**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 of 26 December 2007 to Constitution and laws of the Republic of Azerbaijan in connection with the complaint of Adalat Hasanova*

**30 December 2008 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 (reporter judge), R.Qvaladze, E.Mammadov, I.Nadjafov and A.Sultanov,

with participation of the secretary I.Ismayilov,

applicant A.Hasanova and her representative A.Mutallibov

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 26 December 2007 to Constitution and laws of the Republic of Azerbaijan in connection with the complaint of Adalat Hasanova.

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

**DETERMINED AS FOLLOWS:**

As follows from the circumstances of a civil case established by courts, according to the documents from archival fund of Department of “Trade of foodstuff” of Ganja city (former Kirovabad), A. Hasanova was employed by the order No. 72 as of April 17, 1981 by store No. 114 to a position of the cashier, and by the order No. 125 dated July 26, 1983 she was transferred to store No. 59 to the same position.

This store (hereinafter referred to as the “challenged store”) which was commercialized along with others by order of the Trade Association “Foodstuff” of Ganja city (hereinafter referred to as the “Association”) “On extraction of structural units of management and commercialization” No. 343 dated November 19, 1992, and assigned number 198, being the independent economic subject since April 29, 1993 was registered in the Ministry of Justice of the Republic of Azerbaijan as the legal entity with No. 708.

By the order of Association No. 36 as of July 11, 1995 Etibar Mamedov was appointed the manager of challenged shop.

By the order of the State Property Committee of the Republic of Azerbaijan (hereinafter referred to as the SPC) No. 23 dated April 20, 1999 association was liquidated, all its enterprises and objects were transferred to jurisdiction of the production and economic board of SPC.

According to the copy of the notarized work record, after association’s liquidation by the order of SPC No. 230 dated April 19, 1999 and the order No. 23 as of April 20, 1999 by order of its director No. 02 dated April 28, 1999 A. Hasanova was dismissed since June 28, 1999 according to the Article 38 of the Code of Laws on Labor of the Republic of Azerbaijan (hereinafter referred to as the CLL) acting at that period.

By the certificate “On sale of the state property to legal entities and individuals”, issued by Department of management and privatization of the state property of the Ministry of Economic Development of the Republic of Azerbaijan (hereinafter referred to as the Department of Privatization) on October 25, 2004, the property right of E.Mamedov to challenged shop was recognized. In the references made by Ganja branch of the State archive of National archival administration and which reliability is established by courts, it is noted that in the mandative books of association checked till 1999, the order on A. Hasanova's release from work is absent, and according to wage schedule the salary is specified till March, 1995.

In view of a failure to provide participation of A. Hasanova in privatization of challenged shop in spite of the fact that she was the employee of this shop, the claim A. Hasanova's to E.Mamedov, to Department of Privatization, to Ganja branch of Department of management and privatization of the state property of the Ministry of Economic Development of the Republic of Azerbaijan (hereinafter referred to as the Ganja city department) and to the Arab Mamedov was satisfied by a judgment of the Kapaz district court of the Ganja city of October 7, 2005, the contract on purchase and sale concerning privileged sale of challenged shop is cancelled, the certificate on the property right is nullified and ensuring of her participation in privatization of challenged shop is entrusted to Department of Privatization.

The court of the Kapaz district proved the conclusion to which came by that A. Hasanova worked in shop No. 114 since 1981, and in 1983 was transferred to shop No. 59. According to archival documents in 1992, in connection with commercialization, number 198is assigned to this shop. As she got paid till 1995 and was not released from work in Management of “Trade of foodstuff” of the Ganja city till 1999, was the employee of challenged shop during privatization, but was not included in the privatization list as the worker with the right of participation in privileged sale. The similar circumstance was estimated by this court as violation of Articles 2 and 17 of the Law of the Republic of Azerbaijan “On Privatization of State-Owned Property”.

