**ON BEHALF OF REPUBLIC OF AZERBAIJAN**

**DECISION**

##### OF THE CONSTITUTIONAL COURT

##### OF THE REPUBLIC OF AZERBAIJAN

*On Article 228.5 of the Civil Code of the Republic of Azerbaijan*

# 27 May, 2008 Baku city

The Plenum of the Constitutional Court of the Republic of Azerbaijan composed of F.Abdullayev (Chairman), S.Salmanova, B.Garibov, E.Mamedov, F.Babayev, S. Hasanova, , R. Gvaladze (Reporter Judge), I.Najafov and A.Sultanov;

attended by the Court Clerk I.Ismayilov,

the legal representatives of the subjects interested in special constitutional proceedings: Y. Javadov, Judge of the Court of Appeal of Sumqayit city of Republic of Azerbaijan; A.Safihanli, Head of Department of Staff of Ombudsman and M. Mamedov, employee; I.Jafarov, senior adviser of department of the administrative and military legislation of Milli Meclis of the Republic of Azerbaijan;

the expert: A. Dunyamaliyeva, Head of Civil Law Chair of the Baku State University;

based on parts 6 and 7 of Article 130 of the Constitution of the Republic of Azerbaijan has examined in open court session the constitutional case on Article 228.5 of the Civil Code of the Republic of Azerbaijan;

having heard the report of Judge R.Qvaladze on appeal the Court of Appeal of Sumqayit city and on inquiry of Ombudsman of the Republic of Azerbaijan, the reports of the lawful representatives of the subjects interested in special constitutional proceedings and expert, the Plenum of Constitutional Court of the Republic of Azerbaijan

**DETERMINED AS FOLLOWS:**

According to Article 228.5 of the Civil Code of the Republic of Azerbaijan (hereinafter referred to as Civil Code), the family members of the owner of integral part of living space (husband, wife, parents, children) residing together with him, shall have the right of use of living space equally with him. Family members of the owner of integral part of living space are entitled to move their minor children in this building. Moving of other family members (husband, wife) in shall be permitted only with the owner's consent. The right of use of integral part of living space shall be reserved in case of divorce. The right of use of integral part of living space shall arise since the day of coming into force of this Code.

Court of Appeal of Sumqayit city having addressed to the Constitutional Court of the Republic of Azerbaijan (hereinafter referred to as Constitutional Court) asked to interpret expression “the owner's consent”, specified in the third sentence of Article 228.5 of the Civil Code. The appeal has been based on the fact that in judicial practice there were difficulties with application of the given norm as the legislation does not regulate a procedure of the noted provision.

Ombudsman of the Republic of Azerbaijan, having addressed to the Constitutional Court with inquiry, asked to verify the conformity of Article 228.5 of the Civil Code with the Constitution of the Republic of Azerbaijan (hereinafter referred to as Constitution).

The inquiry has been based on the fact that the providing in the challenged norm of preservation of the right of use of part of living space by other members of a family (wife, husband) of the owner of a part of a living space limits the property rights provided by Articles 13 and 29 of the Constitution even after termination of family relations with the owner. In inquiry it is also declared that the indication in the given article of appearance of the right of members of a family of the owner to a part of premises from the date of coming into force of the given Code contradicts to Article 149.7 of the Constitution.

Before resolving a matter in essence, it is necessary to note that the Constitutional Court adopted earlier the decisions concerning application of Article 228 of the Civil Code and has clarified a number of issues.

So, the Constitutional Court in its decision of 27 July 2001 “concerning interpretation of Article 228.2 of the Civil Code of the Republic of Azerbaijan and Article 123.1 of the Housing Code of the Republic of Azerbaijan” came to a conclusion that the disputes connected with legal relationships initiated in connection with usage of living space (apartment) after 1 September 2000 should be resolved via the procedure stipulated in Articles 228.1 and 228.2 of the Civil Code, and disputes connected with legal relationships initiated before the mentioned date – in accordance with provisions of Article 123 of the Housing Code.

Plenum of the Constitutional Court in the decision of 26 September 2007 on R.Agalarov's complaint in connection with Article 228.2 of the Civil Code noticed that the ownership right differs from the right of use of a living space, at the same time has come to a conclusion that both rights are subject to execution being in a sense of proportionally equated.

