**ON BEHALF OF THE REPUBLIC OF AZERBAIJAN**

**DECISION**

**OF THE PLENUM OF THE CONSTITUTIONAL COURT**

**OF THE REPUBLIC OF AZERBAIJAN**

*Concerning Article 1 of the Law of the Republic of Azerbaijan “On perpetuating the name of shahid and benefits to families of shahids”*

**30 December 2008 Baku city**

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

with participation of the secretary I.Ismayilov,

the legal representative of the subject interested in special constitutional proceedings: I.Veliyev, Judge of the Court of Appeal of Baku city and M.Buzagov, senior adviser of Department for Social Legislation of Milli Majlis of the Republic of Azerbaijan;

specialists: Sh. Yusifov, Chairman of Judicial Board on Criminal Cases of military courts of the Supreme Court of the Republic of Azerbaijan, Ch. Mamedov, Deputy Minister of Defense of the Republic of Azerbaijan and R. Kishiyev, Head of Legal Department of the Ministry of Defense of the Republic of Azerbaijan, E.Mamedov, senior adviser of Head Department of the Legislation of the Ministry of Justice of the Republic of Azerbaijan, R. Murshudov, deputy head of department of Pension policy of the Ministry of Labor and Social Protection of the Population of the Republic of Azerbaijan;

in accordance with Article 130.6 of the Constitution of the Republic of Azerbaijanexamined in open judicial session via special constitutional proceedings the case concerning interpretation Article 1 of the Law of the Republic of Azerbaijan “On perpetuating the name of shahid and benefits to shahid’s families”.

Having heard the report of Judge A.Sultanov, speech of the legal representative of the interested subjects and specialists, having considered materials of the case, Plenum of the Constitutional Court

**DETERMINED AS FOLLOWS:**

Kenul Veliyeva appealed to court with the special statement of claim to the Ministry of Defense of the Republic of Azerbaijan conferring the status of “shahid”.

The claimant indicated that her husband Khalid Veliyev who is carrying out a military service in the military unit in the Gedabek area which is a part of the Ministry of Defense of the Republic of Azerbaijan (hereinafter referred to as the Ministry of Defense), on January 27, 2006 executing instructions given by his commander on restoration of interrupted communication with the post of military unit located face to face with the enemy died, having got under the snow collapse which is suddenly broken from the mountain.

On the address concerning perpetuation of her late husband’s name she was refused by the letter of the head of Department of Military Ranks and Awards of Department of Personnel and Military Education of the Ministry of Defense as of August 23, 2007. In this letter with reference to point 1.2.6 of “Rules of perpetuation of a name of the shahid and application of benefits to families of shahids” (hereinafter referred to as the Rules), approved by the resolution of the Cabinet of Ministers of the Republic of Azerbaijan (hereinafter referred to as the Cabinet of Ministers), it is told that assignment is impossible for her husband of the status of the shahid as he died not from a bullet wound or having been undermined on a mine. K. Veliyeva disagreeing with it asked court to recognize the above-noted letter illegal and to oblige the Ministry of Defense to provide her husband with status of shahid.

The court of the Sabail district which considered case, having established that the late H.Veliyev died on January 27, 2006 as a result of a snow collapse while being at his military service, having come to conclusion that the name of the shahid from the point of view of point 1.2.6 of Rules should not be appropriated to him, by the decision of December 7, 2007 rejected the claim.

The applicant, being dissatisfied with judgment of the first instance, made the appeal complaint. During consideration of the case as the appeal the claimant, having submitted the petition, asked to appeal to the Constitutional Court of the Republic of Azerbaijan (hereinafter referred to as the Constitutional Court) in connection with this issue. Judicial Board on Civil Cases of the Court of Appeal of Baku city, having agreed with this petition, satisfied it by the ruling dated July 4, 2008 and decided to appeal to the Constitutional Court.

Court of Appeal of Baku city (hereinafter referred to as the Court) in the appeal asks to give interpretation of the Article 1 of the Law of the Republic of Azerbaijan “On perpetuation of shahid name and benefits to families of shahids” as of September 3, 1993 (hereinafter referred to as the Law “On perpetuation of shahid name and benefits to families of shahids”) from the point of view of the point 1.2.6 of the “Rules of perpetuation of shahid name and application of benefits to families of shahids”, approved by the resolution of the Cabinet of Ministers of the Republic of Azerbaijan dated January 15, 1994.

