**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 2 February 2010 with Constitution and laws of the Republic of Azerbaijan in connection with the complaint of Nonna Jabrailova*

**2 December 2010 Baku city**

Plenum of the Constitutional Court of the Republic of Azerbaijan composed of F.Abdullayev (Chairman), Sona Salmanova, Fikret Babayev (reporter judge), Rafael Qvaladze, Sudaba Hasanova, Rovshan Ismaylov, Isa Nadjafov and Kamran Shafiyev,

the secretary I.Ismayilov,

with participation of applicant Nonna Jabrailova and her representative Vugar Babaliyev,

in accordance with Article 130.5 of the Constitution of the Republic of Azerbaijan examined 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 2 February 2010 with Constitution and laws of the Republic of Azerbaijan in connection with the complaint of Nonna Jabrailova.

In spite of the fact that a defendant – the representative of the Supreme Court of the Republic of Azerbaijan, received the written notice of time and a place of consideration of the case in advance, was not appear at court session and the case was considered without its participation.

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

**DETERMINED AS FOLLOWS:**

The Surakhani District Court of the Baku city, by its decision as of September 24, 2008 satisfied the claim of N. Jabrailova against Teddie Dzhabrailov for recognition of the rights of her and her juvenile son Emil Jabrailov on use of living space to the address: “Eni Gyuneshli” settlement, housing estate “D”, building 21, apartment 23 and their registration to this address.

By the decision of 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) of January 15, 2009, provided the appeal complaint of the respondent T. Jabrailov, cancelled the decision of Surakhani District Court of September 24, 2008 and rejected the claim of the claimant of N. Jabrailova.

Judicial Board on Civil Cases of the Supreme Court (hereinafter referred to as the JBCC of the Supreme Court) on June 5, 2009 settled in part the appeal of the claimant N. Jabrailova, while the decision of JBCC of the Court of Appeal of Baku city as of January 15, 2009 was cancelled and case, with corresponding instructions, was sent for new appeal consideration.

JBCC of the Supreme Court came to such conclusion that the court of appeal instance made a mistake in interpretation of the applied Article 228.5 of the Civil Code of the Republic of Azerbaijan (hereinafter referred to as the CC). Thus, the legislator in the first sentence of Article 228.5 of the CC, recognizes the right for equal use of living space by family members (spouses, parents, children) living together with an owner of a component part of a residential building and does not link emergence of such right with the Articles 228.1 and 228.2 of the CC.

However, JBCC of the Court of Appeal of Baku city reconsidering the case, by the decision as of October 7, 2009 repeatedly decided not to settle the claim of N. Jabrailova, and thus not comply with the requirement of Article 420 of the Civil Procedural Code of the Republic of Azerbaijan (hereinafter referred to as the CPC) that the instructions noted in a judgment of cassation instance are obligatory for the court reconsidering the case.

JBCC of the Supreme Court by the decision as of February 2, 2010 did not settle the repeated appeal and upheld the judgment of appeal instance. This decision was substantiated by absence of notarized agreement giving reasons for emergence of rights of use with respect to living space of the apartment which is in property of T. Jabrailov after the official marriage was concluded.

In the complaint it was specified that courts of appeal and cassation instances, not having taken into consideration the decision of Plenum of the Constitutional Court as 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.

This right reflected in the Constitution means possession of constant living space and free use of it at observance of the conditions determined by the law. Specificity of the housing right consists in possibility of free implementation by the parties of the housing relations of these to the rights at discretion and in compliance legitimate interests.

Proceeding from the specified constitutional norms, legal regulation of the relations arising in connection with housing issues found the reflection in housing and civil legislation. Article 228 of the CC defines the order of implementation of a right of use of the living space that is a component part of the housing relations.

Thus, family members of owner of integral part of residential building and other persons have the right of use of building, provided that such right has been registered in the state register of immovable property. Emergence, enforcement conditions and termination of right of use of integral part of residential building is established by notarized written agreement concluded with owner. In the event of absence of agreement on termination of right of use of integral part of residential building, this right may be terminated on the basis of claim of owner in court order by payment of compensation equal to market price(Articles 228.1 and 228.2 of the CC).

Article 228.5 was added to the CC later, by the Law of the Republic of Azerbaijan of October 21, 2005 “On additions and amendments into some acts of the Republic of Azerbaijan”. According to given article, the 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.

Plenum of the Constitutional Court, in the decision as of May 27, 2008, on interpretation of the provision “with consent of an owner” of Article 228.5 of the CC 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. At the same time, Plenum 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. 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.

The order reflected in Article 228.5 of the CC concerning position of members of the family of the owner follows from Article 17.2, parts IV and V of Article 34 of the Constitution, from Article 1.3 of the Family Code of the Republic of Azerbaijan and Article 27.2 of the CC.

In provisions of the specified norms it is fixed that rights of wife and husband are equal. Care and education of children constitute both right and responsibility of parents. Responsibility of children is to respect parents, look after them. Children who are of fourteen-year age and capable of working must support disabled parents. Thus, for the members of the family of the owner living together with him the right of use of a component part of a residential building arises not based on contract signed with him but on the basis of the confidential family relations.

