**ON BEHALF OF THE REPUBLIC OF AZERBAIJAN**

**DECISION**

**OF THE PLENUM OF THE CONSTITUTIONAL COURT**

**OF THE REPUBLIC OF AZERBAIJAN**

*On complaint of Sayala Teymurova concerning the infringement*

*of the right of access to a court*

**13 July 2009 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, E.Mammadov, I.Najafov, S.Salmanova and A.Sultanov (Reporter Judge);

attended by Court Clerk I.Ismayilov,

the complainant S.Teymurova and her representative A. Aliyev,

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

has examined in open session via special constitutional proceedings in accordance with Article 130 Section V of the Constitution of the Republic of Azerbaijan and article 34.4.2 of the Law of the Republic of Azerbaijan “On Constitutional Court”, the constitutional case by complaint of Sayala Teymurova concerning the infringement of the right of access to a court.

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

**DETERMINED AS FOLLOWS:**

As evident from the complaint of Sayala Teymurova and materials of a civil case, Teymurova has been accepted as the actress in Gazah State Theatre and on the basis of the order N458 of April 28, 1989 (hereinafter referred to as the first order), issued to her by the Executive Committee of Council of People's Deputies of Gazah she was granted a two-room apartment for service use at the address of Sabir 179 str, apt. 7.

Due to inadequate reasoning for missing the job she was fired according to the order N71 on October 1, 1999.

After that Housing maintenance enterprise of Gazah district has applied to court with the statement of claim concerning recognition as a void the office order, and on January 25, 2000 the claim was satisfied by the decision of Gazah district court.

On April 28, 2000 Executive power of Gazah district issued to the complainant an order N144 concerning the same flat (hereinafter referred to as the second order) and after a while Executive power of Gazah district submitted a claim concerning recognition of the given order as a void.

According to the decision of Gazah district court of September 28, 2004 this second order also was recognized as null and void.

Being based on above mentioned decisions the Housing maintenance enterprise and Executive power of Gazah district addressed to court with the claim on eviction of the respondent and deprivation of her registration.

On June 9, 2006 the Gazah district court decided to evict the respondent from the challenged apartment.

During execution of last decision, S.Teymurova declaring the lack of information concerning decisions on recognition as void of both orders, her eviction from apartment and also the fact that she was not invited to court hearings, submitted an appeal complaint concerning the decision of Gazah district court of June 9, 2006.

Civil Board of the Court of Appeal of the Republic of Azerbaijan (hereinafter referred to as CB of the Court of Appeal), being based on decisions of Gazah district court of January 25, 2000 and September 28, 2004, referring to article 82 of the Code of Civil Procedure (hereinafter referred to as CCP) has upheld the given decision.

In that case S.Teymurova petitioned for restoration of the missed term for submission of the appeal complaint against the decision of Gazah district court of January 25, 2000.

The petition was rejected by definition of Gazah district court of September 20, 2006. On November 21, 2006 the made definition was cancelled by decision CB of the Court of Appeal and was submitted to court of the first instance for revision. On February 6, 2007 the district court has satisfied the petition and submitted the case for consideration on jurisdiction to court of appeal instance.

Court of Appeal of Ganja city having considered case, has come to a conclusion that court of the first instance in the established circumstances of case without having applied items 3 and 5 of the article 105 of the Housing Code of the Republic of Azerbaijan made a mistake. So, the court of appeal instance considers that, having established that S.Teymurova worked at theatre not less than 10 years and was the lonely woman, the court of the first instance did not take into consideration impossibility of her eviction from apartment without granting of other housing area. Therefore, the Court of Appeal of Ganja city by its decision of September 11, 2007 cancelled a decision of court of first instance and left the statement of claim without satisfaction.

On the basis of this decision S.Teymurova applied to Plenum of the Supreme Court of the Republic of Azerbaijan (hereinafter referred to as Plenum of the Supreme Court) on the basis of article 432 CCP on newly revealed circumstances for cancellation of decision of CB of the Court of Appeal of the Republic of Azerbaijan of November 28, 2006 on her eviction from apartment.

By the letter of senior secretary of the Supreme Court of March 17, 2008 S.Teymurova was informed that her reference was brought for examination by Plenum and date of session concerning her complaint was appointed to March 31, 2008. But at the specified session the complaint was not considered, and the complainant did not receive any official explanations.

By the letter of the Chairman of the Supreme Court of April 4, 2008 S.Tejmurova informed that in view of absence of the bases provided by article 432 of the CCP of the Republic of Azerbaijan her complaint was not placed for consideration by Plenum of the Supreme Court.

