**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 as of 1 October 2009 with the Constitution and laws of the Republic of Azerbaijan in connection with the complaint of S. Suleymanova*

**2 April 2010 Baku city**

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

with participation of the secretary I.Ismayilov,

representative of applicant –H.Bagirov and J.Javadov,

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

in accordance with the Article 130.5 of the Constitution of the Republic of Azerbaijan examined in open judicial session via special constitutional proceedings the case on complaint of Sevinj Suleymanova concerning verification of conformity of decision of the Judicial Board on Civil Cases (hereinafter referred to as theJBCC) of the Supreme Court of the Republic of Azerbaijan as of 1 October 2009 with Constitution and laws of the Republic of Azerbaijan

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

**DETERMINED AS FOLLOWS:**

Nizami District Court of Baku city by its decision as of July 23, 2008 satisfied the claim of S. Suleymanova to A. Ayyubov for recognition of a right of use of living space, registration and moving into the apartment.

From the facts of the case established by court it is evident that S. Suleymanova on December 17, 2005 entered into family relations with A. Ayyubov through official marriage. The same day she brought her dowry items into property of the respondent A. Ayyubov - apartment No. 41 in the house No. 20 located on Rustamov street, Nizami district of Baku city where then they lived together. In the course of their family life on November 29, 2006 they gave birth to the child named Rasim. Subsequently the respondent brought S. Suleymanova together with the baby to the house of her father not letting them to the above-mentioned apartment and not allowing them to live in the latter.

The court of the first instance which established these facts of the case proceeding from the Article 228.5 of the Civil Code of the Republic of Azerbaijan (hereinafter referred to as the Civil Code), came to a conclusion that the rights of residence and use of S. Suleymanova for the disputed apartment arose from the date of moving to A. Ayyubov's apartment as the family member. Considering that their marriage remains in force, possibility of reconciliation is completely not settled, the respondent does not object the moving in and residence of the claimant in the apartment, court having recognized her right of use of the apartment together with her juvenile child, made the decision on her moving in the apartment.

However 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 of Baku city) which considered case on the appeal complaint of the respondent, referring to that the disputed apartment is registered in the state register of real estate as a private property of A. Ayyubov since June 4, 2003, and marriage between S. Suleymanova and A. Ayyubov is concluded on February 17, 2005, thus between them the written agreement concerning a right of use for S. Suleymanova of the disputed apartment was not notarized, and this right was not registered in the state register of real estate, with the decision as of November 24, 2008 satisfied the appeal complaint of A. Ayyubov, cancelled a judgment of the court of first instance and rejected S. Suleymanova's claim, having recognized it as unreasonable.

JBCC of the Court of Appeal of Baku city proved such position by interpretation by the Constitutional Court of the Republic of Azerbaijan (hereinafter referred to as the Constitutional Court), of the provision “ with consent of the owner” of Article 228.5 of the Civil Code in the decision of the Plenum “On Article 228.5 of the Civil Code of the Republic of Azerbaijan” of May 27, 2008.

The Judicial Board on Civil Cases of the Supreme Court of the Republic of Azerbaijan (hereinafter referred to as the JBCC of the Supreme Court) which considered case on the order of appeal, having regarded opinion of court of appeal instance on need of the notarized agreement with the owner of the apartment A. Ayyubov for emergence at S. Suleymanova of a right of use of the disputed apartment as wrong interpretation of the law, and came to conclusion that as S. Suleymanova and her juvenile son, being members of the family of the respondent, live together with him, there is no need of written agreement.

At the same time the judicial board estimated similar settlement of dispute by court of appeal instance in the above order as A. Ayyubov's release from a duty to provide his son R. Ayub with the corresponding housing before achievement of minority and specified it as contradicting to family legislation, to the Convention of the UN “On Rights of Child”, regulating the rights and the duty of parents at moral, physical, intellectual upbringing of children and as violating requirements of Articles 17 and 20 of the Law of the Republic of Azerbaijan “On Rights of Child”.

JBCC of the Supreme Court by its decision of February 27, 2009 cancelled a judgment of appeal instance and sent case back for new appeal consideration with the corresponding instructions.

