**ON BEHALF OF THE REPUBLIC OF AZERBAIJAN**

**DECISION**

**OF THE PLENUM OF CONSTITUTIONAL COURT**

**OF THE REPUBLIC OF AZERBAIJAN**

*On interpretation of paragraph twenty of Article 11.1 of the Law of the Republic of Azerbaijan “On Status of Military Personnel” and Article 121.2 of Regulation “On Performing of Military Service” approved by the Law of the Republic of Azerbaijan of October 3, 1997*

**28 March 2014 Baku city**

The Plenum of the Constitutional Court of the Republic of Azerbaijan composed of Farhad Abdullayev (Chairman), Sona Salmanova, Sudaba Hasanova, Rovshan Ismaylov (Reporter-Judge), Mahir Muradov, Jeyhun Garajayev, Rafael Gvaladze, Isa Najafov and Kamran Shafiyev;

attended by the Court Clerk Faraid Aliyev,

representatives of interested parties – Rauf Kishiyev, colonel of justice, Head of Legal Department of the Ministry of Defense of the Republic of Azerbaijan; Chingiz Kazimov, Acting Head of Finance and Budgetary Department; Sardar Mamedov, Head of Sector of Military Legislation of the Department for Administrative and Military Legislation of Milli Majlis of the Republic of Azerbaijan;

specialists – Asad Mirzaliyev, Judge of Supreme Court of the Republic of Azerbaijan; Ulvi Mailov, Judge of the Court of Appeal of Baku city; Bahtiyar Mamedov, Senior Advisor of Department of Labour Policy of the Ministry of Labour and Social Protection of Population of the Republic of Azerbaijan;

expert – Alish Gasimov, Head of the Department for Labor and Environmental Law of Baku State University, Doctor of Law;

in accordance with the Article 130.4 of the Constitution of the Republic of Azerbaijan examined in open judicial session via special constitutional proceedings the case on request of the Cabinet of Ministers of the Republic of Azerbaijan on interpretation of paragraph twenty of Article 11.1. of the Law of the Republic of Azerbaijan “On Status of Military Personnel” and Article 121.2 of Regulation “On Performing of Military Service” approved by the Law of the Republic of Azerbaijan on October 3, 1997 No. 377-IQ.

having heard the report of Judge Rovshan Ismaylov, the reports of the legal representatives of the subjects interested in special constitutional proceedings and specialists, conclusions of expert, examined the materials of the case the Plenum of Constitutional Court of the Republic of Azerbaijan

**DETERMINED AS FOLLOWS:**

The Cabinet of Ministers of the Republic of Azerbaijan (hereinafter referred to as the Cabinet of Ministers) in accordance with Article 130.4 of the Constitution of the Republic of Azerbaijan (hereinafter referred to as the Constitution) asked the Constitutional Court of the Republic of Azerbaijan (hereinafter referred to as the Constitutional Court) to interpret the paragraph twenty of Article 11.1.of the Law of the Republic of Azerbaijan “On Status of Military Personnel” (hereinafter referred to as the Law “On Status of Military Personnel”) and Article 121.2 of the Regulation “On Performing of Military Service” approved by the Law of the Republic of Azerbaijan of October 3, 1997 No. 377-IQ (hereinafter referred to as the Regulation “On Performing of Military Service”).

In the request it is noted that for the purpose of improvement of social protection of the military personnel and bringing of regulatory legal acts in the field of the military legislation according with existing labor legislation to the Law of the Republic of Azerbaijan of May 11, 2010 No. 1005-IIIQD (hereinafter referred to as the Law of May 11, 2010) “On introduction of amendments into the Law of the Republic of Azerbaijan “On Status of Military Personnel” and to the Regulation “On Performing of Military Service” approved by the Law of the Republic of Azerbaijan as of October 3, 1997 No. 377-IQ” in the specified acts the new provision of the following content was added:

“In case of non-use for any reasons by military personnel (except military personnel being at active military service) within calendar year, and also within other calendar years of the period on active military service of the regular leave, provided in this article, the compensation in an order and the amount, established by relevant organ of the executive authority is paid to him/her for unused regular leave of this calendar year, and also other calendar years of the period on active military service”.

