**ON BEHALF OF THE REPUBLIC OF AZERBAIJAN**

**DECISION**

**OF THE PLENUM OF THE CONSTITUTIONAL COURT**

**OFTHEREPUBLICOFAZERBAIJAN**

*On verification of conformity of decision of the Judicial Board on Civil Cases of the Supreme Court of the Republic of Azerbaijan dated 12 September 2007 to Constitution and laws of the Republic of Azerbaijan in connection with the complaint of Svetlana Aliyeva*

**18 July 2008 Baku city**

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

with participation of the secretary I.Ismayilov,

applicant S.Aliyeva and her representativeA.Gasimov

representative of respondent body – R.Akperov, employee of Staff of the Supreme Court of the Republic of Azerbaijan

in accordance with Article 130.5 of the Constitution of the Republic of Azerbaijanexamined in open judicial session via special constitutional proceedings the case on verification of conformity of decision of the Judicial Board on Civil Cases of the Supreme Court of the Republic of Azerbaijan of 12 September 2007 to Constitution and laws of the Republic of Azerbaijan in connection with the complaint of S.Aliyeva.

Having heard the report of Judge S.Salmanova, speech of the representatives of applicant and respondent body, having considered materials of the case, Plenum of the Constitutional Court

**DETERMINED AS FOLLOWS:**

From the complaint made by S. Aliyeva to the Constitutional Court of the Republic of Azerbaijan (hereinafter referred to as the Constitutional Court), it is seen that her son Teymur Aliyev and Kyamalya Aliyeva married on December 11, 2004. S. Aliyeva gave oral consent to their temporary residence in the apartment No. 9 of building No. 48, on M. Subkhi street of the Baku city that is in her property (hereinafter referred to as the disputed apartment). S. Aliyeva together with her husband live on other address.

In the complaint it is noted that, despite of accommodation of the son and daughter-in-law in this apartment since December 11, 2004, the applicant did not allow them to register to this address. T. Aliyev and K. Aliyeva has no children in marriage and on July 24, 2007 the marriage was dissolved by a judgment of the Nizami district court of Baku city.

K. Aliyeva before cancellation of her marriage with T. Aliyev appealed to Yasamal district court of the Baku city (hereinafter referred to as the Yasamal district court) with the claim for recognition of her right of use of the disputed apartment and registration.

By a judgment of the Yasamal district court as of February 28, 2007 her claim was rejected, the counterclaim of S. Aliyeva was satisfied and adopted decision on K. Aliyeva's eviction from the disputed apartment and S. Aliyeva's moving in this apartment as the owner.

By the decision of Judicial Board on Civil Cases of the Court of Appeal of the Republic of Azerbaijan (hereinafter referred to as the JBCC of the Court of Appeal) as of May 16, 2007 the appeal complaint of K. Aliyeva was partially satisfied, and judgment of the Yasamal district court regarding a rejection of primary claim and “eviction of K.Aliyeva from the disputed apartment” was canceled according to the counterclaim; also the right of the claimant K. Aliyeva to accommodate in this apartment and to register there was recognized.

The Judicial Board on Civil Cases of the Supreme Court of the Azerbaijan Republic (hereinafter referred to as the JBCC of the Supreme Court) by the decision as of September 12, 2007 upheld the decision of JBCC of the Court of Appeal dated May 16, 2007.

Chairman of the Supreme Court of the Republic of Azerbaijan by the letter as of November 14, 2007 in response to the additional appeal of the applicant informed concerning the lack of grounds for presentation of case for consideration by Plenum of the Supreme Court.

S. Aliyeva specified in the constitutional complaint that the above-noted judicial acts do not correspond to the Articles 13, 29, 60 and 71 of the Constitution of the Republic of Azerbaijan (hereinafter referred to as the Constitution), the Article 6 of the Convention “On Protection of Human Rights and Fundamental Freedoms” and the Article 1 of the Protocol No. 1 to the Convention and asked to recognize them as void.

In the complaint it is specified that JBCC of the Supreme Court, having upheld the judgment of appeal instance, did not motivate the decision, did not consider the official interpretation expressed in the decision of the Constitutional Court of July 27, 2001 concerning interpretation of Article 228 of the Civil Code and Article 123.1 of the Housing Code of the Republic of Azerbaijan, that is obligatory for courts.

In the complaint it is noted that the applicant addressed to the Supreme Court with the petition requiring inquiry by the Constitutional Court for the purpose of verification of compliance of the Article 228.5 of the Civil Code of the Republic of Azerbaijan (hereinafter referred to as the CC) with the Constitution, but the Supreme Court not only did not satisfy this petition, but even did not give in the decision any explanations concerning that issue.

The applicant for justification of the position also referred to a number of precedents of the European Court of Human Rights concerning “the property right” and “the principle of legal certainty”.

Plenum of the Constitutional Court in connection with the complaint considers necessary to note the following.

The property in the Republic of Azerbaijan is inviolable and is protected by state. Everyone has the right to own property. Right of ownership envisages the rights of owner to own property on his or her own or together with others, to use the property and to make arrangements for it (Articles 13 and 29 of the Constitution).

According to the Article 1 of the Protocol No. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms, every natural or legal person is entitled to the peaceful enjoyment of his possessions.

No one shall be deprived of his/her possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

According to the concept of the property right given in the Article 152.1 of the CC, the property right means acknowledged right, protected by the state, of a subject to possess, use and dispose property (chattel) belonging to such subject at his/her discretion.

It should be noted that the Constitutional Court adopted number of decisions concerning the Article 228 of the CC.

