**ON BEHALF OF THE REPUBLIC OF AZERBAIJAN**

**DECISION**

**OF THE PLENUM OF THE CONSTITUTIONAL COURT**

**OF THE REPUBLIC OF AZERBAIJAN**

*Concerning violation of right of access to court in connection with the complaint of G.Huseynov*

**29 June 2007 Baku city**

Plenum of the Constitutional Court of the Republic of Azerbaijan composed of F.Abdullayev (Chairman), S.Salmanova, F.Babayev, S.Hasanova, B.Garibov, R.Qvaladze (reporter judge), I.Nadjafov and A.Sultanov,

with participation of the secretary I.Ismayilov,

applicant G.Huseynov

representative of respondent – E.Rahmanov, employee of Neftchali District Court of the Republic of Azerbaijan

in accordance with Article 130.5 of the Constitution of the Republic of Azerbaijan examined in open session via special constitutional proceedings the case on verification of conformity of judicial acts to Constitution and laws of the Republic of Azerbaijan in connection with the complaint of Gabil Huseynov.

Having heard the report of Judge R.Qvaladze, speech of applicant G.Huseynov and representative of respondent E.Rahmanov, having considered materials of the case, Plenum of the Constitutional Court

**DETERMINED AS FOLLOWS:**

By the decision of Neftchali district court as of September 12, 2006 No. 2-118 was satisfied the claim by Fatulla Guliyev against the respondent Gabil Huseynov concerning the requirement from Kyurgarabudzhagsky rural municipality of a salary in connection with the dismissal wage, and the decision on receiving from Kyurgarabudzhagsky municipality and transfer to G. Badalov of salary and dismissal wage (as well as additional receiving from municipality of the state tax) was made.

The copy of this decision was sent to the respondent by the letter as of November 10, 2006 No. 2-118 signed by the judge of Neftchali district court.

On December 10, 2006 G. Huseynov made the appeal complaint to the decision. By the ruling of Neftchali district court as of December 15, 2006No. 2-118 the appeal complaint was returned to G. Huseynov in connection with the expiration of procedural periods.

The ruling was proved by that the respondent made the appeal complaint to a judgment on December 11, 2006, 3 months later after adjudication, and though specified in the complaint that received a judgment on November 24, 2006, nevertheless, did not appeal to court with the petition for recognition of the expired terms as valid and its restoration.

The specified ruling, the appeal complaint and other documents were directed to G. Huseynov by the letter No. 21 as of December 15, 2006.

On December 28, 2006 G. Huseynov filed a lawsuit statement for disagreement with ruling and asked to direct this application with the complaint to Court of Appeal.

The answer to this complaint arrived from the acting judge of Neftchali district court by the letter No. 17 of February 1, 2007. In the letter it is told: “You appealed against this ruling to court on December 28, 2006, that is after a complaint term. You did not request restoration of this term and in the complaint did not specify the date of receipt of the copy of the judgment. Therefore in connection with your complaint documents send back to you for observance of requirements of Articles 267-268 of the Civil Procedure Code of the Republic of Azerbaijan”.

G. Huseynov, claiming violation of his right of access to courts and ensuring of legal protection of rights and freedoms, lodged the complaint to the Constitutional Court of the Republic of Azerbaijan (hereinafter referred to as the “Constitutional Court”). According to the applicant, the decision of the judge of Neftchali district court No. 17 as of February 1, 2007 violated his right of access to courts, court instead of responding to the complaint with ruling within established periods, contrary to requirements of the law answered by the letter, unreasonably and illegally deprived him of right to appeal to superior court, having deprived thereby of the right to ensure legal protection of rights and freedoms guaranteed by the Article 60 of the Constitution of the Republic of Azerbaijan (hereinafter referred to as the Constitution).

Without touch on of a civil case, Plenum of the Constitutional Court in connection with observance of procedural periods on case and application of procedural legislative norms considers necessary to note the following.

As evident from the materials of a civil case attached to the complaint of the receipts issued to Neftchali district post-office of the state enterprise “Azerpocht”, and the documents certified by it, the letter No. 2-118 dated November 10, 2006 sent to G. Huseynov with the copy of the decision was handed to him on November 24, 2006. The appeal complaint of the applicant was brought to court on December 10, 2006. The ruling of Neftchali district court No. 2-118 dated December 15, 2006 and the cover letter were handed to the applicant on December 28, 2006, on the same day the applicant appealed against this ruling to court. The answer to the last complaint was sent to the acting judge of Neftchali district court by the letter No. 17 as of February 1, 2007 in which it was noted that the complaint was made after expiration of term.

According to the Civil Procedure Code of the Republic of Azerbaijan (hereinafter referred to as the CPC) in the cases specified by this Code, the ruling adopted by court in the form of the separate act can be appealed. The complaint is made within 10 days after official delivery of ruling to the party or receiving of it by party. If the ruling was declared at the persons having the right of its appeal, the term of the complaint is estimated from the date of the announcement of ruling. The complaint is considered by the court of the first instance that adopted the ruling within 3 days. If the complaint is proved, the judge changes or cancels ruling and together with the parties carries out the subsequent procedural actions for consideration of dispute. Otherwise, this complaint within 7 days after consideration together with case goes to court of appeal instance (Articles 267-269 and 369 of the CPC).