The address was proved by that, despite of definition of concept of the shahid in Article 1 of the Law of the Republic of Azerbaijan “On perpetuating of a name of the shahid and benefits to families of shahids” as the person who was died for freedom, the sovereignty and territorial integrity of the Republic of Azerbaijan in point 1.2.6 of Rules only the persons who were died as a result of fire opened from the enemy or who were blown up on a mine on duty in military units and in the law-enforcement bodies located in fighting zones during ceasefire are referred to category of these persons.

According to court, the circle of people, established by the Cabinet of Ministers, is too limited and at the same time, unfair as the death on duty can result not only an enemy bullet or blasting on a mine, but also from a cold weapon or other ways. From this point of view, the court considers that though Article 1 of the Law of the Republic of Azerbaijan “On perpetuating of a name of the shahid and benefits to families of shahids” is extensive so that can cover all these cases, in the Rules accepted by the Cabinet of Ministers, this circle is stated very restrictedly.

According to the appearance and the conclusions of the interested subjects and experts given during court session on special constitutional procedure it is also possible to draw a conclusion that in spite of the fact that in Article 1 of the Law “On perpetuating of a name of the shahid and benefits to families of shahids” the concept of the persons who are considered as shahids is given, point 1.2.6 of Rules generates in practice of assignment of a name of the shahid of difficulty and uncertainty.

Plenum of the Constitutional Court, taking into account the Constitution of the Republic of Azerbaijan (hereinafter referred to as the Constitution) and some legislative provisions concerning the military personnel, considers necessary to note the following.

Fidelity to the Motherland in the Republic of Azerbaijan is sacred. Defense of motherland is duty of any citizen. Citizens of the Republic of Azerbaijan serve in the army according to legislation (Articles 74.1 and 76.1 of the Constitution).

In Article 1 of the Law of the Republic of Azerbaijan “On Armed forces of the Republic of Azerbaijan” as of October 9, 1991 it is established that Armed forces of the Republic of Azerbaijan serve for the armed protection of the sovereignty, territorial integrity, inviolability and interests of the Republic of Azerbaijan, prevention of armed attack on the state, and at aggression – to its repulse.

According to point 1 of the internal service Charter of Armed Forces of the Republic of Azerbaijan approved by the Law of the Republic of Azerbaijan of September 23, 1994, the serviceman of Armed Forces of the Republic of Azerbaijan is the defender of the Motherland – the Republic of Azerbaijan. The serviceman bears a personal responsibility for protection of the Motherland. He is obliged to protect interests of the Azerbaijani state, to try to strengthen his authority and power, to observe the Constitution and laws of the Republic of Azerbaijan, piously and firmly, execute the military oath, to be disciplined, conscientious, truthful and courageous, not spare himself and if it is necessary nor spare the life at execution of a military duty, implicitly to submit to commanders (chiefs) and to protect them in fights, to protect the Battle Flag of the military unit like the apple of eye.

Military duties of the military personnel forming Armed forces found the reflection in the Law of the Republic of Azerbaijan “On status of the military personnel” of December 25, 1991. According to Article 4.2 of this Law, the military personnel is considered at execution of military service in all cases of the actual execution of the military official duties, including with participation in combat operations, studies, combat alert (active service), daily and garrison duties, military training, missions, on the way to the duty station and in other cases.

According to concept of the shahid given in point 1 of the Law “On perpetuating of a name of the shahid and benefits to families of shahids”, the shahid is the person who was died for freedom, the sovereignty and territorial integrity of the Republic of Azerbaijan, missing in connection with military operation and considered as the dead in the order established by the legislation.

As appears from the analysis of the specified legislative norms, Article 1 of the Law “On perpetuating of a name of the shahid and benefits to families of shahids” the persons who were died at execution the duty following from protection of the sovereignty and territorial integrity of the Republic of Azerbaijan within military official duties in Armed forces of the Republic of Azerbaijan also are considered as shahids. This provision of the law causes existence of a causal relationship between death of specified persons irrespective of a way, conditions and circumstances and protection of freedom, the sovereignty and territorial integrity of the Republic of Azerbaijan for assignment of a name of the shahid.