JBCC of the Court of Appeal of Baku city which reconsidered case without observing the requirement of Article 420 of the Civil Procedural Code of the Republic of Azerbaijan (hereinafter referred to as the CPC) concerning obligation of the instructions stated in the decision of court of cassation instance for the court which is reconsidering the this case, by the decision of May 8, 2009 did not sustain S. Suleymanova's claim.

JBCC of the Supreme Court by its decision of October 1, 2009 uphold the judgment of court of appeal instance.

S.Suleymanova, having apply to the Constitutional Court, specified that courts of appeal and cassation instances, not having taken into consideration the decision of Plenum of the Constitutional Court of May 27, 2008, from the point of view of the established facts of the case incorrectly interpreted Article 228.5 of the Civil Code and violated requirements of the existing material and procedural legislation. Thus, the applicant who came to a conclusion about violation of the rights fixed in Articles 43 and 60 of the Constitution of the Republic of Azerbaijan (hereinafter referred to as the Constitution), asks to verify conformity of the decision of court of cassation instance with the Constitution and laws.

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

In Article 43 of the Constitution, the right of everyone for home is fixed. According to this Article of the Constitution, nobody might be deprived of his/her home. As one of guarantees of this right, Article 60 of the Constitution provides legal protection of the rights and freedoms of everyone.

With the purpose of ensuring the right of everyone for home according to the legislation, Plenum of the Constitutional Court in connection with various regulation of “a right of use of a component part of residential building” in the housing and civil legislation, based on action of the law in time, the decision of July 27, 2001 established that the disputes which arose after September 1, 2000 have to be resolved in the order of Articles 228.1 and 228.2 of the Civil Code, and the disputes which arose before this date in the order of Article 123 of the (former) Housing Code.

Subsequently the Law of the Republic of Azerbaijan of October 21, 2005 “On additions and amendments into some acts of the Republic of Azerbaijan” to the Civil Code added the Article 228.5.

According to this Article, “family members of the owner of integral part of residential building (husband, wife, parents, children), residing together with him, have the right of use of living space equally with him. Family members of the owner of integral part of residential building are entitled to move their minor children in this building. Moving in of other family members (husband, wife) is permitted only with the owner's consent. The right of use of integral part of residential building reserved in case of divorce. The right of use of integral part of residential building arise since the day of coming into force of this Code”.

The difficulties which arose in jurisprudence in connection with the comment of provision of this article “moving in of other family members (husband, wife) is permitted only with the owner's consent” created need of interpretation of article. For elimination of these difficulties according to the appeal of the Court of Appeal of Sumgait city and inquiry of the Commissioner for Human Rights (Ombudsman) Plenum of the Constitutional Court adopted on May 27, 2008 the decision “On Article 228.5 of the Civil Code of the Republic of Azerbaijan”. In this decision Plenum also referred to the legal positions which are earlier created on disputes of similar character.

Plenum, having interpreted the provision of Article 228.5 of the Civil Code “with consent of the owner” concerning other family members, noted that moving in of other family members (the husband, the wife) of owner of a component part of a residential building is allowed only with the consent of the owner.

In connection with the provision of Article 228.5 of the Civil Code “consent of the owner”, Plenum of the Constitutional Court noted that this provision provides the contract that is in writing signed and notarized according to the order established in Article 228.2 of the Civil Code.

In this regard it is necessary to consider that the above interpretation of the provision “consent of the owner” belongs not to Article 228.5 of the Civil Code in general, but only to the provision of this article “moving of other family members (husband, wife) is permitted only with the owner's consent”, and does not extend on members of the family of the owner.

The legal position of the Constitutional Court was “the right of use equally with the owner of a living space of the husband, the wife, parents and children depends on their moving in a part of a living space and constant residing there with the consent of the owner”. In this sense, it is necessary to consider that in connection with members of the family of the owner of a component part of a house the Article 228.1 of the Civil Code bears wider character in comparison with Article 228.5 of this Code. Thus, in Article 228.1 of the Civil Code it is told about members of the family of the owner whereas Article 228.5 of this Code concerns only the family members who live together with the owner. As evident, the members of the family of the owner who are not living together with him do not fall under action of Article 228.5 of the Civil Code.