According to the Article 363.2 of the CPC, the ruling should be issued on return of appeal complaint. According to the Article 396.1 of the CPC, complaint may be submitted to court of first instance within 10 days of official presentation of ruling of court of first instance.

According to the Article 397 of the CPC, in the event of presence of grounds specified in Article 269.3 of this Code, initial complaint against ruling of court should be sent together with a case to court of appellate instance.

The civil procedural legislation provides that term for the complaints made about a judgment of the first instance is also estimated from the date of delivery to the party of the judicial act. According to the Article 360 of the CPC called “Period for submission of appeal complaint”, the appeal complaint may be submitted within 1 month of presentation (receipt) of decision.

As evident from case papers, Neftchali district court, returning to the applicant the complaint made about the decision referred to date of pronouncement of the decision, confirming obtaining this decision by the party on November 24, 2006, nevertheless, returned the complaint, being guided by absence of the petition for recognition of the expired term valid and its restoration.

In this regard Plenum of the Constitutional Court notes that the legislation provides under the expiration of the procedural term the expiration established by the law. The CPC provides the direct instruction on calculation of term from the moment of delivery (receiving) of the decision (ruling), but not from the date of its removal, except for the cases provided by the law. It means that date of pronouncement of the decision is not the basis for establishment of expiration, and court, referring only to date of pronouncement of the decision having no right to compel the party to show the petition for restoration of procedural term. The case when the party did not delay term, exempts it from presentation of such petition and obliges court to execute the next procedural actions provided by the legislation.

Besides, from case papers it is evident that the mentioned ruling declared in the absence of the applicant was handed to the applicant on December 28, 2006, and the applicant appealed against the specified ruling in court on the same day. While the court had to consider the complaint within 3 days, in case of validity of the complaint – to change or cancel definition and to execute together with the parties the subsequent procedural actions for dispute consideration, and otherwise - the complaint within 7 days after consideration together with case had to be sent to court of appeal instance, the court answered to applicant by the letter only after 33 days.

Article 60.1 of the Constitution guarantees the legal protection of rights and liberties of every citizen. The right of legal protection and the right of an appeal to the court covered by this right are widely reflected in the international legal acts as the right for fair trial. Article 6.1 of the European Convention on protection of human rights and fundamental freedoms specified that 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.

The Constitutional Court in the decision of April 23, 2004 on complaint lodged by executive power of Narimanov district of Baku concerning verification of conformity of the court decision to Constitution and legislation of Republic of Azerbaijan, referring to the decision of the European Court of Human Rights on case of Delur vs. Belgium, noted that the right to fair trial includes three elements:

1) existence of independent, impartial and legitimate courts

2) existence of broad jurisdiction for courts so that they can solve all the issues concerning the claim or criminal charge

3) existence of opportunity for every person to apply to the courts

Absence of one of these elements, as well as absence of the right to apply to the courts makes the right to fair trial meaningless.

The Constitutional Court also specified in this decision that the right of the person for an appeal to the court concerns all stages of trial.

In the given case, the court of the first instance, having answered contrary to requirements of the legislation to the applicant with the letter, deprived of his right of the apply in case of discontent with actions of court to the highest judicial authority, and thereby – protection of rights and freedoms by him in court of appeal instance.

Plenum of the Constitutional Court also notes that the court of the first instance responded to the complaint of the applicant 33 days later, having roughly broken the terms provided by the procedural legislation that it is also impossible to consider combined with one of the basic principles of the right for legal protection – the principle of consideration of the case of everyone in reasonable terms.

The legal position of the Constitutional Court on issue in the above-mentioned decision as of April 23, 2004 was that in the cases provided by the procedural legislation, an order and terms drawing up and the direction by court or the judge instead of the judicial act (the decision or ruling) any declarative decision, including the letter, depending on concrete cases can promote adoption of such decision or letter as the judicial act.

Thus, the letter of Neftchali district court No. 17 as of February 1, 2007 violated the right of the applicant for an appeal to the court that in turn led to exhaustion of the judicial remedies allocated for restoration of the violated rights.

Considering the above, Plenum of the Constitutional Court comes to conclusion that because of discrepancy of the letter of Neftchali district court No. 17 as of the February 1, 2007 (violating the right of applicant for an appeal to court and accepted as the judicial act) to the Article 60.1 of the Constitution, to the Articles 268-269 and 397 of the CPC to consider it as null and void.

Being guided by parts V, 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 the Constitutional Court of the Republic of Azerbaijan

**DECIDED:**

1. To Recognize the letter of Neftchali district court No. 17 of February 1, 2007 adopted as the judicial act in Fatulla Guliyev's claim against Gabil Guseynov concerning the requirement from Kyurgarabudzhagsky rural municipality of a salary and the dismissal wage as null and void in connection with its discrepancy with the Article 60.1 of the Constitution of the Republic of Azerbaijan, with the Articles 268-269 and 397 of the Civil Procedural Code of the Republic of Azerbaijan. To reconsider case according to the present decision, an order and the terms established by the civil procedure legislation of the Republic of Azerbaijan.

2. The decision shall come into force from the date of its publication.

3. The decision shall be published in “Azerbaijan”, “Respublika”, “Xalq Qazeti” and “Bakinskiy Rabochiy” newspapers, and “Bulletin of the Constitutional Court of the Republic of Azerbaijan”.

4. The decision is final, and may not be cancelled, changed or officially interpreted by any body or official.