**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 as of 2 July 2009 to Constitution and laws of the Republic of Azerbaijan in connection with the complaint of*

*Viktor Ozerov*

**15 April 2011 Baku city**

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

with participation of the secretary I.Ismayilov,

applicant Viktor Ozerov and his representative Gulnar Gurbanova,

representative of respondent body – Gunel Aliyeva, employee of Staff of the Supreme Court 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 July 2009 to Constitution and laws of the Republic of Azerbaijan in connection with the complaint of V.Ozerov.

Having heard the report of Judge R.Ismaylov, speech of applicant V.Ozerov and his representative G. Gurbanova and representative of respondent body G.Aliyeva, having considered materials of the case, Plenum of the Constitutional Court

**DETERMINED AS FOLLOWS:**

From case papers it is evident that Victor Ozerov, Irina Ozerova and her daughter Camilla Ozerova are registered in the apartment located in Baku city on A. Javad Street, building 22, apartment 94. The tenant in this apartment was also L.Bobrova. According to the Order of the Chief Executive of the Sabail district of the Baku city as of December 12, 1994 No. 4136 “On change of the lease contract of living space and gratuitous transfer of the apartment of I. Ozerova” the lease contract with respect to this apartment after death of L.Bobrova (who was the tenant according to the lease contract) was changed. The deceased person made this property over to her granddaughter I. Ozerova. According to the Law of the Republic of Azerbaijan as of January 26, 1993 “On privatization of housing stock in the Republic of Azerbaijan” (hereinafter referred to as the Law “On Privatization of Housing Stock in the Republic of Azerbaijan”) it was gratuitously transferred to her personal property and on the basis of the registration certificate as of January 11, 1995 it was registered for I. Ozerova as a private property.

I. Ozerova appealed to court with the claim against V. Ozerov for loss of the right for living space and cancellation of a registration. I. Ozerova proved the claim that her brother V. Ozerov does not live long time in the registered challenged apartment, actually living in other place and therefore his registration has to be cancelled.

V. Ozerov put forward the counterclaim against I. Ozerova and the Baku Municipal Government of Public Service of the Register of Real Estate (hereinafter referred to as the Service of the Register) “concerning recognition of privatization as not valid, cancellation of the registration certificate, loss of the right for living space and cancellation of registration”. V. Ozerov proving the counterclaim claimed that his sister I. Ozerova without his permission illegally privatized the challenged apartment and as a result deprived him of the right to a share in the apartment that is in common use.

Sabail District Court of Baku city by its Decision as of September 25, 2008, having satisfied I. Ozerova's claim, recognized a right of use of V. Ozerov on the challenged apartment as lost and cancelled his registration in this apartment, and rejected the counter claim requirement.

The Sabail district court concluded that V. Ozerov constantly did not live in the challenged apartment and in this regard his registration in this apartment has formal character. Therefore, according to Article 60 of the Housing Code of the Republic of Azerbaijan acting till October 1, 2009 his registration in this apartment has to be cancelled. At the same time, the court of the first instance considered that V. Ozerov, having put forward the counterclaim concerning recognition of privatization as not valid and so forth, in July, 2008 according to Article 73 of the Civil Code of the Republic of Azerbaijan acting till September 1, 2000 (hereinafter referred to as the former Civil Code) passed the 3rd year period of limitation of action provided at privatization of the challenged apartment.

By the decision of Civil Board of the Court of Appeal of Baku city (previously named as the Judicial Board on Civil Cases of the Court of Appeal of Baku city) of January 29, 2009 the judgment of the first instance in the part regarding the requirement of I. Ozerova cancelled, and adopted the new decision on a rejection of requirements of the last, and uphold other part of the decision.

