was turned down by the court which proceeded with the substantive consideration of the case.

On 23 May 2005 the Yasamal District Court ruled to:

* sustain the claim by Shikhlinskaya;
* invalidate residence rights of respondents Qasimov, A.Sviridova and N.Huseynov;
* evict them from apartments they occupied; and
* oblige the respondents, individually, to pay Shikhlinskaya the equivalent of USD 7,000 in Azerbaijani manats (using the prevalent exchange rate) for each month they had occupied the respective apartments between 24 March 2004 and the date when the present court decision takes legal effect.

A cassation complaint by Qasimov to the procedural decision of the Civil Collegium of the Court of Appeals of 15 April 2005 was dismissed as unacceptable by the letter of Judge I.Damirov of the Court of Appeals of 16 June 2005 (ref.# 1mk-2671/2005).

Subsequently, Qasimov on several occasions requested the Constitutional Court of the Republic of Azerbaijan to restore his right to judicial recourse which he deemed had been violated due to turning down of his cassation complaint. Qasimov further requested to forfeit all court decisions pertaining to his case that were adopted after the dismissal in question and appoint of a new trial in accordance with Article 66.4 of the Law of the Republic of Azerbaijan on the Constitutional Court.

On 23 June 2005 Qasimov also appealed the judgement of the Yasamal District Court of 23 May 2005 and then regularly asked the Court of Appeals to postpone appellate court proceedings due to his poor health.

On 11 July 2005, in relation to the constitutional complaint lodged by Qasimov, the Constitutional Court formally inquired from the Court of Appeals whether the latter can forward the pertinent civil case to the former for their information. On 1 August 2005 the Court of Appeals responded to the effect that as the case was under examination at the Court of Appeals, immediately forwarding the case to the Constitutional Court was impossible but that it would be forwarded once the appellate review is over.

On 6 September 2005 the Civil Collegium of the Court of Appeals ruled to:

* dismiss the appeal by Qasimov; and
* uphold the judgement of the Yasamal District Court of 23 may 2005.

On 7 October 2005 Qasimov lodged a cassation complaint concerning the above judgement of the Civil Collegium of the Court of Appeals but on 11 October 2005 he withdrew his complaint. By the procedural decision of the Civil Collegium of the Court of Appeals the complaint was registered as withdrawn.

After that the Court of Appeals forwarded the civil case for constitutional review to the Constitutional Court. In accordance Articles 34, 52 and 68 of the Law of the Republic of Azerbaijan on the Constitutional Court, Qasimov’s complaint was admitted to procedure by the Constitutional Court.

The Plenum of the Constitutional Court has noted the following in relation to the complaint.

The Constitution of the Republic of Azerbaijan guarantees everyone judicial protection of his or her rights and freedoms (Article 60 Section I).

The European Convention on Protection of Human Rights and Basic Freedoms (henceforth “the European Convention”) states that every individual, in the determination of his civil rights and obligations or of any criminal charge against him, is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law (Article 6 Paragraph 1).

Enforcement of the right to judicial protection (the right to fair trial) though various legal procedures at the courts of justice is a key prerequisite of the rule of law. Although this right is not absolute, limitations to it shall be stated in law and shall not inhibit its substance.

The right to judicial recourse as an integral part of the right to judicial protection (the right to fair trial) shall be provided both formally and really in respect of any and all judicial instances. With regard to the right to judicial recourse in civil cases, the European Court of Human Rights has stated repeatedly that the European Convention does not require member states to institute appellate and cassation instance courts. However, if those courts are instituted and exist, proceedings thereat are bound to obey by Article 6 guarantees and provide the disputing parties with effective judicial recourse in respect of court decisions pertaining to their rights and obligations under civil law (Garcia Manibardo v. Spain 29 June 2000; Annoni di Gussola et al v. France 14 February 2001; etc.).

Therefore, the constitutional complaint by Qasimov shall be resolved in consideration of procedural provisions currently in force in the Republic of Azerbaijan.

Article 22.5 and .6 of the Code of Civil Procedure of the Republic of Azerbaijan (henceforth “CCP”) substantially require that an objection (protest) made to the full session of the first-instance court shall be resolved by a procedural decision of the appellate court and can’t be appealed further. An issue of disputing court jurisdiction is resolved through a procedure completely different from the one set for resolution of objections.

The issue of court jurisdiction can be resolved either at the time of acceptance of the case to court procedure or during the pre-trial preparatory phase or through a substantiated motion of a party in the proceedings during the trial. In accordance with CCP Chapter 21, a judge may pass a procedural decision concerning a dispute being outside jurisdiction of a court and/or about appointing a case to jurisdiction of another court. This procedural decision may be appealed within five days of receipt (sending) thereof by any party in proceedings (CCP Article 45.1 and .2). In line with Article 269.2 and .3 (CCP Chapter 21), if the above appeal is substantiated, a judge shall modify or reverse the procedural decision in question and proceed to further procedural actions for dispute resolution. Otherwise, the appeal is forwarded to the appellate court together with the case in question within seven days of the review of the appeal.