Adoption of the acts necessary for resolution of the issues connected with application of the Law "On perpetuating of a name of the shahid and benefits to families of shahids” is entrusted by Article 8 of this Law to the Cabinet of Ministers.

Proceeding from it, on January 15, 1994 the Cabinet of Ministers adopted the resolution No. 10 “On approval of the “Rules of perpetuating of a name of the shahid and benefits to families of shahids”. With the repeat of Article 1 of the Law “On perpetuating of a name of the shahid and benefits to families of shahids” in point 1.1. of the Rules, in point 1.2 it is specified that the following persons are considered as a shahid:

Who dead as a result of tragic events in the Baku city, Lenkoran and Neftchali areas in January, 1990 (point 1.2.1);

The persons who died in the plane crash in Leninakan on December 11, 1988 (point 1.2.2);

The citizens who were died as a result of illegal actions or maneuvers of the Soviet Army during the period from 1988 to January, 1990 in the Republic of Azerbaijan (point 1.2.3);

Civilian persons, the dead or missing persons as a result of the Armenian aggression in Karabakh and areas border with Armenia, (point 1.2.4);

Military personnel, the dead and missing persons during the military operations which are carried out for territorial integrity of the Republic of Azerbaijan (point 1.2.5);

Persons, who dead, missing and recognized as the dead in other events connected with freedom, the sovereignty and territorial integrity of the Republic of Azerbaijan, established by the legislation of the Republic of Azerbaijan (point 1.2.6).

By the resolutions of the Cabinet of Ministers for No. 35 of March 5, 1999 and for No. 131 of May 22, 2006 to point 1.2.6 of Rules added the provision “including the persons who were died as a result of fire opened from the enemy party or having been undermined on a mine on duty in the military units located in fighting zones and in law-enforcement bodies during ceasefire”.

According to point 4.1 of Rules regulating the mechanism of assignment of a name of the shahid, the issue of assignment of the status of the shahid and a family of the shahidis considered according to the address of the interested person and according to the petition of government bodies or the relevant military unit. On this point, the status of a family of the shahid for non-commissioned officer's and officers is confirmed by the references issued by personnel department of the Ministry of Defense, the Ministry of Internal Affairs, the Ministry of National Security, the State Frontier Service, other military personnel of military commissariats where they consist on the account, and to civilian persons bodies of regional (city) executive power. The Ministry of Defense, the Ministry of Internal Affairs, the Ministry of National Security, the State Frontier Service and bodies of regional (city) executive power are obliged to accept immediately addresses and petitions for recognition as the shahid and the shahid's family, and to issue the reference in the order corresponding to the Law “On perpetuating of a name of the shahid and benefits to families of shahids” no later than one month. The certificate to families of shahids is given by the centers of social protection of the population domiciliary, according to the references specified in point 4.1 of these rules (point 4.2). It is also necessary to emphasize that the interested persons who do not agree with the acts adopted by authorized bodies on noted issue have the right to appeal to court in the order established by the legislation of the Republic of Azerbaijan.

Apparently, in Article 1 of the Law “On perpetuating of a name of the shahid and benefits to families of shahids” linking of assignment of a name of the shahid with freedom, the sovereignty and territorial integrity of the Republic of Azerbaijan covers a wide range of the events doing possible assignment of a name of the shahid. At the same time, the analysis of noted provisions of Rules shows that the Cabinet of Ministers, having repeated concept of the shahid as in this Law, established that persons who died or missing at concrete occurrences are considered as the shahid.

It is also necessary to consider that the possibilities of establishment provided in Rules the legislation of other cases (point 1.2.6) does not contradict to Article 1 of the Law “On perpetuating of a name of the shahid and benefits to families of shahids”. Thus, other cases which are not established by the legislation do not exclude assignment of a name of the shahid to persons who died, missed or recognized dead for freedom, the sovereignty and territorial integrity of the Republic of Azerbaijan according to Article 1 of noted Law by the authorized government bodies considering the issue of assignment of the status of the shahid or the shahid's family.