Reflection in Article 228.5 of the Civil Code of an order in connection with position of members of the family of the owner follows from Article 17.2 and parts IV and V of Article 34 of the Constitution, Article 1.3 of the Family Code of the Republic of Azerbaijan and Article 27.2 of the Civil Code. Provisions of the specified norms, along with other issues, it is fixed, equality of spouses, and also that the care of children, their education is both the right, and a duty of parents, and to respect parents, to care of them is a duty of children, family members have to give each other mutual aid and bear responsibility before a family, free implementation of their rights and possibility of legal protection of the specified rights has to be provided. A residence of the persons which did not reach fourteen years is the residence of the parents who did not lose the parental rights. Thus, the right of the members of the family of the owner, equal with the owner living together with him for use of a component part of a residential building arises not from the contract signed with the owner, but only on the basis of the reliable family relations with him.

But in a contradiction with the legal position created in the specified decision of Plenum of the Constitutional Court, the court of appeal instance and court of cassation instance which uphold the decision incorrectly referred on Articles 228.1, 228.2 of the Civil Code for moving in of S. Suleymanova together with her juvenile child in the disputed apartment with emergence at them of a right of use of this apartment.

In this sense Plenum of the Constitutional Court considers important once again to note that, according to part IX of Article 130 of the Constitution, the decision of the Constitutional Court has binding force in the territory of the Republic of Azerbaijan.

The same situation found the reflection in Article 66.1 of the Law of the Republic of Azerbaijan “On Constitutional Court”. According to Articles 66.2 and 63.4 of this Law, the decisions of the Constitutional Court are binding after their adoption, these decisions are final and cannot be cancelled, changed or officially interpreted by any organ   or official person.

Along with it, Plenum of the Constitutional Court in its decision of January 25, 2005 “On verification of conformity of para III, item 9 and para IV, item 7 of the Law of Republic of Azerbaijan N 688-II QD of 11 June 2004 “On Introduction of Modifications into Some Legislative Acts of Republic of Azerbaijan” to Article 130.IX of the Constitution of Republic of Azerbaijan specified that the high legal force of the decision of Constitutional Court covers its all parts including the legal positions, which constitute its basis. 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”.

However, courts of appeal and cassation instances on the given case distorted decisions of Plenum of the Constitutional Court, having obviously violated requirements of the above norms of the Constitution and the Law of the Republic of Azerbaijan “On Constitutional Court”.

Besides, Plenum of the Constitutional Court, having noted that the court of cassation instance adopted the decision reflecting two various positions in connection with application of norms of a material law on case once again emphasized possibility of observance of the principle of legal certainty for formation of uniform jurisprudence.

According to the civil procedural legislation of the Republic of Azerbaijan the court of cassation instance verify correct application of norms of a material and procedural law by court of appeal instance. When considering the case the court of cassation instance can cancel the decision or ruling of court of appeal instance completely or in part, and to send the case to court of appeal instance for reconsideration. Violation or the wrong application of norms of a material law and norms of a procedural law is the basis for cancellation of the decision or ruling of court of appeal instance by court of cassation instance (Articles 416, 417.1.4 and 418.1 of the CPC).

Plenum of the Constitutional Court, considering noted, comes to conclusion that JBCC of the Supreme Court having uphold the decision of JBCC of the Court of Appeal of Baku city of May 8, 2009which is not correspond to requirements of the legislation, adopted the decision which is not correspond to provisions of Article 228.5 of the Civil Code, Articles 416, 417 and 418 of the CPC and violate the right of applicant for home and guarantee of legal protection provided in Articles 43 and 60 of the Constitution.

According to the above, Plenum of the Constitutional Court considers that the decision of JBCC of the Supreme Court on a civil case on S. Suleymanova's claim to A. Ayyubov for recognition of a right of use of living space, registration and moving in to the apartment of October 1, 2009 has to be recognized as null and void in view of non conformity with Articles 43 and 60 of the Constitution, Article 228.5 of the Civil Code, Articles 416, 417.1.4 and 418.1 of the Civil Procedure Code. The case has to be reconsidered according to the present decision, an order and the terms established by the 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, 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 Judicial Board on Civil Cases of the Supreme Court of the Republic of Azerbaijan on a civil case on S. Suleymanova's claim to A. Ayyubov for recognition of a right of use of living space, registration and moving in to the apartment as of October 1, 2009 as null and void in view of non conformity with the Articles 43 and 60 of the Constitution, Article 228.5 of the Civil Code, Articles 416, 417.1.4 and 418.1 of the Civil Procedure Code. 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.