Civil Board of the Court of Appeal of Baku city on the basis of the appeal complaint of V. Ozerov, having taken into account that he temporarily did not live in the challenged apartment, seasonal nature of his work, and also his accommodation in the apartment of the mother-in-law and based on the decision of the Constitutional Court of the Republic of Azerbaijan of March 12, 1999 “On Article 60 of the Housing Code” came to a conclusion concerning lack of the basis of loss of a right of use of this apartment. The Civil Board of the Court of Appeal of Baku city, agreed with a conclusion of court of the first instance concerning the admission V. Ozerov of the term of limitation of action, though established that from July 16, 1993 to September 4, 1995 he served in the urgent forces. Based on the available notices and payment checks for utilities the court considered that he had to know concerning privatization of the apartment by I. Ozerova.

By the decision of Civil Board of the Supreme Court of the Republic of Azerbaijan (previously named as the Judicial Board on Civil Cases of the Supreme Court; hereinafter referred to as the Civil Board of the Supreme Court) of July 2, 2009 appeals of I. Ozerova and V. Ozerov were not satisfied, the judgment of appeal instance were upheld.

V. Ozerov in the complaint lodged to the Constitutional Court of the Republic of Azerbaijan (hereinafter referred to as the Constitutional Court) asks to verify compliance of the decision of court of cassation instance with the Constitution (hereinafter referred to as the Constitution) and to laws of the Republic of Azerbaijan.

The main argument of the applicant is that the courts that considered case, having applied the term of limitation of action to the requirement concerning illegal privatization of the challenged apartment of I. Ozerova without his permission, specified that he had to know concerning violation of the rights from notices and checks addressed to I. Ozerova. Without having any proofs concerning obtaining by V. Ozerov these notices and checks, without establishing the beginning of a current of term of limitation of action, the relevant provisions of former Civil Code were applied. However, in case there are no proofs of his knowledge concerning privatization. The applicant considers that his property right, including the right of a guarantee of legal protection of the rights and freedoms enshrined in Articles 29 and 60 of the Constitution are broken.

Plenum of the Constitutional Court in connection with the complaint considers important to note the following.

According to Article 60.1 of the Constitution legal protection of rights and liberties of every citizen is ensured. This article of the Constitution guarantees legal protection as rights and freedoms of the citizens fixed by the Constitution, and the rights and freedoms provided in laws and other normative legal acts of the Republic of Azerbaijan. The judicial guarantee defines on the one hand, the right of an appeal to the court for the purpose of restoration of the violated rights and freedoms of everyone, and on the other hand an obligation of courts to consider these addresses and to adopt on them the fair decision.

The judicial guarantee of the violated rights and freedoms, acts as one of legal measures of the serving realization of their constitutional guarantees. In the decision of the European Court of Human Rights (hereinafter referred to as the European Court) in the case of “Miragall Escolano and others v. Spain” of October 28, 1998 it was noted that “the rules governing the formal steps to be taken and the time-limits to be complied with in lodging an appeal are aimed at ensuring a proper administration of justice and compliance, in particular, with the principle of legal certainty. Litigants should expect those rules to be applied…The Court reiterates that the rules governing time-limits for appeals are intended to ensure a proper administration of justice. That being so, the rules in question, or their application, should not prevent litigants from using an available remedy” (§ 45).

In the decision of Plenum of the Constitutional Court of November 3, 2008 On verification of conformity of decision of the Judicial Board on Civil Cases of the Supreme Court of the Republic of Azerbaijan as of 6 November 2007 to Constitution and laws of the Republic of Azerbaijanin connection with the complaint of Eyvaz Khakimov”, and also in other decisions it is specified that the beginning of a running of limitation of action is connected, on the one hand, with the objective moment of violation of the subjective right, and on another hand with the subjective moment when authorized person learned or had to learn about violation of the rights. Existence of these two different factors and their quite frequent discrepancy are the important point influencing establishment of the beginning of limitation of action.

Besides, in decisions of Plenum of the Constitutional Court it was noted that from the point of view of lawful resolution of any civil dispute along with establishment of the beginning of a current of term of limitation of action, also other circumstances concerning dispute have to be considered.