Thus, the Constitutional Court, in the decision dated July 27, 2001 “On interpretation of the Article 228 of the Civil Code of the Republic of Azerbaijan and the Article 123.1 of the Housing Code of the Republic of Azerbaijan” the Constitutional Court, considering force of the law on time, specified that the disputes concerning the legal relations that arose after 1 September 2000 have to be solved in accordance with the rules of Articles 228.1 and 228.2 of the Civil Code and the disputes connected with legal relations established prior to this date are to be solved in accordance with the rules of Article 123 of the Housing Code.

In the decision as of September 26, 2007 according to R. Agalarov's complaint concerning verification of compliance of judicial acts to the Constitution and to laws the Constitutional Court cleared up some issues connected with providing the corresponding compensation at market value according to the requirement of the owner of a right of use of a component of living space in a judicial proceeding. The Constitutional Court also emphasized that the property right 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. The Court in this decision noted that the property right differs from a right of use of living space, at the same time came to a conclusion that both rights are subject to providing, being in a sense in proportion leveled.

Plenum of the Constitutional Court notes that after receipt of the complaint of the applicant the appeal of Court of Appeal of Sumgait city and inquiry of the Ombudsman also came to the Constitutional Court for the purpose of elimination of the difficulties which arose in connection with application of the Article 228 of the CC.

In this regard consideration of the complaint of S. Aliyeva is postponed until consideration of noted inquiry and the address on a being and adoptions of the relevant decision. On May 27, 2008 the Plenum of the Constitutional Court adopted the decision concerning the Article 228.5 of the Civil Code of the Republic of Azerbaijan. Just after that, it was decided to consider S. Aliyeva's complaint in essence.

Plenum of the Constitutional Court in the decision concerning Article 228.5 of the CC noted that, as evident from sense of Articles 228.1 and 228.2 of the CC, emergence of a right of use of a component of a residential building requires execution of the following indispensable conditions:

– conclusion of the written agreement with the owner;

– notarization of this agreement;

– registration of a right of use in the state register of real estate.

The Constitutional Court which noted in the specified decision 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.

Plenum of the Constitutional Court in the decision came to a conclusion that provision “the consent of the owner”, reflected in the 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, has to be expressed in the agreement concluded in writing, and notarization.

Thus, similar interpretation of this provision does not violate the right of the owner. On the contrary, qualification of provision “the consent of the owner” reflected in Article 228.5 of the Civil Code, in contradiction with the Articles 228.1 and 228.2 of the given Code, can lead to discrepancy with the provisions of the Article 13 (inviolability of the property), the Article 29 (ownership right), the Article 147 (legal force of the Constitution) and Article 149 (inadmissibility of the contradiction of laws to the Constitution) of the Constitution.

From the circumstances of a civil case established by courts is clear that K. Aliyeva did not conclude with the mother-in-law S. Aliyeva (who is the owner of the disputed apartment) the written notarized agreement on emergence, conditions of implementation and termination of a right of use of a component of living space.

Considering a civil case in K. Aliyeva's claim, court of the first instance, referring to the decision of the Constitutional Court on interpretation of the Article 228 of the Civil Code and the Article 123.1 of the Housing Code of the Republic of Azerbaijan, rejected the claim requirement.

But the Court of Appeal in the decision as of May 16, 2007 noted that the court of the first instance did not consider Article 228.5 of the CC, and, having interpreted the provision of this norm “consent of the owner” in a contradiction with Articles 228.1 and 228.2 of the CC as consent, estimated the oral consent of S. Aliyeva as the basis granting K. Aliyeva a right of use on the apartment (the right of accommodation and the right of a registration) which is in her property and came to a conclusion on satisfaction of primary claim.

As appears from the above legal position of the Constitutional Court, the court of appeal instance did not consider the requirement of Articles 228.1 and 228.2 of the CC and interpreted the provision of Article 228.5 of the CC concerning consent of the owner incorrectly, adopt the decision which is not coordinated with guarantees of legal protection of the property right, the rights and freedoms of the applicant.

The JBCC of the Supreme Court which considered case in a cassation order without having fulfilled requirements of Articles 416, 417.3 and 418.1 of the CPC, uphold the judgment of appeal instance which is not corresponding to the content of norms of the Civil Code.

Thereby, the property right of the applicant guaranteed by the Article 29 and the right for legal protection guaranteed by the Article 60.1 of the Constitution is violated.

Plenum of the Constitutional Court, considering the above, comes to conclusion that the decision of JBCC of the Supreme Court as of September 12, 2007 on a civil case in K. Aliyeva's claim against S. Aliyeva for recognition of right of accommodation for the apartment and registration, and the counterclaim of S. Aliyeva concerning eviction of K. Aliyeva from the apartment and moving in the apartment has to be recognized as void in view of its discrepancy with the Article 29 and Article 60.1 of the Constitution, with the Articles 416, 417.3 and 418.1 of the CPC, and reconsider the case according to the present decision, an order and the terms established by the civil procedure legislation of the Republic of Azerbaijan.

Being guided by parts V and IX of Article 130 of the Constitution of the Republic of Azerbaijan, Articles 52, 60, 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 decision of JBCC of the Supreme Court dated September 12, 2007 on a civil case in the claim Kamalya Aliyeva against Svetlana Aliyeva concerning recognition of the right of accommodation in the apartment and registration, and the counterclaim of S.Aliyeva concerning eviction of K.Aliyeva from the apartment and moving into the apartment as null and void due to its discrepancy with the Articles 29 and 60.1 of the Constitution, with the Articles 416, 417.3 and 418.1 of the CPC. To reconsider case according to the present decision, in order and terms established by 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.