The decision of Judicial Board on Civil Cases of Court of Appeal of the Azerbaijan Republic (hereinafter referred to as the JBCC of the Court of Appeal) of February 21, 2006 canceling this decision is cancelled by the decision of Judicial Board on Civil Cases of the Supreme Court of the Republic of Azerbaijan (hereinafter referred to as the JBCC of the Supreme Court) of June 30, 2006, and case sent for reconsideration.

By the decision of JBCC of the Court of Appeal dated January 17, 2007 the judgment of court of first instance was partially changed. This decision cancelled by the decision of JBCC of the Supreme Court of May 10, 2007, and case sent to court of appeal instance for reconsideration. Judicial board in the act, having noted that the challenged shop till 1992 was registered in association, in 1993 was registered in the appropriate order as the independent economic subject, according to the charter of shop, function of acceptance and dismissal from work was carried out by his manager, in 1995 E.Mamedov was appointed as the manager of this shop, the conclusion of the employment contract with A. Hasanova after the beginning of independent activity is not established, and also she was released from work, according to Article 38 of the CLL, in 1999 and other circumstances, specified that in application of Article 17 of the Law of the Republic of Azerbaijan “On Privatization of State-Owned Property” and Article 4.2.1 of the “II State Program On Privatization of State-Owned Property in the Republic of Azerbaijan” the mistake is made.

By the decision of Judicial Board on Civil Cases of the Court of Appeal of Ganja city (hereinafter referred to as the JBCC of the Court of Appeal of Ganja city) of September 25, 2007 the judgment of the Kapaz district court is cancelled, and the statement of claim complied.

The JBCC of the Supreme Court by its decision dated December 26, 2007 uphold the judgment of appeal instance. By the letter of the Chairman of the Supreme Court of April 3, 2008 to A. Hasanova she was informed that the complaint made by her as the additional cassation is left without presentation at consideration of plenum in view of lack of the bases.

In the constitutional complaint it is specified that the applicant was deprived by the decision of JBCC of the Supreme Court of December 26, 2007 the rights provided by the Articles 26, 29 and 60 of the Constitution of the Republic of Azerbaijan, the obligation of protection established by the Article 71 is violated and also significance was not attached to a number of articles of the Civil Procedural Code of the Republic of Azerbaijan (hereinafter referred to as the CPC), and contains the application on its cancellation.

Plenum of the Constitutional Court notes that as a basis of the complaint illegality and groundlessness of the conclusion to which courts in connection with membership of the applicant in labor staff of challenged shop came, and also make assumptions concerning violation of her rights in the course of privatization of the state property, the comparative analysis of the legislative norms governing the labor and privatization relations is necessary.

Providing a worthy standard of living with everything according to fair economic and social rules is one of the intentions listed in the Constitution preamble.

According to the Constitution, Development of an economy based on various forms of property in the Republic of Azerbaijan is aimed at the prosperity of people. The state takes care about improvement of prosperity of all people and each citizen, their social protection and proper living conditions.(Article 15, Article 16.1 of the Constitution).

From this point of view, among the organizational, economic and legal actions which are carried out by the state for the purpose of acceleration of development of market economy by its stimulation, attraction of new progressive technologies and investments, increase of welfare and a standard of living of each member of society by closer integration in a circle of the modern economic relations, stimulations of formation of the wide competitive environment where all types of property, including a private property are attracted, the privatization regulated by the relevant laws takes an important place.

In the Law of the Republic of Azerbaijan “On Privatization of State-Owned Property in the Republic of Azerbaijan” of 1993 (acting at the date of the order on A. Hasanova's release from work) it is specified that among the listed subjects of privatization, it is provided also the labor collective, the rights and privileges established in the relevant legislation for the workers released from work of the reorganized and liquidated enterprises extend and on the workers released as a result of privatization of the state enterprises and also is specified that by incorporating the enterprises for the purpose of privatization, payment of compensations and granting other privileges extends on pensioners, worked at this enterprise not less than 7 years, and persons, having the right to return on a former place of work at this enterprise on the basis of requirements of the current legislation (Articles 5 and 26 of this Law).

In “A state program On Privatization of State-Owned Property in 1995-1998 in the Republic of Azerbaijan”, adopted after this Law, the circle of these persons is specified even more, and in part 2 of addendum No. 4 to this act the subjects using privileges are established.