According to a legal position of Plenum of the Constitutional Court of the limitation of action stated in these decisions term as the term of protection of the violated right is inseparably linked with violation of the subjective right which is the reason of the beginning of a current of this term. The court was not right having rejected the claim because of the expiration of limitation of action, in advance without having investigated such issues, whether as the applicant has the corresponding subjective rights, whether there were violations of subjective right, whether the respondent knew about this violation. Therefore, the judicial act that rejected the claim for the reason of a current of term of limitation of action, and not resolving an issue of violation of subjective civil law in itself is contradictory and unreasonable. Conclusions to which the court in connection with a current of term of limitation of action came have no due basis (decision of Plenum of the Constitutional Court of May 8, 2008 according to L. Binnatova's complaint and of January 16, 2009 according to H. Khalilov's complaint).

It is necessary to note that the courts that considered case did not state the relation to the fact that at the above Order of the chief executive of the Sabail district there were no information on registration of other persons in the challenged apartment, and therefore concerning consent on privatization. At the same time courts at all stages of judicial proceedings did not give a legal assessment to V. Ozerov's arguments that he learned about privatization of the challenged apartment only after giving in court of the claim against him, to recognition of the representative of I. Ozerova concerning ignorance of existence of consent of V. Ozerov to privatization of the apartment and information of the representative of Service of Register on absence in archive of any document concerning consent of V. Ozerov.

According to the civil procedure legislation, justice is carried out based on facts, principle of contentiousness and equality of parties. Judge should always secure compliance with the principle of contentiousness. Judge should base his decision solely upon reasons discussed in compliance with the principle of contentiousness, explanations and documentation submitted by parties. Court should create necessary conditions for all-faceted, complete and fair hearing of case for the purposes of finding truth. Court evaluate evidence in a fair, impartial, all-complete and full manner and thereafter evaluate norms of law to apply to such evidence. No evidence have a preliminarily established force for court. Court decision should be legal and motivated. Decision should be based upon actual circumstances established with respect to case and relationships between the parties(Articles 9.1, 9.3, 14.1, 88, 217.1 and 217.3 of the Civil Procedure Code of the Republic of Azerbaijan (hereinafter referred to as the CPC)).

In spite of the fact that courts also referred to notices and checks for utility and operational costs, however did not take into account that it’s are not the documents certifying privatization of the apartment, did not raise the issue of obtaining of these documents by the applicant, despite their importance for lawful and fair consideration of the case. Besides, during privatization that took place when it was unambiguously established that V. Ozerov was in military service (from 17 August 1993 till 4 September 1995), courts, without having specified the beginning of a current of term of limitation of action in judicial acts, came to a wrong conclusion considering that he had to know concerning violation of the rights.

In this regard, Plenum of the Constitutional Court considers important to pay attention to the principle of legal certainty having special value in protection of the rights and freedoms of the person. According to a legal position of Plenum of the Constitutional Court, the constitutional law doctrine recognizes a principle of legal certainty as one of basic elements of rule of the law, found its reflection in a preamble of the Constitution of the Republic of Azerbaijan. And the principle of legal certainty, along with other requirements, provides for clearness and definiteness concerning an existing legal situation in the most general sense. From this point of view, people should trust reliability of the data of the state register of real estate via the procedure established by the law. People should not expect constantly other new data calling the data obtained from this register into question having changeable character and becoming the reason of negative consequences for them (decision of Plenum of the Constitutional Court as of May 27, 2008 “On Article 228.5 of the Civil Code of the Republic of Azerbaijan”).

Plenum of the Constitutional Court considers that application by courts of Articles 73 and 78 of former acting Civil Code without establishment of the moment of the beginning of a current of term of limitation of action, results in discrepancy of a legal conclusion concerning the admission to them this term to the principle of legal certainty and violates the right of a guarantee of legal protection affirmed in Article 60 of the Constitution.