After that S.Teymurova having made complaint to the Constitutional Court of the Republic of Azerbaijan (hereinafter referred to as Constitutional Court) specified that she considered the judicial acts accepted on her case as illegal and refusal in a legal investigation on newly revealed circumstances violating her right of access to a court. On September 10, 2008 the Constitutional Court sent the letter to the Supreme Court for repeated consideration of the reference of S.Tejmurova on newly revealed circumstances and taking of corresponding measures.

In the letter of response of September 18, 2008 of the Acting Head of Staff of the Supreme Court she was informed that despite of refusal of Court of Appeal of Ganja city by the decision of September 11, 2007 in consideration of the claim, applied by Housing maintenance enterprise of Gazah on recognition as void the first order, the decision of Gazah district court of September 28, 2004 on recognition as void the second order remains in force that did not allow to consider decision of Court of Appeal of Ganja city of September 11, 2007 on which S.Teymurova based on as again opened circumstances.

Considering specified in this letter, S.Teymurova submitted an appeal complaint concerning the decision of Gazah district court of September 28, 2004.

On February 4, 2009 challenged definition was cancelled by the decision of Court of Appeal of Ganja city in part of regarding S.Tejmurova.

According to the letter of the Supreme Court, S.Teymurova having sent to the Supreme Court the decision of Court of Appeal of Ganja city of February 4, 2009 concerning cancellation of the decision of Gazah district court of September 28, 2004 regarding the part concerning complainant, once again asked about consideration of her reference on again opened circumstances.

However by the letter of the Acting Head of Staff of the Supreme Court of March 31, 2009, the complainant was informed that the Chairman of the Supreme Court had already answered her concerning the issue.

On April 23 2009 S.Teymurova again having addressed to the Supreme Court asked Chairman of the Supreme Court to express the opinion (position) on this point.

This time the Acting Chairman of the Supreme Court by the letter of June 8, 2009 to S.Tejmurova informed her that in connection with granting on January 7, 2009 the third party with the new order of N14 on disputable apartment, there are no basis for consideration by Plenum of the Supreme Court of the statement on again opened circumstances, and she can appeal against the specified order on general proceedings.

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

According to article 5 of the Law of the Republic of Azerbaijan «On courts and judges» courts pass resolutions, verdicts, decisions and judgments (further called judgments) on behalf of the Republic of Azerbaijan.

Judicial acts take a special place in maintenance of completeness of judicial authority. The criterion of a parity of this or that act of bodies of judicial authority to the judicial act should reflect the basic purpose of judicial authority in society. Therefore, judicial acts on considered affairs can include only those acts of bodies of judicial authority in which execution of justice which is the basic function of judicial authority is reflected.

In connection with the legal maintenance of judicial acts Plenum of the Constitutional Court notices that they, being a kind of legal acts, along with others are characterised by following features:

- Are taken out by plenipotentiary state structures;

- Express will of the given state structure;

- Have individual character;

- Entail legal consequences;

- Represent documentary certificates.

Along with it, by the nature of action of court, on a level with judicial acts, can be carried out in other form. Courts accept legal requirements, commissions, appeals, notices and other references not entering into judicial acts which are not demanding lawful coming into force of execution in the corresponding order. The given documents, being the acts providing execution of justice have only auxiliary character. In judiciary practice also there are cases of the answer by the letter (or the resolution) about refusal in consideration of claims or complaints.

From the aforesaid it becomes clear that practice of giving of answers by letters is a component of execution of justice in proceedings on again opened circumstances. The statement of S.Tejmurova on again opened circumstances was not considered in essence, in connection with it Plenum of the Supreme Court did not accept the well-founded judicial act, and corresponding answers about it were directed to her by the letter.

In this connection it is necessary to notice that unlike the examination of cases as the additional cassation the beginning of proceeding on again opened circumstances arises or after civil case consideration, or connected with disclosing of the facts unknown to court, but found out in the course of a legal investigation. One of such circumstances is repeal of resolution, verdict, ruling or decision of court or decision of other body serving as a basis for issuance of the court act provided in article 432.2.4 of CCP.

Despite of lacking of connection with any lack admitted by court, other circumstances above-stated and provided by the law as a result do not allow to consider judicial decisions taken out on cases as lawful, proved and fair. Updating proceeding on again opened circumstances, the court provides examining of not charge lacks but the circumstances having great value and left away from examination of the objective reasons on case.

The European Court on Human Rights in the decision on case of Oferta Plus S.R.L. Against Moldova of December 19, 2006 held that reopening is not, as such, incompatible with the Convention. However, decisions to revise final judgments must be in accordance with the relevant statutory criteria; and the misuse of such a procedure may well be contrary to the Convention, given that its result – the “loss” of the judgment – is the same as that of a request for annulment. The principles of legal certainty and the rule of law require the Court to be vigilant in this area.