The Article 17.2 of the Law of the Republic of Azerbaijan “On Privatization of State-Owned Property”, adopted on May 16, 2000 (according to Article 33 of this Law, from the date of its coming into effect both aforementioned normative legal acts became invalid), Article 4.2.1 of “II State Program On Privatization of State-Owned Property in the Republic of Azerbaijan”, approved by the Decree of the President of the Republic of Azerbaijan as of August 10, 2000 stipulates that  staff members with major employment in that enterprise (in conformity with legislation of the Republic of Azerbaijan), those who are eligible to return to the previous employment at that enterprise, retired persons who worked at that enterprise for more than seven years, persons who laid off as a result of the staff reduction  after 1 January 1995 and have obtained a status of unemployed are eligible for privileges in the sale of the stocks or parts of the state-owned enterprises (in part 2 of addendum No. 4 of “A state program On Privatization of State-Owned Property during 1995-1998 in the Republic of Azerbaijan” subjects of this category are also specified).

Plenum of the Constitutional Court considers that noncompliance with the claim requirement and the conclusion concerning not being of A. Hasanova the member of labor staff of challenged shop to which came the JBCC of the Supreme Court by the judicial act of May 10, 2007, the JBCC of Court of Appeal of Ganja city by decision of September 25, 2007, the JBCC of the Supreme Court by the decision of December 26, 2007, cannot be considered acceptable from the point of view of ensuring the rights and interests of the applicant.

Thus, follows from case materials that regulation of the labor relations of A. Hasanova connected with the subjective rights and duties as worker falls under action of Article 19 of the CLL acting at this period as she worked in challenged shop, since 1983. According to this article (this article is given in the new edition in the law of April 25, 1997), the employment contract can be signed in an oral or written form. The execution of an employment agreement is in writing obligatory in the cases provided by the legislation. Employment is made out by the order of the administration of the enterprise, establishment, organization. The order presented to the worker, and he appends the signature concerning it. Actually, irrespective of, whether employment as appropriate is made out or not, the admission to work is considered an execution of an employment agreement.

According to the charter of the challenged shop registered in 1993 as the legal entity, hiring and release from work is carried out by the director (point 35 of the charter of challenged shop). In Article 31 of the Law of the Republic of Azerbaijan “On enterprises”, which come into force on July 1, 1994, also the conclusion of contracts, including labor, it is carried to powers of the director (this Law became invalid).

It is also necessary to emphasize that the Law of the Republic of Azerbaijan “On individual employment contracts” (this Law became invalid on July 1, 1999), which come into force on July 27, 1996, established display of conditions of employment contracts between the employer and the worker, the rights and obligations of the parties in the written contract. Nevertheless, in point 4 of Article 38 regulating “transitional provisions” of this Law it is provided that to the introduction of this Law in force the form of registration of the private employment contracts signed between workers and employers keeps the force by agreement of the parties if the contract isnot renewed in writing in the order established in Article 13 of this Law.

According to Article 315.1 of the Labor Code of the Republic of Azerbaijan acting since July 1, 1999 the legislator, also proceeding from a similar position, provides that if the employment contracts signed on the basis of the labor legislation acting till the entering into force of Labor Code of the Republic of Azerbaijan in an oral form and issued by orders of the employer won't be made in writing by a mutual consent of the parties before the termination of these labor relations, they keep validity with all related legal consequences.

Plenum of the Constitutional Court also notes that at resolution of a civil case by courts the evidences given by I. Khalilov working as the director of association in 1984-1996 as the witness, the established facts of the case such as charge of a salary addressed to A. Hasanova till March, 1995, continuation by the applicant to carry out the labor functions and after 1993 when the challenged shop was registered by its administration as the independent economic subject, were not investigated comprehensively, completely and objectively, they were not given a legal assessment from the point of view of the requirement of Article 19 of the CLL. On the other hand, existence of any changes (release from work and hiring for work in this object again) in the labor legal relations connected with liquidation of association in which E.Mamedov took part, and also the arguments which are put forward by A. Hasanova in connection with the service record werenot estimated according to requirements of the procedural legislation.