Plenum of the Constitutional Court also considers necessary to note some issues connected with the property right of the applicant. By the courts considering case it was established that along with that V. Ozerov was the member of the family of the tenant of the apartment, and before privatization of the challenged apartment of I. Ozerova he was registered in the apartment which was their joint place of residence, according to the Article 5 of the Law of the Republic of Azerbaijan “On privatization of housing stock in the Republic of Azerbaijan”. Thus the applicant had rights of acquisition of a share from the general property which resulted from privatization.

Concerning a issue of definition of this share as property, it is necessary to consider the created case law of the European Court. The Court in case of “Öneryildiz v. Turkey” as of November 30, 2004 specified that the concept of “possessions” in the first part of Article 1 of Minutes No. 1 has an autonomous meaning which is not limited to ownership of physical goods and is independent from the formal classification in domestic law: the issue that needs to be examined is whether the circumstances of the case, considered as a whole, may be regarded as having conferred on the applicant title to a substantive interest protected by that provision. Accordingly, as well as physical goods, certain rights and interests constituting assets may also be regarded as “property rights”, and thus as “possessions” for the purposes of this provision. The concept of “possessions” is not limited to “existing possessions” but may also cover assets, including claims, in respect of which the applicant can argue that he has at least a reasonable and “legitimate expectation” of obtaining effective enjoyment of a property right.

In view of the specified legal position of the European Court, Plenum of the Constitutional Court considers that according to Article 5 of the Law of the Republic of Azerbaijan “On privatization of housing stock in the Republic of Azerbaijan” the applicant possesses right for “lawful expectation” with respect to receiving a share during privatization from the general property, and has interest according to essence of the Article 1 of the Minutes No. 1 of the European Convention on Protection of Human Rights and Fundamental Freedoms regarding the “property” concept.

Respectively the courts that considered the case groundlessly applied terms of limitation of action to V. Ozerov's requirements, deprived him of his right of participation in privatization on the basis of the Article 5 of the Law of the Republic of Azerbaijan “On privatization of housing stock in the Republic of Azerbaijan” and violated his property right affirmed in the Article 29 of the Constitution.

Despite of it the case was considered by court of appeal instance without execution of norms of a substantive and procedural law. The Civil Board of the Supreme Court by its decision dated July 2, 2009 upheld a judgment of appeal instance and as a result the requirements of the Articles 416 and 418.1 of the Civil Procedure Code were not observed, the property right and the right of a guarantee of legal protection of the applicant enshrined in the Articles 29 and 60 of the Constitution were violated.

Thus, according to Article 416 of the Civil Procedure Code the court of cassation instance verify the correctness of application by court of appeal instance of norms of a substantive and procedural law. According to Article 418.1 of the Civil Procedure Code violation or the wrong application of norms of a substantive and procedural law is the basis for cancellation by court the cassation instance of the decision or ruling of court of appeal instance.

Plenum of the Constitutional Court considers that the courts which considered the this case by applying Articles 73 and 78 of the former Civil Code, but not Article 5 of the Law of the Republic of Azerbaijan “On privatization of housing stock in the Republic of Azerbaijan” which had to be applied, violated requirements of Articles 416 and 418.1 of the Civil Procedure Code, the property right and the right of a guarantee of legal protection of the applicant fixed in Articles 29 and 60 of the Constitution.

According to the aforementioned, Plenum of the Constitutional Court comes to a conclusion that the decision of Civil Board of the Supreme Court as of July 2, 2009 has to be recognized as void because of its discrepancy with the Articles 29 and 60 of the Constitution and with the Articles 416 and 418.1 of the Civil Procedure Code. Case has to be reconsidered according to the present decision, in order and the terms established by the civil procedure legislation of the Republic of Azerbaijan.

Being guided by parts V, IX and X 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 Civil Board of the Supreme Court dated July 02, 2009 concerning loss of the right for living space and cancellation of registration of I. Ozerova against V. Ozerov as of July 2, 2009 as null and void due to its discrepancy with the Articles 29 and 60 of the Constitution of the Republic of Azerbaijan and the Articles 416, and 418.1 of the Civil Procedure 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.