In this sense, by examination of concrete civil cases, including statement consideration on again opened circumstances and their decisions, courts are connected by the civil remedial form and, thus, all their actions directed on departure of justice, should be expressed in judicial acts. The base of beginnings of civil-procedure legal relationship should make the judicial statements which have been taken out only according to procedure, a form and content, the established law can draw up a basis of occurrence, change or stay. Observance of the remedial form, being a guarantee of maintenance of the rights of participants of process, admits not only national, but also international law.

According to article 9.2 of the «Declaration of the United Nations on the right and a duty of separate persons, groups and society bodies to encourage and protect the conventional human rights and the basic freedom» of December 9, 1998 each person, whose rights and freedoms are violated, has the right to receive from judicial body the decision concerning examination of the complaint.

Also, according to a legal position of the European Court on Human Rights the Convention has no theoretical and imagined character, and is directed on practical and effective maintenance of the rights. Article 6.1 of the Convention provides the right of access to a court for the determination of civil disputes. This right of access to a court includes not only the right to institute proceedings but also the right to obtain a “determination” of the dispute by a court (the decision on case of Kutich against Croatia of March 1, 2002, § 25).

Also the attitude to this point in question of other bodies of the constitutional control of Europe is of interest. So, the Constitutional Tribunal of Poland, in the decision of March 16, 1999 has specified that the judicial right covers: (1) right of access to a court providing promotion of the requirement before independent and unprejudiced court, (2) right of correct carrying out of litigation according to justice and publicity requirements, (3) right of the judicial decision providing the right of reception from court of the obligatory decision.

The civil-procedural legislation of the Republic of Azerbaijan, establishing the requirements concerning the form, the content and procedure of removal of the judicial certificate, article 433 of CCP also establishes re-hearing on new established circumstances by the Plenum of the Supreme Court. According to article 437.1 of the given Code it is provided that Plenum of the Supreme Court review petition in respect of re-hearing of court act on new established circumstances in court session. According to Republic According to article 438.1 Plenum of the Supreme Court of the Azerbaijan Republic shall, in the course of review of resolution, ruling or decision on new established circumstances, either repeal court acts by satisfying petition or reject re-hearing.

Non-observance of the specified requirements of the procedural law can contradict to principle of legal definiteness. Plenum of the Constitutional Court notices again that the constitutional law doctrine recognizes a principle of legal definiteness as one of basic elements of rule of the law, reflected in the Preamble of the Constitution of the Republic of Azerbaijan. The principle of legal definiteness, along with other requirements, provides 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, everyone should be assured of examination in the order of the statements established by the law and complaints and acceptance of the corresponding well-founded judicial act. Nobody should wait constantly for the messages informing concerning various barriers to check of the reference in the way, beyond a procedural order without examination of its statement or the complaint by non making the corresponding judicial act.

Plenum of the Constitutional Court considers that the actions connected with examination of the statement on again opened circumstances, having great value for the right of the fair trial which is one of fundamental laws within the limits of execution of justice should be made out not by letters but well-founded judicial acts of Plenum of the Supreme Court in the order established by the civil-procedural legislation.

Continuation of the practice which does not mean meeting the requirements of the law will deprive of the maintenance the means established by CCP for correction of erroneous judicial acts and as a result will lead to infringement of the rights provided by articles 26 and 60 of the Constitutions of the Republic of Azerbaijan and articles 6 and 13 of the European Convention. In this sense it is necessary to notice that in the decision on case Iochev against Bulgaria of February 2, 2006 the European Court expressed a legal position in connection with requirements of Article 13 that remedies must be effective in practice as well as in law. (§ 142).

Considering the above-stated, Plenum of the Constitutional Court comes to opinion that non examination of S.Tejmurova’s statements on again opened circumstances by Plenum of the Supreme Court according to articles 433, 437 and 438 of CCP and non-acceptance of the corresponding decision should be considered as an infringement of her right of access to a court which is one of elements of maintenance of judicial protection, provided by article 60 of the Constitution.

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

**DECIDED:**

1. To consider non examination of S.Tejmurova’s statements on again opened circumstances against decision of Civil Board of the Court of Appeal on eviction from apartment according to articles 433, 437 and 438 of CCP and non taking of a relevant decision - as contradiction of her right of access to a court provided by Article 60 of the Constitution of the Republic of Azerbaijan. To examine the statement of S.Tejmurova on again opened circumstances against abovementioned decision according to the present decision and via the procedure and terms determined by the 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.