A procedural decision by the appellate court takes effect immediately after it is announced. If this procedural decision is not appealed, the case is sent back to the first-instance court together with a certified copy of the procedural decision (CCP Articles 400 and 401).

It should also be noted that a cassation complaint against the procedural decision of the appellate court can be lodged with the appellate court by the parties in the proceedings, third persons, claimants in cases considered under a special procedure and interested parties within three months of the complained decision (CCP Articles 403.1, 405.1 and 406.1).

A cassation complaint can be turned down by a procedural decision of a pertinent court only in cases provided by Article 408.1 and in accordance to procedure described in Article 408.2 and .3.

As seen above, the civil procedure legislation currently in force provides that:

1. court objections and matters of court jurisdiction are resolved through different legal procedure;
2. a cassation complaint against a procedural decision of the appellate court on court objection is inadmissible;
3. a cassation complaint against a procedural decision of the appellate court concerning court jurisdiction is admissible in the prescribed timeframe and manner; such cassation complaint can be turned down by a procedural decision of the appellate and cassation courts in cases and in the manner prescribed by law;
4. during the review of the issue of court jurisdiction the appellate court can neither forward a case to the first-instance court without waiting for the entire period allowed for lodging a cassation complaint against its procedural decision, nor turn down a cassation complaint lodged within the allowed period by a letter of a judge; during the same timeframe the first-instance court can’t try the case on substance and make a judgement thereof.

As seen from materials of this civil case, Qasimov duly lodged his cassation complaint in the manner and within the time allowed. But the judge of the Court of Appeals forwarded the case to the first-instance court without waiting for expiration of the three-month cassation period and afterwards turned down the cassation complaint entered by a letter of his having no legal effect whatsoever. In the meantime, the appellate and cassation courts continued examination of the case and adopted respective court decisions in violation of CCP Articles 401, 402, 403.1, 405.1, 406.1, 408.1, .2 and .3 and in absence of the respondents in the case.

Speaking in the session of the Plenum of the Constitutional Court examining the present civil case, the representative of the Court of Appeals admitted that the respondent Qasimov was deprived of right to lodge a cassation complaint against a procedural decision of the Sabayil District Court of 24 March 2005 and the Civil Collegium of the Court of Appeals of 15 April 2005.

The position of the Constitutional Court of the Republic of Azerbaijan on violation of the right to judicial recourse was stated in its decision titled “Review of the constitutional complaint by the Baku City Narimanov District Executive Office concerning conformity of several court decisions to the Constitution and laws of the Republic of Azerbaijan” adopted on 23 April 2004.

The Plenum of the Constitutional Court restates its position herein and especially notes that non-admittance of a cassation complaint can be interpreted as a substantial threat to the right of petition, which leads to tipping of the balance between the lawful effort to enforce a court order, on the one hand, and the right of petition to a judge of the cassation court as necessary for implementation of the right to judicial protection.

The Plenum of the Constitutional Court notes that violation of CCP Articles 401, 402, 403.1, 405.1, 406.1, 408.1, .2 and .3 had led to the breach of Qasimov’s right to judicial protection as guaranteed by Article 60 of the Constitution of the Republic of Azerbaijan.

The Plenum of the Constitutional Court also considers that while the right to a cassation complaint was not secured for the respondent in the civil case, the judgement of the Yasamal District Court of 23 May 2005 and the judgement of the Civil Collegium of the Court of Appeals of 6 September 2005 were not in compliance with Article 60 of the Constitution of the Republic of Azerbaijan and should therefore be deemed forfeited. In accordance with Article 66.4 of the Law of the Republic of Azerbaijan on the Constitutional Court, the case shall be tried again in the manner and at times prescribed by the civil procedure of the Republic of Azerbaijan.

Guided by Article 130 Sections V, 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. The judgement of the Yasamal District Court of 23 May 2005 and the judgement of the Civil Collegium of the Supreme Court of 6 September 2005 in the civil case brought by the suit of L.Shikhlinskaya against Khanlar Qasimov and other respondents to invalidate respondents’ residence rights, evict them from their dwellings and terminate their rent agreements shall be deemed as contravening Article 60 of the Constitution of the Republic of Azerbaijan and not enforced. The case shall be tried again in the manner prescribed by the civil procedure of the Republic of Azerbaijan while securing Qasimov’s right to the cassation complaint.
2. The Decision shall become effective immediately after it is announced..
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.