With the purpose of ensuring of execution of point 1.3 of the Decree of the President of the Republic of Azerbaijan of June 10, 2010 No. 281 “On Application of the Law of the Republic of Azerbaijan dated May 11, 2010 No. 1005-IIIQD “On introduction of amendments into the Law of the Republic of Azerbaijan “On Status of Military Personnel” and to the Regulation “On Performing of Military Service” approved by the Law of the Republic of Azerbaijan of October 3, 1997 No. 377-IQ” (hereinafter referred to as the Decree of June 10, 2010) the Cabinet of Ministers accepted the Resolution of September 28, 2012 No. 217 “On establishment of a payment procedure and compensation amount to the military personnel (except the military personnel of active military service) who was not used for any reasons the regular leave within calendar year, and also within other calendar years of the period on active military service for unused regular leave of this year and also other calendar years of the period on active military service" (hereinafter referred to as the Resolution dated September 28, 2012). According to a Part of 1 this Resolution, in case of non-use for any reasons by the military personnel (except the military personnel of active military service) within calendar year, and also within other calendar years of the period on active military service of the regular leave, for establishment of a compensation amount for unused regular leave of this calendar year, and also other calendar years of the period on active military service the amount of his official pay rate, a salary on a rank and the length-of-service allowances which were at the time of the address is divided into annual average number of calendar days of month (30.4 days) and the received amount is multiplied on the number of calendar days of the unused holiday period.

According to a conclusion of a requested body, such regulation generally follows from content of a concept of the status of the military personnel enshrined in the military legislation. Thus, according to Article 3 of the Law “On Status of Military Personnel” citizens obtain the status of the military personnel from the date of call-up to the Armed Forces of the Republic of Azerbaijan, the enlisting on service in Armed Forces voluntarily or under the contract, call-up on reservist trainings, entering in military educational institutions and lose this status from the date of dismissal from service in Armed Forces of the Republic of Azerbaijan, an exception of lists of military unit, assignment or an exception of military educational institutions, the ends of reservist trainings as it should be established by the legislation of the Republic of Azerbaijan.

In a request, it is also noted that because the Law of May 11, 2010 came into force since June 12, 2010 the implementation of the Resolution of September 28, 2012 shall extend to the military personnel who is on active military service from the date of entry into force of this Law.

From the filed materials it is evident that for the reason that addresses of military personnel transferred to the reserve and resignation concerning the payment of compensation, sent to Ministry of Defense was not decide positively, they are forced to turn to the courts. Courts satisfy their claims referring generally to Articles 25 and 37 of the Constitution.

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

According to Article 37 of the Constitution, everyone has the right to rest. To people working on contract with a maximum 8-hour working day, rest and holiday days, at least 21-day paid annual leave is guaranteed.

The right to rest including the right of use of periodic holidays with pay found the reflection in Article 24 of the Universal Declaration of Human Rights, the point “d” of Article 7 of the International Covenant on Economic, Social and Cultural Rights and in the first point of Article 3 of the Convention No. 132 of the International Labour Organization “Holidays with Pay” accepted in 1970 (hereinafter referred to as the Convention).

Existence and implementation of right to rest is a necessary condition for development of the person and realization of some other constitutional rights, but as it is apparent from content of Article 37 of the Constitution its right is exercised within the labor relations and is generally connected with the right of everyone affirmed in Article 35 of the Constitution to freely choose to himself on the basis of the ability the activity, profession, position and area of employment and the right to work in safe and healthy conditions.

Having exercised the right to rest the individual is exempted from fulfillment of duties, following from the labor relations and using this time at discretion, first of all, tries to obtain restoration of the moral and physical forces, working capacity and strengthening of health. Along with it, other important purpose of the right to rest consists in development and improvement of abilities and talents of the personality, ensuring his participation in private and public life.

In Article 37.2 of the Constitution, the means guaranteeing right to rest are established. The legislator shall perceive the provisions reflected in this regulation of the Constitution as the minimum standards of right to rest. However, it does not mean at all that the legislator considering features of certain types of a labor activity, cannot establish higher level of right to rest for the workers who are engaged in these types of a labor activity.

In the system of the means guaranteeing the right to rest a specific place holds, the holidays with pay as the longest time of rest. The right for a holiday having constitutional bases and regulated by the legislation is the subjective right that is carried out within the labor relations. For realization of this right, the legislator has to establish conditions of use, and to assign certain duties to the employer. At the same time, the balance between constitutional rights of workers and need of execution of labor functions has to be kept.

