**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 Salimzade concerning conformity of the decision*

*of the Civil Collegium of the Supreme Court of 2 March 2005*

*to the Constitution and laws of the Republic of Azerbaijan*

**8 June, 2006 Baku city**

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

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

in presence of

complainant’s representatives N.Allahverdiyev, T.Qasimov and I.Ojaghverdiyev and respondent’s representative Judge A.Kalbaliyev of the Supreme Court of the Republic of Azerbaijan

and specialists: Reader M.Tahirov of the Chair of Civil Law of the Law Department of the Baku State University and Senior Adviser B.Hasanov of the State Land and Cartography Committee of the Republic of Azerbaijan,

based on a complaint lodged by A.Salimzade

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 the decision of the Civil Collegium of the Supreme Court of the Republic of Azerbaijan of 2 March 2005 to the Constitution and laws of the Republic of Azerbaijan.

Having heard a report of Judge Qvaladze and statements from complainant’s representatives N.Allahverdiyev, T.Qasimov and I.Ojaghverdiyev, respondent’s representative A.Kalbaliyev, specialists M.Tahirov and B.Hasanov, studied materials and deliberated the case, the Plenum of the Constitutional Court of the Republic of Azerbaijan

**DETERMINED AS FOLLOWS:**

On 5 April 2002 the estate No. 1218-A located in the township of Nardardan (the city of Baku) was leased for 10 years to A.Salimzade based on the lease agreement No. 30819 whereas the estate No. 1218 has been in use by M.Ibrahimbeyov since 1978 and is now his private property. The said estates are adjacent and have a shared wall so that, when facing the Caspian Sea, M.Ibrahimbeyov shares his left side wall with the right side wall of A.Salimzade.

In its letter of 19 May 2004 (ref. # 977), the Estate Development and Maintenance Association (henceforth “EDMA”) consented to the construction by M.Ibrahimbeyov of a year-round observation deck (dimensions: 6.2 m long and 5.5 m wide) in the northerly direction at the north-eastern corner of his estate. Further on, by the letter of 1 June 2004 (ref. # 1026) and the letter of 18 June 2004 (ref. # 1113) EDMA permitted M.Ibrahimbeyov to build an observation deck in the northerly direction at the north-eastern corner of his estate with the length of 14 m and the width of 5.5 m.

Considering the above letters unlawful, A.Salimzade brought a suit to the Baku City Sabunchu District Court claiming that the construction initiated by M.Ibrahimbeyov is carried out in close proximity to the wall of A.Salimzade’s estate facing the sea, that this construction obstructs his free access to the shore, that it interferes with his right to rest and demanding the aforesaid letters to be deemed unlawful and the construction to be prohibited.

On 2 July 2004 the Sabunchu District Court ruled to dismiss the claim by A.Salimzade. The Court substantiated its judgement by stating that a permit to construct the year-round observation deck was granted to M.Ibrahimbeyov on legal grounds, that the area allotted for the construction is totally unrelated to the estate leased to A.Salimzade and that the said construction does not in any way violate A.Salimzade’s tenancy rights.

However, on 10 August 2004 the Civil Collegium of the Court of Appeals of the Republic of Azerbaijan ruled to:

sustain an appeal of A.Salimzade;

reverse the above judgement of the first-instance court;

illegalise the EDMA letters of 19 May, 1 June and 18 June of 2004;

forbid the construction of the observation deck by M.Ibrahimbeyov; and

order M.Ibrahimbeyov to destroy the constructed portion of structure at his own expense.

In contrast with conclusions of the first-instance court, the appellate court determined that the construction permit for the observation deck was granted to M.Ibrahimbeyov by an entity lacking such competencies, that the construction was carried out beyond the bounds of M.Ibrahimbeyov’s estate in the area adjacent to the sea-facing wall of A.Salimzade’s estate and, consequently, the construction in question obstructs free access of the latter to the seashore and interferes with his right to rest.

On 29 September 2004 the cassation court determined that as the appellate court reviewed the case in breach of the terms mandated by Article 367.2 of the Code of Civil Procedure of the Republic of Azerbaijan (henceforth “CCP”), this constitutes a violation of M.Ibrahimbeyov’s right to judicial defence and ruled to reverse the appellate judgement and forward the case to retrial.

On 19 November 2004 the appellate court ruled to uphold the above judgement of the Sabunchu District Court, and on 2 March 2005 the Civil Collegium of the Supreme Court of the Republic of Azerbaijan ruled to uphold the relevant judgement of the appellate court.

An additional cassation claim by the complainant about bringing the case before the Plenum of the Supreme Court was dismissed by the letter of the Chairperson of the Supreme Court of 24 June 2005.