The similar legal position found the reflection in the decision of Plenum of the Constitutional Court of November 14, 2008 according to complaint of A.M. Javidan and of April 2, 2010 according to complaint of S. Suleymanova.

However, the court of appeal instance and the court of cassation instance which upheld the decision were not right what not took into consideration the legal position formulated in decisions of Plenum of the Constitutional Court and referred to Articles 228.1 and 228.2 of the CC for emergence of the rights for moving in of N. Jabrailova together with the juvenile daughter in the disputed apartment and use of this living space.

From this point of view, Plenum of the Constitutional Court considers necessary once again to note that according to Article 130.9 of the Constitution decisions of the Constitutional Court have mandatory force within the territory of the Republic of Azerbaijan. Identical situation found the reflection and in Article 66.1 of the Law of the Republic of Azerbaijan “On Constitutional Court” (hereinafter referred to as the Law of “On Constitutional Court”). According to Articles 63.4 and 66.2 of this Law decision of the Plenum of Constitutional Court is final and cannot be cancelled, changed or officially interpreted by any organ or official.

It should be noted especially that in Article 130 of the Constitution, defining legal bases of activity of the Constitutional Court, interpretation of the Constitution and laws was referred to special powers of the Constitutional Court. Such imperative requirement is provided in the relevant procedural legislation, that the interpretation given by the Constitutional Court of the Constitution and laws is obligatory for courts (Article 13.7 of the CPC and Article 10.3 of the Criminal Procedure Code of the Republic of Azerbaijan).

In addition, according to the decision of Plenum of the Constitutional Court 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 para IX of Article 130, of the Constitution of the Republic of Azerbaijan”, 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.

Not taking into consideration the legal positions reflected in decisions of Plenum of the Constitutional Court, courts of appeal and cassation instances violates the above-mentioned requirements of norms of the Constitution, Law “On Constitutional Court” and CPC.

Thus, considering case for the first time, court of cassation instance, in the adopted decision of June 5, 2009, having cancelled a judgment of appeal instance and having sent it for new appeal consideration, noted that claimant N. Jabrailova is not among persons specified in the third sentence of Article 228.5 but concerns the number of persons specified in the first sentence of the same article. By that legislator recognizes N. Jabrailova's right for equal use of disputable living space together with the owner and does not demand observance of Articles 228.1 and 228.2 of the CC for emergence of a right of use. According to the conclusion of court of cassation instance the opinion of the court of appeal instance in connection with interpretation of Article 228.5 of the CC cannot be considered as correct.

According to requirements of Article 420 of the CPC, the instructions indicated in decision of court hearing case in cassation instance is obligatory for court reconsidering the case.

However, JBCC of the Court of Appeal of Baku city cancelled a judgment of the first instance, rejected N. Jabrailova's claim and by that without having executed properly the instructions defined in the decision of JBCC of the Supreme Court of June 5, 2009 did not fulfill the specified requirements of the legislator.

According to Article 416 of the CPC, the court of cassation instance has powers to verify the correct application of norms of a substantive and procedural law by court of appeal instance. According to Article 418 of the CPC, violation or the incorrect application of norms of a substantive and procedural law is the basis for cancellation of the decision or definition of court of appeal instance by court of cassation instance.

However, JBCC of the Supreme Court reconsidering given case, did not take into consideration that JBCC of the Court of Appeal of Baku city did not execute the instruction of court of cassation instance, bearing a binding character and that case was considered without observance of norms of a substantive and procedural law. Unlike the previous decision the JBCC of the Supreme Court uphold a judgment of appeal instance of October 7, 2009, and as a result without adhering to requirements of Article 228.5 of the CC and Articles 416, 417 and 418 the CPC, violated N. Jabrailova's rights affirmed in Article 43.1 and in Article 60.1 of the Constitution.

In a number of decisions of the Constitutional Court it was especially noted that among the constitutional provisions directed on protection of human rights and freedoms, the right for legal protection of the rights and freedoms (right for fair trial) has special value and failure to deliver this right, from the point of view of the principle of the rule of law, leads to considerable restriction of the rights and freedoms (decisions of Plenum of the Constitutional Court of February 1, 2005, on December 13, 2005, on May 8, 2008, on December 30, 2008).

On the basis of the foregoing the Plenum of the Constitutional Court considers that the decision of JBCC of the Supreme Court as of February 2, 2010 on a civil case in connection with claim of N. Jabrailova for recognition of the right for use of living space, registration and moving in the apartment, in view of the non-conformity with Article 43.1, Article 60.1 of the Constitution, Article 228.5 of Civil Code, Articles 416, 417.1.4 and 418.1 of the CPC has to be considered null and void. 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 claim of N. Jabrailova for recognition of a right of use of living space, registration and moving in to the apartment of February 2, 2010 as null and void in view of non-conformity with the Articles 43,1 and 60.1 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, in order and 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.