Enlisting of the citizen on active military service is one of methods of implementation of his right to work affirmed in the Constitution. The military service in itself as a special type of public service directly connected with ensuring of defense of the country and state security is the activities performed for common (public) interests. Implementation of functions of the constitutional value by the persons who are on military service exerts impact on their legal status, and also on content and nature of the relations existing between these persons and the state. This type of service differs from other types of a labor activity and has certain features.

Based on the specified position the legislator fixing within the constitutional powers by the person legal status of the military personnel sets certain additions or restrictions for implementation of their rights and freedoms, and also assigns the special obligations following from the obligations, the principles and functions of military service, and also from features of activities of persons who are in military service. This power of the legislator is directly reflected in the Law “On Status of Military Personnel”. Thus, according to Article 1.2 of this Law the military personnel has the rights and freedoms of citizens of the Republic of Azerbaijan with the additions and restrictions connected with features of military service and established by this Law and other legal acts of the Republic of Azerbaijan. The military personnel performs all duties of citizens of the Republic of Azerbaijan, and also the obligations following from the status.

In view of complexity of the functions that are carried out on military service, their danger to life and health, the legislator, unlike other persons that are engaged in a labor activity, provided higher level of social protection of the military personnel. It, in turn found the reflection in their right to rest and, in particular in terms of a holidays with pay.

According to Article 37.2 of the Constitution, to people working on contract with a maximum 8-hour working day, rest and holiday days, at least 21-day paid annual leave is guaranteed. Article 114.2 of the Labor Code of the Republic of Azerbaijan repeating the specified Constitution provisions establishes that At least 21 calendar days of paid base vacation must be granted to employees, and to the employees specified in point 3 of this article, paid main leave length of 30 calendar days shall be granted.

Considering the above concerning performance of functions of military service the legislator in the paragraphs “b”, “v”, “q” of Article 120 of the Regulation «On Performing of Military Service” has established granting the main holiday to the military personnel of extended military service - 30 days for each calendar year, ensigns and warrant officers – 35 days for each calendar year, to officers - 45 days for each calendar year.

It should be especially noted that the military personnel performs functions of the constitutional value and therefore timely realization of right to rest serves not only to his interests but also to public interests.

In this connection, the legislator established a number of regulations for implementation of the right of the military personnel to rest. Thus, according to content of Article 126 of the Regulation “On Performing of Military Service” in military units and sub-units till January first is drawing the plan of the regular leaves of the military personnel for new year which affirms the chief authorized to grant leaves to the corresponding categories of the military personnel and declared to staff. The relevant organizations shall control constantly provision of the regular leaves of the military personnel based on the approved plan and inform concerning it the corresponding commander (chief). At the beginning of a year the relevant organization of the corps (division) generalizes information on the persons who did not leave to the regular leave last year and the reasons of this circumstance and till January ten provides to the commander of the corps (division), the commander to a type of troops the offers on provision in the first quarter of new year of the regular leave by this military personnel. The commander of the corps (division) brings to the notice of the commanding officer the list of military personnel who was not leave to the regular leave.

The provisions providing the right of the military personnel to rest found the reflection also in Article 121 of the specified Regulation. In part one of this article the time frames of use of regular leave are established. Thus, the regular leave is granted to each serviceman within calendar year. If during previous year leave for the exclusive reasons was not granted, then in particular cases, with the permission of the commander of the corps (division) and direct chiefs equal to him or higher, the leave for last year can be granted in the first part of next year.

Thus, the serviceman should go to the regular leave, as a rule within calendar year. Transferring of issue for the exclusive reasons for other time (the first quarter of the next year) can be performed with the permission of the commander with higher rank. In case of establishment of such restriction connected with transferring of regular leave for other time, the legislator does not connect it with the fact that not granted timely regular leave, does not allow to achieve effective objectives and also with need of continued support of combat readiness of armed groups.

The Court of European Union expresses the similar position. In the decision of this Court of November 22, 2011 on case of KHS AG vs. Winfried Schulte has been specified that transfer of implementation of the right for the paid holiday for other time is an additional opportunity to use this right; the objectives of the right for a holiday are achieved if its transfer for other time does not exceed a certain temporal limit (§25, 33). The Court has come to such conclusion referring to Article 9.1 of the Convention. According to contents of this provision, the uninterrupted part of the annual holiday with pay must be granted and taken no later than one year, and the remainder of the annual holiday with pay no later than 18 months, from the end of the year in respect of which the holiday entitlement has arisen.

