**ON BEHALF OF THE REPUBLIC OF AZERBAIJAN**

**DECISION**

**OF THE PLENUM OF THE CONSTITUTIONAL COURT**

**OF THE REPUBLIC OF AZERBAIJAN**

*On verification of conformity of decision of the Judicial Board on Civil Cases*

*of the Supreme Court of the Republic of Azerbaijan of 17 February 2009 to Constitution and laws of the Republic of Azerbaijan*

*in connection with the complaint of U.Ragimova*

**25 December 2009 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 (reporter judge), E.Mammadov, I.Nadjafov and A.Sultanov,

with participation of the secretary I.Ismayilov,

applicant U.Ragimova and her representative A.Alizadeh

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 17 February 2009 to Constitution and laws of the Republic of Azerbaijan in connection with the complaint of Ulker Ragimova.

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

**DETERMINED AS FOLLOWS:**

By the decision of Narimanov district court of Baku city dated 12 May 2008 the claim of Ulker Ragimova against Vugar and Nailya Ragimova concerning termination of right of use of premises with payment of compensation and removing from the register was not satisfied, the counterclaim of Nailya Ragimova against Ulker Ragimova concerning elimination of the created obstacle in a right of use of housing and moving in the apartment was satisfied.

The Judicial Board on Civil Cases of the Court of Appeal of Baku city (hereinafter referred to as the JBCC of the Court of Appeal) on October 17, 2008 upheld the decision of Narimanov district court. By the decision of Judicial Board on Civil Cases of the Supreme Court (hereinafter referred to as the JBCC of the Supreme Court) as of October 17, 2009 the judgment of appeal instance was upheld.

The additional appeal of U. Ragimova was not satisfied by the Chairman of the Supreme Court.

In the complaint lodged to the Constitutional Court, U. Ragimova noted that JBCC of the Supreme Court at consideration of her appeal, referred to the norms of the former Housing Code which do not have relations to this case and, having misinterpreted Article 228 of the existing Civil Code, did not consider the decision of Plenum of the Constitutional Court of the Republic of Azerbaijan as of May 27, 2008 concerning this article.

U. Ragimova in the complaint asked to verify compliance of the judicial act adopted by court of cassation instance, with the Articles 29 and 71 of the Constitution of the Republic of Azerbaijan, Articles 152.1, 228.1, 228.2 and 228.5 of the Civil Code of the Republic of Azerbaijan.

Plenum of the Constitutional Court in connection with U. Ragimova's complaint notes the following.

As evident from the facts of the case established by courts, the apartment No. 12 of the house No. 119, street of the G. Aliyev of the Baku city is property of Ulker Ragimova. The son of U. Ragimova Vugar, on September 30, 2003 having established a family with Nailya Ragimova, lived in the challenged apartment. In 2005NailyaRagimova was registered to this apartment with the consent of the owner.

In view of the fact that the relations between Ulker and Vugar Ragimov and Nailya Ragimova deteriorated, N. Ragimova together with the juvenile child, having left the challenged apartment, temporarily moved to the house of the parents and lived there.

The courts of the first and appeal instance which established the specified facts of the case, and the court of cassation instance which recognized decisions of given courts as lawful referring to the norms which do not have any relation to this dispute came to a conclusion concerning validity of the counterclaim of N. Ragimova.

Thus, based on Articles 53 and 123 of the former Housing Code, courts considered that N. Ragimova was moving in and registered to the challenged apartment with the consent of the owner and, living in this apartment as the member of the family of the owner and keep house, got a right of use of this apartment.

But, applying these norms, courts missed from attention that, according to the decision of the Constitutional Court of the Republic of Azerbaijan of July 27, 2001 “On interpretation of Article 228 of the Civil Code and Article 123.1 of the Housing Code of the Republic of Azerbaijan”, the disputes connected with legal relationships initiated in connection with usage of residential building (apartment) after 1st September 2000 should be resolved via the procedure stipulated in Articles 228.1 and 228.2 of the Civil Code, and disputes connected with legal relationships initiated before the mentioned date – in accordance with provisions of Article 123 of the Housing Code.

As legal relationship between the owner U. Ragimova and N. Ragimova arose in 2003, from the point of view of the above mentioned decision of Plenum of the Constitutional Court, rules of Articles 53 and 123 of the former Housing Code could not be applied to the dispute.

Plenum of the Constitutional Court considers that at settlement of dispute between the parties courts applied the called norms of the former Housing Code which are not subject of application.