In the given decision it is specified that when family members (or persons equal to them) live in same apartment it is possible that one of them (or several of them) possesses the right to property (including the right to use of the residential area) over the apartment and the rest – only the right to use the residential area. In course of consideration of the dispute among these persons, the nature of the right to property and the right to use the residential area, their co-relation and provisions of the legislation of the Republic of Azerbaijan in force for their application should be considered.

The Plenum of the Constitutional Court according to the legal provision in the noted decisions considers necessary to carry out the legal analysis of the interrelations which have arisen between the ownership right and the right of use concerning a subject of inquiry and the appeal.

The legislator, proceeding from the constitutional principle of inviolability of the property and its protection by the state, has established the rules on the right of use of a part of living space in Article 228 of the Civil Code.

If the first part of Article 123 of the Housing Code of the Republic of Azerbaijan put into dependence the rights of members of a family of the owner of the apartment house installed by him in the house belonging to him on using premises in the house on the same level with him, on whether otherwise has been stipulated at their moving, then Article 228.1 of the Civil Code which came into force on 1 September, 2000 established that members of a family of the owner of a part of a living space and other persons possess the right of use of a living space on condition of registration of this right in the state register of real estate.

According to article 228.2 of the given Code, the appearance, enforcement conditions and termination of right of use of integral part of residential building shall be established by notarized written agreement concluded with owner. In the event of absence of agreement on termination of right of use of integral part of residential building this right may be terminated on the basis of claim of owner in via judicial procedure through payment of compensation equal to market price.

As it gets evident from articles 228.1 and 228.2 of the Civil Code, for appearance of the right of use of a part of living space the fulfillment of following indispensable conditions is required:

- the conclusion of the written agreement with the owner;

- notary certification of the given agreement;

- registration of the right of use in the state register of real estate.

Fixing of such rules is connected by that “the right to property in the Republic of Azerbaijan is not only a broad power of the proprietor reflected by the law (to own the property that belongs to him, to use this property as she/he wishes in accordance with the functions of the property and in accordance with his/her needs, and to determine legal regime of the property by his/her will) but also is the power, in the frame of the current legislation, to eliminate the interference by third parties to his/her powers over the property guaranteed by the state without damage to rights and lawful interests of others and to act on his/her choice, and in accordance with his/her interests. It should be emphasized that disposal of a property is possible by means of concluding of transactions or by virtue of other legal acts” (the decision of Plenum of the Constitutional Court on R.Agalarov's complaint).

By the Law of the Republic of Azerbaijan “On introduction of modifications and amendments into some acts of the Republic of Azerbaijan” of 21 October 2005 the Article 228.5 was added in the Civil Code (came into force on 14 December 2005).

Plenum of the Constitutional Court notes that the housing legislation is one of civil law integrals. While house premises are subject only to civil circulation the civil legislation regulates the questions connected with ownership, using and the deal with it. Using house premises, their maintenance and a number of other questions should be regulated by the housing legislation. But in other cases the leading role is played by the norms of the Civil Code directed at the relations developed in the sphere of r habitation including Article 228 of the Civil Code.

When defining the legal status of the users who are not the owner of a living space the distinction between “the ownership right to a living space” and “the right of use of a living space” should be taken into account.

The concept of “property right” is given in Article 152.1 of the Civil Code. According to given article, the ownership rights means acknowledged right, protected by the state, of a subject to possess, use and dispose of property (chattel) belonging to such subject at his discretion.

The first feature of the ownership right to a living space consists in realisation of the rights of the owner for a living space belonging to him according to property appointment that is only for personal residing of the owner and members of his family and also the transfer of a living space belonging to him for the purpose of residing of other persons on a paid or gratuitous basis. The living space cannot be used for other purposes. The second feature of the ownership right to a living space consists that getting apartment in a apartment building the owner receives not only the ownership right to a living space, but also a share in the general property on a building. The third feature of the ownership right to a living space is made by presence besides the owner of the rights of other persons living in a living space belonging to owner. Just at that moment the “a right of use of a part of living space” is beginning.

