**ON BEHALF OF THE REPUBLIC OF AZERBAIJAN**

**DECISION**

# OF THE PLENUM OF THE CONSTITUTIONAL COURT

**OF THE REPUBLIC OF AZERBAIJAN**

*On the review of the complaint by R.Zulfugarov concerning conformity of the decision of the Civil Board of the Supreme Court of 02 August 2007 to the Constitution and laws of the Republic of Azerbaijan*

**20 November, 2008 Baku city**

The Plenum of the Constitutional Court of the Republic of Azerbaijan composed of Judges F.Abdullayev (Chairman), F.Babayev, B.Qaribov, R.Qvaladze (Reporter Judge), E.Mammadov, I.Najafov, S.Salmanova and A.Sultanov;

attended by Court Clerk I.Ismayilov,

the complainant R.Zulfugarov,

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

has examined in open session via special constitutional proceedings in accordance with Article 130 Section V of the Constitution of the Republic of Azerbaijan by complaint of R. Zulfugarov the constitutional case on conformity of the decision of the Civil Board of the Supreme Court of the Republic of Azerbaijan of 2 August 2007 to the Constitution and laws of the Republic of Azerbaijan.

Having heard report of Judge R. Gvaladze and statements of complainant and respondent’s representative, studied materials and examined the case, the Plenum of the Constitutional Court of the Republic of Azerbaijan

**DETERMINED AS FOLLOWS:**

Karim Mammadov brought a suit to the Guba City District Court concerning the drive out, destruction of building and payment of compensation. Besides, in the cross-claim against R.Zulfugarov and Executive Power of Guba District K. Mammadov asked from the Head of Executive Power of Guba District for termination of authorization for construction of commercial facility on the 374 square meter ground area allocated to him from the territory of the “Guba-Istehsalat” Joint-Stock Company of Open Type (hereinafter referred to as JSCOT).

The suit was grounded on the fact that R.Zulfugarov occupied the land property of K.Mammadov and started the construction of building on that territory and in spite of numerous admonitions made he (R.Zulfugarov) did not leave the land property.

On 10 April 2006 Guba District Court refused to receive the case for examination.

On 22 June 2006 the Civil Board of the Court of Appeal of the Republic of Azerbaijan upheld the above judgment of the Guba District Court.

On 22 September 2006 the Civil Board of the Supreme Court of the Republic of Azerbaijan abolished the mentioned judgment of the Court of Appeal and sent it back for re-examination.

On 28 December 2006 the Civil Board of the Court of Appeal abolished the decision of Guba District Court and decided to consider null and void the protocol N4 of “Guba-Istehsalat” JSCOT, on 3 September 2004 - concerning the allocation of 374 square meter ground area and the authorization N192, on 23 July 2005 concerning construction of commercial facility, the driving out of R.Zulfugarov from occupied territory, destruction of facilities and payment of compensation.

On 2 August 2007 the Civil Board of the Supreme Court upheld the judgment of the Court of Appeal.

An additional cassation claim by the complainant about bringing the case before the Plenum of the Supreme Court was dismissed for the lack of merits by the letter of the Chairperson of the Supreme Court of 5 October 2007.

In his complaint lodged with the Constitutional Court of the Republic of Azerbaijan (hereinafter referred to as Constitutional Court) R.Zulfugarov indicated that he was not informed concerning the place and date of examination at appeal instance and therefore the case examinations were held without his participation. Also he did not delegate anybody to represent him during court sessions.

In spite of law violations of appeal instance the Civil Board of the Supreme Court having not paid attention to the evidences indicated in complaint upheld the ill-grounded and unlawful ruling.

Applicant considers that during the court sessions his right for legal protection guaranteed by the Article 60 of the Constitution of the Republic of Azerbaijan (hereinafter referred to as Constitution) was violated.

The Plenum of the Constitutional Court emphasized the below-mentioned in relation to the complaint of R.Zulfugarov.

According to Article 60.1 of the Constitution the legal protection of rights and liberties of every citizen shall be ensured.

The ensuring of legal protection on the basis of right to fair trial by an independent court is prescribed by international law (Article 8 of the Universal Declaration of Human Rights, Article 14.1 of the International Covenant on Civil and Political Rights, Article 6.1 of the Convention for the Protection of Human Rights and Fundamental Freedoms).

According to requirements of the Constitution of the Republic of Azerbaijan and norms of international law the justice in its meaning should respond to notion of fairness and effectively ensure the rights restoration.

The judicial act adopted after court session held with the violations of law could not be considered as a fair justice.

According to the Article 140.1 of the Code of Civil Procedure of the Republic of Azerbaijan (henceforth “CCP”) persons participating in case should be notified of time and place of a court session. Persons participating in case should be notified of time and place of a court session, as well as of performance of individual procedural actions by writs (Article 140.3 of CCP). Writs should be dispatched to the address specified by a person participating in case. Where a person is not resident at the address notified to the court, it should be permitted to dispatch a writ to his place of work (Article 140.6 of CCP). Writs should be delivered by post or through persons commissioned by the judge. Time of presentation of writ to the recipient should be shown on the part of the writ to be returned to the court (Article 142.1 of CCP).