It is also necessary to note that courts of appeal and cassation instances when giving a legal treatment to the circumstances established on case referred also to Article 228 of the Civil Code of the Republic of Azerbaijan (hereinafter referred to as the CC), but having given the wrong interpretation to this norm, and in this case did not consider 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.

Thus, according to Article 228.5 of the CC, members of the family of the owner of integral part of residential building have a right of use of living space, equal with the owner. The Article for this purpose specifically specifies husband, wife, parents, and children.

In this article, it is also provided that family members of the owner of integral part of residential building are entitled to move their minor children in this building.

Moving of other family members (husband, wife) in is permitted only with the owner's consent. Plenum of the Constitutional Court in the above-mentioned decision of May 27, 2008 in connection with Article 228.5 of the CC noted that for moving in by members of the family of the owner of integral part of residential building of the husband or wife in this area the consent of the owner is required.

As for the provision “consent of the owner” of the Article 228.5 of the CC, Plenum of the Constitutional Court explained that this situation provides the agreement which is in writing signed and notarized according to order established by the Article 228.2 of the CC.

In a contradiction to the specified decision of Plenum of the Constitutional Court courts of the first and appeal instances being based on N. Ragimova's moving in the challenged apartment and registration in this apartment on the basis of oral consent of the owner, came to a conclusion that according to the Article 228.5 of the CC, she got a right of use of this apartment.

The courts which resolved dispute in such order, having violated the property right of U. Ragimova fixed in the Articles 13 and 29 of the Constitution, the Article 152.1 of the CC, limited her in her right to own, use and dispose at her own discretion of the one-room apartment belonging to her.

The JBCC of the Supreme Court, contrary to requirements of the Articles 416 and 418 of the Civil Procedural Code of the Republic of Azerbaijan (hereinafter referred to as the CPC), having upheld by the decision of February 17, 2007 the judgment of appeal instance which contradict to the requirements of the legislation and thus violated the property right and the right for legal protection of U. Ragimova guaranteed by Articles 13, 29 and Article 60.1 of the Constitution.

Plenum of the Constitutional Court considers necessary once again to note that, according to part IX of article 130 of the Constitution of the Azerbaijan Republic, decision of the Constitutional Court have mandatory force within the territory of the Republic of Azerbaijan.

The same provision found its reflection in the Article 66.1 of the Law of the Republic of Azerbaijan “On Constitutional Court”.

According to the Articles 66.2 and 66.3 of this Law, the decision of the Constitutional Court is subject to unconditional execution after coming into force; these resolutions are final, and may not be cancelled, changed or officially interpreted by any body or official.

In the decision of Plenum of the Constitutional Court of the Republic of Azerbaijan of January 25, 2005 “ On verification of conformity of para III, item 9 and para IV, item 7 of the Law of the Republic of Azerbaijan N 688-II QD of 11 June 2004 “On Introduction of Modifications into Some Legislative Acts of the Republic of Azerbaijan” to Article 130.9 of the Constitution of the Republic of Azerbaijan” it is specified that “the high legal force of the decision of Constitutional Court covers its all parts including the legal positions, which constitute its foundation. Courts should adopt decisions only within framework installed by Constitutional Court on a certain case. The legal issues specified in the decision of Plenum of Constitutional Court and allegedly violated rights and freedoms should constitute this framework”.

Courts not only unconditionally did not execute the decision of Plenum of the Constitutional Court on this case, on the contrary, having distorted them, substantially violated requirements of the above norms of the Constitution of the Republic of Azerbaijan and the Law “On Constitutional Court”.

According to the above Plenum of the Constitutional Court considers that the decision of JBCC of the Supreme Court as of February 17, 2009 on a civil case on the basis of U. Ragimova's claim against N. Ragimova for termination of right of use of the challenged apartment and eviction from the apartment with payment of compensation has to be recognized as void due to its discrepancy with the Articles 13, 29, Article 60.1 of the Constitution of the Republic of Azerbaijan, with the Articles 416, 418.1 of the CPC, and case is subject of reconsideration according to the present decision, in order and terms established by 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 17 February 2009 on a civil case on the basis of U. Ragimova's claim against N. Ragimova for termination of right of use of the challenged apartment and eviction from the apartment with payment of compensation as null and void in connection with its discrepancy with the Articles 13, 29, Article 60.1 of the Constitution of the Republic of Azerbaijan, with the Articles 416, 418.1 of the CPC. To reconsider case according to the present decision, an order and the terms established 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.