Article 60 of the Constitution guarantees Legal protection of rights and liberties of every citizen. The right of legal protection, being among basic rights and freedoms of the person and citizen, is also accepted as a guarantee of other rights and freedoms. This right, without being limited only to the right to appeal to court, also provides the justice capable it is productive to restore the violated rights and freedoms within, adjusted in the legislation.

 To observe and to protect the human and civil rights and freedoms established by the Constitution is the duty of legislative, executive and judicial bodies. Disputes related to violation of human and civil rights and freedoms are resolved by courts (parts I, VII of Article 71 of the Constitution).

In this regard, it is necessary to consider that protection of rights and freedoms of person presupposes application of relevant norms of substantive law with exact observance of norms of procedural law and without prejudice to other constitutional values, so the balance between public and private interests could be maintained. According to the CPC, justice is carried out on the basis of competition, equality of the parties and on the basis of the facts. The court for achievement of truth creates necessary conditions for comprehensive, full and objective investigation of case. For this purpose, the court explains to the persons participating in case their procedural laws and duties, warns them concerning consequences of actions which will be or won't be made, promotes implementation of their procedural laws. Proofs are estimated after impartial, comprehensive and complete examination of the available proofs and according to rules of law (Articles 9.1, 14.1, 88 of the CPC). Judicial acts, in particular, the rules established in the CPC adopted at non-compliance or evasion from these principles and instructions cannot be recognized fair in view of discrepancy to criteria of legality and validity. However, JBCC of the Court of Appeal of Ganja city considered a civil case with violation of requirements of Article 71 of the Constitution, Articles 9.1, 14.1 and 88 of the CPC, Article 19 of the CLL, having as a result violated the right of the applicant for legal protection affirmed in Article 60 of the Constitution. According to provisions of the CPC, the court of cassational instance verify correct application by court of appellate instance of material and procedural norms of law. The wrong application of norms of a substantive and procedural law is the basis for cancellation of decisions and rulings of court of appeal instance. Their cancellation also among powers of this court (Articles 416, 417, 418 of the CPC).

Nevertheless, JBCC of the Supreme Court did not verify the correctness of application of norms of a substantive and procedural law by court of appeal instance, having upheld its decision by the decision of December 26, 2007, broke the guarantee of judicial protection of the rights and freedoms of the applicant fixed in Article 60.1 of the Constitution. According to the Constitution, everyone has the right to own property. No type of property shall be granted superiority. Ownership rights, including the rights for private owners, is protected by law. Everyone might have movable and immovable assets in 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 (parts I, II, III of Article 29 of the Constitution).

Adopted judicial acts, making impossible A.Hasanova's participation in privatization of challenged shop as member of labor collective, according to the Article 17.2 of the Law of the Republic of Azerbaijan “On Privatization of State-Owned Property” and the Article 4.2.1 of “II State Program On Privatization of State-Owned Property in the Republic of Azerbaijan”, became an obstacle in realization of its property rights guaranteed by the Article 29 of the Constitution.

Thus, Plenum of the Constitutional Court comes to conclusion that the decision of the JBCC of the Supreme Court dated December 26, 2007 on a civil case in connection with A.Hasanova's claim against E.Mamedov, Department of Privatization, Ganja city department and A. Mamedov has to be recognized invalid because of discrepancy with parts I, II, III of the Article 29, Article 60.1 of the Constitution, and with the Articles 416, 417, 418.1 of the CPC. The case shall be reconsidered according to this decision in order and terms established by civil procedure legislation of the Republic of Azerbaijan.

Being guided by parts V, IX and X of the 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 December 26, 2007 on a civil case in connection with A.Hasanova's claim against E.Mamedov and others concerning cancellation of privatization and recognition of the right in privatization because of discrepancy with parts I, II, III of the Article 29, the Article 60.1 of the Constitution, and the Articles 416, 417, 418.1 of the Civil Procedural Code of the Republic of Azerbaijan. 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.