But specified in the provision “including the persons who were died as a result of fire opened from the enemy or having been undermined on a mine on duty in the military units located in fighting zones and in law-enforcement bodies during ceasefire” subsequently added to point 1.2.6 of Rules, two moments concerning the ceasefire period especially making impression of more limited character in comparison with a provision of the law, though does not exclude assignment of a name of the shahid on the basis of noted Law, but possibly do impossible assignment a name of the shahid to persons who died under any other circumstances.

According to Article 148.1.5 of the Constitution of the Republic of Azerbaijan, the resolution of the Cabinet have to meet certain requirements as are in number of the normative legal acts entering into legislative system of the Republic of Azerbaijan. Thus, according to a position of the European Court of Human Rights a rule cannot be regarded as “law” unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail (case Maestri v. Italy (Grand Chamber), No. 39748/98, § 30; Adalav. Turkey, No. 38187/97, § 272, of March 31, 2005; Rekvényi v. Hungary (Grand Chamber), No. 25390/94, § 34).

Plenum of the Constitutional Court, repeating earlier expressed legal position, notes that the constitutional law doctrine recognizes 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. The principle of legal certainty, along with other requirements, provides for clearness and definiteness concerning an existing legal situation in the most general sense. (The decision of Plenum of the Constitutional Court “On Article 228.5 of the Civil Code of the Republic of Azerbaijan” of May 27, 2008).

From this point of view, possibility of receiving by the person who was died for freedom, the sovereignty and territorial integrity of the Republic of Azerbaijan, a name of the shahid according to the criteria established in the law in all cases of death has to be clearly expressed. The indication in the point 1.2.6 of Rules, added subsequently only two cases of death for assignment of a name of the shahid generates uncertainty in practice, causing an ambiguity in assignment of this high title.

Also for comparison, it should be noted that the resolution of the Cabinet of Ministers No. 73 of June 2, 2003 to Rules added point 1.2.7 in the following edition:

“Military personnel, who died or missing on duty on protection of borders of the Republic of Azerbaijan”.

As evident, in point 1.2.7 added to Rules, the Cabinet of Ministers, having fixed that on duty on protection of frontier of the Republic of Azerbaijan, the name of the shahid has to be appropriated to military personnel who are dead or missing, did not establish any distinctions connected with death cases.

According to the above, Plenum of the Constitutional Court comes to such conclusion.

As the provision “including the persons who died as a result of fire opened from the enemy party or having been undermined on a mine on duty in the military units located in fighting zones and in law-enforcement bodies during ceasefire” of the point 1.2.6 of Rules is expressed not clearly and inexact from the point of view of requirements of the principle of legal certainty, the Article 1 of the Law “On perpetuation of shahid name and benefits to families of shahids” possessing higher validity has to be applied to the legal relations connected with recognition of the person as shahid; and

To recommend to Cabinet of Ministers to improve the point 1.2.6 of the Rules according to requirements of the Law “On perpetuating of a name of the shahid and benefits to families of shahids”.

Being guided by the Article 130.6 of the Constitution of the Republic of Azerbaijan and Articles 60, 62, 63, 65-67 and 69 of the Law of the Republic of Azerbaijan “On Constitutional Court”, Plenum of the Constitutional Court of the Republic of Azerbaijan

**DECIDED:**

1. To apply to the legal relations connected with recognition of person as shahid the Article 1 of the Law of the Republic of Azerbaijan “On perpetuation of shahid name and benefits to families of shahids” as of the September 3, 1993 possessing higher validity in view of the fact, that the provision “including persons who died as a result of fire opened from the enemy party or having been undermined on a mine on duty in the military units located in fighting zones and in law-enforcement bodies during ceasefire” of the point 1.2.6 of the “Rules on perpetuation of a name of shahid and benefits to families of shahids” approved by the resolution of the Cabinet of Ministers of the Republic of Azerbaijan dated January 15, 1994 generates uncertainty in practice.

2. To recommend to the Cabinet of Ministers of the Republic of Azerbaijan to improve the point 1.2.6 “Rules on perpetuation of a name of the shahid and benefits to families of shahids”, approved as the resolution of the Cabinet of Ministers of the Republic of Azerbaijan dated January 15, 1994, according to requirements of the Law of the Azerbaijan Republic “On perpetuation of a name of the shahid and benefits to families of shahids” of September 3, 1993.

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

4. 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”.

5. The decision is final and cannot be cancelled, changed or officially interpreted by any body or official.