The Plenum of the Constitutional Court considers that the court of appeal instance broke the requirements of civil procedure legislation. Thus, as evident from the materials of the case the court of appeal instance assigned the date of examination on 8 and 26 December 2006 and in this connection sent the writ to R.Zulfugarov. But, in this writ were indicated not an exact address of R.Zulfugarov but only a district. And in the materials of the case there is no information concerning delivery of writ to R.Zulfugarov.

As the European Court of Human Rights noted in its judgment on the case of *Groshev vs. Russia* of 20 October 2005 – Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective. Court considers that the right to a fair and public hearing would be devoid of substance if a party to the case were not apprised of the hearing in such a way so as to have an opportunity to attend it, should he or she decide to exercise the right to appear guaranteed in the domestic law.

As it is also evident from the materials of the case, R.Zulfugarov gave the notarized authorization to M.Azizov to represent him in all judicial instances. When the case was sent back for re-examination, the court of appeal instance sent writ also to M.Azizov as to representative of R.Zulfugarov. But there is no document in the civil case confirming that M.Azizov received the writ and would participate at hearing of a case.

As it is evident from the minutes of judicial sitting the court hearing was started on 8 December 2006 and by the motion of the representative of respondent R.Zulfugarov the court session was postponed for 26 December 2006. There is no document in the records of judicial sitting indentifying the personality of representative of respondent R.Zulfugarov. In the record of judicial sitting held on 26 December 2006 it is indicated that R.Zulfugarov was represented by Elkhan Jafarov. But there is no document certifying the representative authorities and no notarized authorization given by R.Zulfugarov in the materials of the case.

According to Article 73.1 of CCP the powers of a representative shall be legalized through power of attorney issued and legalized in the order specified by law. The court of appeal instance during second trial breached Article 373 of CCP by involving of E.Jafarov as representative of R.Zulfugarov without inspection of authorization documents and without attaching of such document to the case materials.

The court of appeal instance violated the main principles of civil procedure legislation those are the principles of contentiousness and equality of parties not legally ensuring the participation of F.Zulfugarov at court sessions.

According to the Article 127.2 of the Constitution in consideration of legal cases the judges shall be impartial, fair, they should provide juridical equality of parties, act based on facts and according to the law. Based on this norm Article 9.1 of CCP stipulates that justice should be exercised based on facts, principle of contentiousness and equality of parties. Judge should always secure compliance with the principle of contentiousness. Judge should base his decision solely upon reasons discussed in compliance with the principle of contentiousness, explanations and documentation submitted by parties. Court shall not be entitled to make its decision based upon reasoning put forward by the court in virtue of its professional status (Article 9.3 of CCP).

In its judgment on the case of *Krčmář and others v. the Czech Republic* of 3 March 2000 the European Court of Human Rights noted that the principle of equality of arms, which is one of the elements of the broader concept of a fair hearing, requires each party to be given a reasonable opportunity to present its case under conditions that do not place it at a substantial disadvantage *vis-à-vis* its opponent (§39).

Thus during examination of the case the court of appeal instance violated Article 127.2 of the Constitution, Articles 9.1, 9.3, 73.1, 140.1, 140.3, 140.6, 142.1, 373 of CCP and thereby violated the right to legal protection ensured by Article 60 of the Constitution.

With the view to ensure the detection of judicial errors the Article 416 of CCP specifies that the Court of cassation instance should verify correct application by court of appeal instance of material and procedural norms of law.

Violation or incorrect application of material and procedural norms of law shall be a ground for repeal of resolution or ruling of court of appeal instance. (Article 418.1 of CCP). Resolution or ruling of court of appeal instance should, irrespective of complaints arguments, be repealed in the following circumstances where the case was heard by court in absence of any persons participating in case not being duly notified by court of place and time of court session (Article 418.4.5 of CCP).

R.Zulfugarov indicated in his cassation complaint that court of appeal instance held its session without sending the notification to him concerning the place and time of court session, admitted to court session as his representative the person who did not have any legal authorization and thus breached his constitutional right to legal protection.

As evident from the materials of the case, court of cassation instance attached no importance to facts that were indicated in the complaint of F.Zulfugarov and not considering the examination by court of appeal instance of the case with the violation of legal norms, upheld the decision.

The Plenum of the Constitutional Court concluded that because the decision of the Civil Board of the Supreme Court of 02 August 2007 in the civil action of K.Mammadov against R.Zulfugarov concerning the drive out, destruction of building and payment of compensation contradicts to Articles 60.1 of the Constitution and Articles 416, 418.4.5 of the CCP, the said decision shall be considered as null and void. Therefore, the case must be examined in the manner and in time prescribed by the civil procedure legislation of the Republic of Azerbaijan.

Being guided by Article 130 Sections V and IX 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 Constitutional Court, the Plenum of the Constitutional Court

**DECIDED:**

1. Since the decision of the Civil Board of the Supreme Court of 2 August 2007 contradicts to Article 60.1 of the Constitution of the Republic of Azerbaijan and Articles 416 and 418.4.5 of the CCP, the said decision in the civil case concerning the suit by Karim Mammadov against Rahim Zulfugarov to evict the latter from the land occupied by him, destruction of building and payment of compensation, shall be considered as void. In accordance with this Decision the case must be re-examined in the manner and in time prescribed by the civil procedure legislation of the Republic of Azerbaijan.
2. The Decision shall become effective immediately after its announcement.
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 any person or official.