In Article 228.5 of the Civil Code it is fixed that family members of the owner of integral part of living space (husband, wife, parents, children), residing together with him, shall have the right of use of living space equally with him. Within the sense of the given article, the right of use equally with the owner of a living space of the husband, the wife, parents and children depends on their moving in a part of a living space and constant residing there with the consent of the owner. In this sense it is necessary to note that in connection with members of a family of the owner of a part of an apartment house Article 228.1 of the Civil Code bears wider character in comparison with Article 228.5 of the given Code. So, in Article 228.1 of the Civil Code it is told about members of a family of the owner whereas Article 228.5 of the given Code concerns only the members of a family living together with the owner. Apparently, the members of a family of the owner not living together with him do not fall under Article 228.5 of the Civil Code.

Reflection of a rule in Article 228.5 of the Civil Code in connection with provision of members of a family of the owner follows from an Article 17.2 and parts IV and V of Article 34 of the Constitution and also Article 1.3 of the Family Code of the Republic of Azerbaijan and Article 27.2 of the Civil Code. Provisions of the specified norms, along with other questions, state that the rights of wife and husband are equal, care and education of children constitute both right and responsibility of parents, the responsibility of children is to respect parents, look after them, members of a family should render each other mutual aid and bear responsibility before a family, unobstructed realisation of their rights and possibility of judicial protection of the specified rights, a residence of the persons who have not reached fourteen years should be provided, the residence of natural person under the age of 14 is the residence of his parents, provided that they have not been deprived of parental rights. Thus, the right of members of a family of the owner equal with the owner, living together with him, on using a part of living space arises not from the contract concluded with the owner, but only on the basis of reliable family relations with him.

It is necessary to note that for correct application of the rules of law regulating the property which object is the living space, it is necessary to spend a line between spheres of civil law and the housing right of the legislation. The right of members of a family of the owner to use a part of living space on the same level with him should be considered as a subject (object) of the housing right and the granted right of members of a family should be estimated as including the using of living space which is available in the property of one of them, on the same level with owner.

And presence of the granted right does not influence on alienation of the given property or realisation by the owner of the right of the order by other way, as the right of members of a family of the owner to using a part of a living space on a level with owner does not make the right of use which is one of elements of the property right, provided in Article 152.1 of the Civil Code. For occurrence of the right of use of a part of living space (a being integral of the property right) observance of Articles 228.1 and 228.2 of the Civil Code is required.

Article 228.5 of the Civil Code also provides that family members of the owner of integral part of residential building are entitled to move their minor children in this building. And as to moving in of other members of a family (the husband, the wife), Article 228.5 of the Civil Code has caused the moving in of the given persons with the consent of the owner. Within the sense of these provisions of law, for moving in by members of a family of the owner of an integral part of a living space of the husband or the wife in the given area the consent of the owner is required. Apparently, the legislation has provided for possibility of moving in of the persons noted in this provision in an integral part of a living space. But the establishment of the consent of the owner especially as an indispensable condition specifies that the right of use obtained by mentioned persons on an integral part of a living space should be estimated as the real right from the point of view of civil law.

According to inquiry in practice there is a various qualification of the given provision reflected in Article 228.5 of the Civil Code that is “the consent of the owner”, including acceptance of absence of objection from the owner on moving in of other persons for the actual consent.

Plenum of the Constitutional Court notes that according to Article 94.1.13 of the Constitution, the establishment of the general rules in connection with the ownership right falls within the competence of Milli Majlis of the Republic of Azerbaijan.

As to legal provision expressed in the decision of the European Court of Human Rights of 21 September 2004 on case of Schirmer v. Poland, the second point of Article 1 of the Protocol 1 of the Convention “On Protection for the Human Rights”, reserves to States the right to enact such laws as they deem necessary to control the use of property in accordance with the general interest. Such laws are especially common in the field of housing, which in our modern societies is a central concern of social and economic policies (§ 34).

The constitutional law doctrine recognises a principle of legal certainty as one of basic elements of rule of the law, found its the reflection in a preamble of the Constitution of the Republic of Azerbaijan. And the principle of legal certainty, along with other requirements, provides for clearness and definiteness concerning an existing legal situation in the most general sense. From this point of view, people should trust reliability of the data of the state register of real estate via the procedure established by the law. People should not expect constantly other new data calling the data obtained from this register into question having changeable character and becoming the reason of negative consequences for them.