In a complaint lodged with the Constitutional Court, A.Salimzade pointed out that the first-instance and appellate courts adjudicated the case without regard to the fact that the permit for construction in front of his estate was issued by an incompetent authority (EDMA), whereas the law dictates that the area in question can only be used and leased for public purposes by a relevant executive authority, thus violating Article 46 Paragraph 2 Section 1 of the Land Code of the Republic of Azerbaijan and Article 180.1 of the Civil Code. The complainant claimed that the above-mentioned letters from EDMA had given M.Ibrahimbeyov the justification to carry out construction in close proximity to his estate wall, block his door leading towards the sea and, by doing so, impede his free access to the seashore. In the opinion of the complainant, the cassation court violated his constitutionally guaranteed right to judicial defence (Article 60 of the Constitution of the Republic of Azerbaijan) by upholding an unlawful and unsubstantiated judgement of the appellate court.

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

Article 60 Section I of the Constitution of the Republic of Azerbaijan guarantees everyone judicial protection of his/her rights and liberties. In international law (Article 8 of the Universal Declaration of Human Rights, Article 14 Paragraph 1 of the International Pact on Civil and Political Rights, Article 6 Paragraph 1 of the European Convention on Protection of Human Rights and Basic Freedoms) judicial protection is accepted as an opportunity for effective reinstatement of one’s rights through recourse to a fair trial.

The Constitution of the Republic of Azerbaijan establishes the main principles of administration of justice: fair and impartial courts, legal equality of parties, trial based on facts and law (Article 127 Section II) and the adversarial process (Article 127 Section VII). In line with the above constitutional provisions, CCP Article 9.1 institutes that justice shall be fact-based and administered through equality of arms (adversarial process) and equality of parties. A judge at the trial shall always uphold the equality of arms and base his/her decision only on arguments, statements and evidence provided by parties to the adversarial process (CCP Article 9.3). Upon objective, unbiased, comprehensive and thorough consideration of the evidence, the court shall determine legal norms to be applied to the evidence (CCP Article 88).

An important element of the administration of justice is availability of recourse to higher instance courts if dissatisfied with decisions of lower ones. In the Republic of Azerbaijan, judgements and procedural decisions of first-instance courts can be appealed in the CCP-prescribed manner up until they enter legal effect. In such occurrence, the appellate court as a full-fledged court instance tries a case on its merits, based on existing and newly introduced evidence (CCP Article 372.1). According to the legal meaning of the stated provisions, the appellate court assesses requests and objections of the parties, determines their respective rights and obligations and examines the case based on facts. To this purpose, the appellate court makes use of evidence presented to the first-instance court and additional evidence presented to the appellate court in compliance with CCP Article 371. CCP Article 365 establishes that the appellate procedure is subjects to provisions of this Chapter (CCP Chapter 41) and the entire Code, including the principle of equality of arms and parties at trial.

A.Salimzade appealed against the judgement of the first-instance court claiming it was not legally sound and substantiated, because the arguments which prevailed at the first-instance court (that the disputed structure was located in front of M.Ibrahimbeyov’s house, that it did not transgress the limits of his estate and that it did not block the access to anyone’s estate) were soundly refuted by available and new evidence, attached to A.Salimzade’a appeal claim. Specifically, the disputed structure was erected in close proximity to his estate wall facing the sea and blocked his door leading towards the sea, thus impeding his right to free and unhindered use of his section of the seashore. The same arguments were presented by a representative of A.Salimzade speaking at the appellate trial. Consequently, A.Salimzade demanded revocation of the judgement of the first-instance court.

A conclusion reached after joint consideration of CCP Articles 9.1, 9.3, 88 and 372.1 is that the appellate court shall examine the entirety of evidence existing in a case and assess the evidence in a comprehensive fashion. Contrary to that, the appellate court during the retrial did not even attempt to consider arguments presented in the appeal claim by A.Salimzade and disregarded provisions of CCP Article 392.1.5 by not giving reasons for its judgement.

CCP Article 392.2 requires that when dismissing an appeal the appellate court must provide grounds for dismissal. Nevertheless, the judgement of the appellate court did not indicate a single reason for disallowing A.Salimzade’s appeal.

A.Salimzade also alleged in his appeal claim and his representative later reiterated at the appellate trial that the construction of the disputed structure was illegal because it was authorised in the aforesaid letters by EDMA, which is not legally competent to give such authorisation.

A.Salimzade argued this allegation as follows. According to Article 46 Paragraph 2-1 of the Land Code of the Republic of Azerbaijan, the coastal zone of 80 to 130 m directly abutting the Caspian seashore falling within the limits of the Republic of Azerbaijan shall remain public property which can not be privatised or in whichever way acquired and can only be used and leased for public purposes by a relevant executive authority. Lands beneath the coastal zone extending 80 to 130 m from the Caspian seashore can not be fenced in, hurdled or in any way enclosed, and access to the seashore can not be limited.