From this point of view it is necessary to underline that qualification of provision “the consent of the owner” reflected in Article 228.5 of the Civil Code, in contradiction with Articles 228.1 and 228.2 of the given Code, can lead to discrepancy with the provisions of Article 13 (inviolability of the property), Article 29 (ownership right), Article 147 (legal force of the Constitution) and Article 149 (inadmissibility of the contradiction of laws to the Constitution) of the Constitution.

Thus, Plenum of the Constitutional Court considers that provision “the consent of the owner”, reflected in Article 228.5 of the Civil Code, should be interpreted from the point of view of requirements of Articles 228.1 and 228.2 of the given Code, “the consent of the owner”, provided in this norm, should be expressed in the agreement concluded in written form. Such interpretation of the given provision does not break the guarantees and the rights of the owner fixed in Articles 13 and 29 of the Constitution.

In inquiry of the Ombudsman there is also challenged the conformity of provision “the right of use of integral part of residential building shall be reserved in case of divorce” of Article 228.5 of the Civil Code with the Constitution.

The right of use which has arisen among other members of a family on a integral part of an apartment house by the written agreement, notary certification and registration in the corresponding register via the procedure specified in challenged provision, according to abovementioned legal provision of Plenum of the Constitutional Court and according to Articles 228.1 and 228.2 of the Civil Code, is not connected with existence of marriage relations in any form.

As it is noted, the termination of the right of use of integral part of a living space is established by the written agreement concluded with the owner according to Article 228.2 of the Civil Code and certificated by notary. In the absence of agreement on the termination of the right of use of integral part of a living space, the granted right can be stopped on request of the owner via judicial procedure by payment of corresponding indemnification at the market price.

Plenum of the Constitutional Court according to the legal provision set forth above comes to such conclusion that the right of use of integral part of a living space, registered in the state register of real estate on the written agreement certified by notary, according to Articles 228.2 and 228.5 of the Civil Code, possesses an independent essence, and the conditions of termination of the granted right depend on the will of the parties expressed in the agreement (in the agreement linkage of the termination of the granted right with divorce is not excluded).

And as to the second provision challenged by the applicant, it is necessary to note that in Article 228.5 of the Civil Code there has found its the reflection the provision “the right of use of members of a family of the owner of an integral part of a living space arises from the date of coming into force of the present Code”. By implication of the given legal norm, the provisions of Article 228.5 of the Civil Code connected with the right of use of members of a family of the owner for integral part of a living space, have a retroactive effect covering also the date of entry into force of the Civil Code of the Republic of Azerbaijan.

Plenum of the Constitutional Court in this connection notes that, according to Article 149.7 of the Constitution, the normative acts that improve legal conditions of individuals and legal entities that lift or mitigate the legal responsibilities have retroactive force. Other normative legal acts not have retroactive force.

According to Article 98 of the Constitution if not specified otherwise in the law and decree of Milli Majlis of the Republic of Azerbaijan themselves the law and decree become valid from the date of their publication. According to a legal provision of Plenum of the Constitutional Court, reflected in its decision of 7 September 2004 “On interpretation of Part II of the Law of the Republic of Azerbaijan “On introduction of modifications and amendments to Tax Code of the Republic of Azerbaijan” of 28 November 2003”, within the sense of given Article if in the law and decree the date of their entry into force is specified then law and the decree come into force from the indicated date.

According to legal position of the European Court of Human Rights, the retrospective civil legislation is not expressly prohibited by the provisions of the Convention and in certain circumstances may be justified (the decision of 28 March 2006, case of Melnyk v. Ukraine, § 30).

At the same time, according to Article 7.1 of the Civil Code concerning application of civil law in time, provisions of civil law, except those provided in Article 149, Chapter VII of the Constitution of the Republic of Azerbaijan, do not have retroactive effect and only apply to relationships created after the enactment of such law. According to Article 7.2 of the present Code, the civil law may not have retroactive effect also in cases specifically provided by the law. And in Article 7.3 of this Code it is provided that the civil law may not have retroactive effect where it causes harm to subjects of the civil law or worsens their position.