Clause 2 of the Decree of the President of the Republic of Azerbaijan “On Enforcement of the Law of the Republic of Azerbaijan on Amending the Land Code of the Republic of Azerbaijan” of 4 August 2003 nominated the Cabinet of Ministers of the Republic of Azerbaijan on presentation of the Ministry of Economic Development to administer functions of “a relevant executive authority” referred to in the first period of Article 46 Paragraph 2-1 of the Land Code of the Republic of Azerbaijan. Therefore, EDMA violated the above normative acts and grossly overstepped its authorities by unlawfully issuing letters of prescriptive (administrative) character, based on which the respondent carried out capital construction on the land beneath the off-limits coastal zone.

During the first review of the case the appellate court used precisely the norms of substantive law referred to in the appeal claim by A.Salimzade to rule on illegality of the EDMA letters. During the repeat trial the appellate court again made reference to the same legal norms, but in contravention of CCP Articles 392.1.5 and 392.2 dismissed the appeal by A.Salimzade without providing any explanation.

Hence, the appellate court in its decision on the dispute did not conform to the principles of adversarial process, equality of parties and fact-based administration of justice established by the Constitution of the Republic of Azerbaijan and civil procedure legislation, did not fully and comprehensively examine available and newly presented evidence and did not provide reasons (substantiation) for its decision, which means that at the retrial the appellate court contravened Article 60 Section I and Article 127 Sections II and VII of the Constitution and CCP Articles 9.1, 9.3, 88, 372.1, 392.1.5 and 392.2.

In respect of the above-mentioned, the Plenum of the Constitutional Court has noted that issuing a judgement which lacks conformity to law precludes it from recognising this judgement as a lawful act of justice.

It should especially be noted that an EDMA representative speaking at a session of the Plenum of the Constitutional Court acknowledged that EDMA had had no authority whatsoever to make decisions about allotment of estates.

According to civil procedure legislation, the cassation court examines proper application of substantive and procedural law norms by the appellate court. Breach or wrong application of substantive and procedural law norms by the appellate court constitutes grounds for revocation of its judgements and procedural decisions. Breach or wrong application of procedural law norms constitutes grounds for revocation of judgements and procedural decisions of the appellate court if such violation resulted or may have resulted in the proper judgement not being passed (CCP Articles 416, 418.1 and 418.3).

The cassation court reviewing the civil case upon the appeal by A.Salimzade did not adequately attend to incorrect application of procedural norms by the appellate court. Consequently, its decision of 2 March 2005 lacked correspondence to CCP Articles 416, 418.1 and 418.3. This amounted to a breach of the principle of effective reinstatement of rights through recourse to a fair trial administered by an independent court, which is a key element of judicial protection of rights and freedoms as established in Article 60 Section I of the Constitution.

The Plenum of the Constitutional Court has also deemed necessary to note the following in relation to the decision of the cassation court.

Referring to the Executive Order No. 1122 of the President of the Republic of Azerbaijan of 13 January 2003 “On Actions to Regulate Land Use on the Caspian Seashore of the Republic of Azerbaijan,” which nominates the Cabinet of Ministers of the Republic of Azerbaijan, the Ministry of Environment and Natural Resources, the State Land and Cartography Committee, chiefs of executive offices of the cities of Baku, Sumqayit and a number of coastal administrative districts as competent authorities for effecting decisions about a legal status of estates and land plots in the 130-meter coastal zone, the cassation court ruled to deny A.Salimzade as a physical person to appeal decisions of responsible administrative agencies in the matter related to their competence.

In this regard, the Plenum of the Constitutional Court notes that Article 60 Section II of the Constitution grants everyone a right to bring a suit against a decision, action (or inaction) by government agencies, political parties, trade unions and other public and societal organisations and officials. However, according to CCP Article 297.1, a person may bring a suit against a decision, action (or inaction) by the said agencies, organisations and officials if such decision, action (or inaction) either (i) violated any of his/her rights or freedoms; (ii) impeded realisation of any of his/her rights or freedoms; (iii) unlawfully burdened or encumbered him/her; or (iv) unlawfully sanctioned him/her.

By referring to EDMA’s issue of letters of prescriptive (administrative) character, which had violated his rights, A.Salimzade lawfully used his right to court appeal in compliance with requirements of the Constitution and procedural laws.

In consideration of the above, the Plenum of the Constitutional Court has come to the conclusion that because the decision of the Civil Collegium of the Supreme Court of 2 March 2005 contravenes Article 60 Section I of the Constitution of the Republic of Azerbaijan and CCP Articles 416, 418.1 and 418.3, the said decision shall be deemed forfeited. Therefore, 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. As the decision of the Civil Collegium of the Supreme Court of 2 March 2005 contravenes Article 60 Section I of the Constitution of the Republic of Azerbaijan and CCP Articles 416, 418.1 and 418.3, the said decision in the civil case concerning a suit by A.Salimzade against M.Ibrahimbeyov and the Estate Development and Maintenance Association of the Executive Office of the City of Baku to forbid construction by M.Ibrahimbeyov and deem official letters permitting these construction works unlawful shall be deemed forfeited. In accordance with this Decision, the case shall be tried again in the manner and at times prescribed by the civil procedure of the Republic of Azerbaijan.
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.