Plenum of the Constitutional Court underlines that the recognition of normative legal act as improving a legal status of individuals and the juridical entity, eliminating or softening legal responsibility is connected with positive influence on the rights and freedom of each participant of the relations regulated by it. And from the point of view of the abovementioned legal position of Plenum of the Constitutional Court concerning Article 228.5 of the Civil Code, provisions of given article do not worsen a legal status of any participant of civil-law relations, including the owner, on the contrary, providing the certain rights concerning the owner and members of his family, improve their legal status, doing its clearer. And as to other members of a family provided in Article 228.5 of the Civil Code, by the abovementioned legal position of Plenum of the Constitutional Court, in view of origin of the right of use by the given persons of a integral part of a living space according to Articles 228.1 and 228.2 of the Civil Code, the retroactive effect of contentious provision does not lead to change of a legal status neither these persons, nor the owner.

Plenum of the Constitutional Court, having come to a conclusion that the ownership right and the right of use of a living space are subject to guaranteeing, being in a sense proportionally equated, also considers necessary to note that during the last years there was a set of questions concerning mutuality of norms of the Civil Code and the Housing Code. Without going deep into the arisen problem, it is necessary to note that the Housing Code adopted more than twenty five years ago long time does not correspond to the public relations which have developed in new existing social and economic conditions because is directed on regulation of social lease contracts of the living space concerning in basic to state and public housing facilities. From this point of view, existing legal conditions demand adopting of the housing legislation regulating a legal status of members of a family of the owner and other persons.

According to the above-stated, the Plenum of the Constitutional Court comes to such conclusion:

* as to constitutional-legal sense, the provision “the consent of the owner”, reflected in Article 228.5 of the Civil Code should be applied according to requirements of Article 228.2 of the given Code and the consent of the owner should be expressed in the notarized written agreement;
* provision “the right of use of integral part of residential building shall be reserved in case of divorce”, reflected in Article 228.5 of the Civil Code, should be recognised as corresponding to the Constitution and is defined by the agreement concluded by the parties in writing according to Article 228.2 of the Civil Code on the termination of the right of other persons on using of a integral part of a living space (in the agreement connection of the termination of the granted right with marriage is not excluded);
* provision “the right of use of integral part of residential building shall arise since the day of coming into force of this Code”, provided in Article 228.5 of Civil Code, should be considered as corresponding to Article 149.7 of the Constitution;

It should be recommended to Milli Majlis of the Republic of Azerbaijan to adopt the housing legislation regulating a legal status of members of a family of the owner of a living space and other persons.

Being guided by Parts V and VI of Article 130 of the Constitution of Republic of Azerbaijan, Articles 52, 60, 62, 63, 65-67 and 69 of the Law of Republic of Azerbaijan “On Constitutional Court”, the Constitutional Court of Republic of Azerbaijan

**DECIDED:**

1. Provision “the consent of the owner” of Articles 228.5 of the Civil Code of the Republic of Azerbaijan, corresponding to the procedure established in Article 228.2 of the given Code, provides for agreement made in written form and certified by notary.

2. To recognize the provision “the right of use of integral part of residential building shall be reserved in case of divorce” of Articles 228.5 of the Civil Code of the Republic of Azerbaijan as corresponding to Articles 13 and 29 of the Constitution of the Republic of Azerbaijan.

The issues connected with the termination of the right of other persons for using of a integral part of a living space, should be resolved according to Article 228.5 of the Civil Code of the Republic of Azerbaijan.

3. To recognize provision “the right of use of integral part of residential building shall arise since the day of coming into force of this Code” of Articles 228.5 of the Civil Code of the Republic of Azerbaijan as corresponding to Article 149.7 of the Constitution of the Republic of Azerbaijan.

4. To recommend to Milli Majlis of the Republic of Azerbaijan to adopt the housing legislation regulating a legal status of members of a family of the owner of a living space and other persons.

5. The decision comes into force from the date of its announcement. According to Article 130.9 of the Constitution of the Republic of Azerbaijan, effect of the present decision extends on the disputes considered after its coming into force.

6. The decision is a subject to publication in the "Azerbaijan" newspaper and “Bulletin of the Constitutional Court of Azerbaijan Republic”.

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