The legislator with the purpose of ensuring of higher level of the right of the military personnel to rest, added to the Article 11 of the Law “On Status of the Military Personnel” as well as to the Article 121 of the Regulation “On Performing of Military Service” the regulation providing for the right to receive compensation for unused regular leave.

Due to the fact that the first and second sentence of the Article 121.1 of this Regulation are characterized in system connection and standard integrity the payment of compensation is considered as the additional tool of providing the entitlement to leave and therefore cannot be apprehended as the basis for not provision of leave or refusal of it.

This position is based also on Article 12 of the Convention.

According to the relatively similar issue, the Plenum of the Constitutional Court considers as deserving attention the position existing in case-law of foreign body of the constitutional justice. Thus, the Constitutional Court of the Russian Federation came to conclusion that payment of a monetary compensation for all non used regular leaves is an exception of the general rule of provision to the dismissed worker of leave in nature and acts as additional guarantee of implementation of the right to rest affirmed in the Constitution (decision of the Constitutional Court of the Russian Federation of October 19, 2010 No. 1355-O-O).

On the other hand, the right of receipt of compensation for unused leave established by the law pursues the aim following from the Constitution, of replacement of violated entitlement to leave. In this connection the compensation for unused leave is paid not for an exit from the status of the serviceman, but for non-use by the serviceman of the right of receipt of the regular leave during stay in this status. For this reason, the legislator in the Law of May 11, 2010 did not establish as a condition active duty at the time of the address for receipt of compensation.

It is necessary once again to consider that declaration in the Constitution of safe work and right to rest, first of all follows from the fact that human health – the highest inseparable blessing and many other benefits and values without it lose a meaning, respectively preserving and strengthening it is played the main role in life of society and state. By this the nature of liabilities of the state acknowledging the responsibility for protection and strengthening of human health, and content of legal regulation of the relations connected with implementation by the corresponding individuals of the specified constitutional rights is determines.

Moreover, any other solution of an issue, that is, payment of compensations only to military personnel that is on military service can lead to violation of equality principle enshrined in the Article 25 of the Constitution.

Based on it the right to receive compensation for unused regular leave for calendar year provided in the twentieth paragraph of the Article 11.1 of the Law “On Status of Military Personnel” and in the Article 121.2 of the Regulation «On Performing of Military Service” shall extend also to the military personnel transferred to the reserve and resignation till June 12, 2010 (that is before entry into force of the Law as of May 11, 2010).

Apparently from content of the twentieth paragraph of the Article 11.1 of the Law “On Status of Military Personnel” and the Article 121.2 of the Regulation “On Performing of Military Service” the establishment of procedures of payment of compensations for unused regular leave, and also its amounts is assigned by the Milli Majlis of the Republic of Azerbaijan to relevant organ of the executive authority.

In point 2 of the Decree of June 10, 2010 it is established that provided in the twentieth paragraph of Article 11.1 of the Law “On Status of Military Personnel” and Article 121.2 of the Regulation “On Performing of Military Service” the authorities of “relevant organ of the executive authority” is performs by the Cabinet of Ministers.

As in other democratic constitutional states the legislator for rational implementation of the governmental authorities at regulation of the issues reflected in the Article 94 of the Constitution, having defined their parties as having the most important and reasonable character, for a specification and implementation of the norms which are already regulated in a legislative order can confer to appropriate authority of executive power the authorities for establishment of rules.

Regulation of an order of implementation of the basic rights provided by the Constitution or the norm of law providing the powers of relevant organ of the executive authority connected with establishment of restrictions in case of implementation of these rights shall be clear and accurate. Restriction of basic rights of the person is not admissible, referring to an ambiguity or equivocation of the powers established by the legislation.

According to content of Article 149.5 of the Constitution, and also the legal position expressed in the decision of the Plenum of the Constitutional Court dated December 30, 2008 “On the Article 1 of the Law of the Republic of Azerbaijan “On perpetuating the name of shahid and benefits to shahid’s families” Resolutions of Cabinet of Ministers should not contradict to the constitutional regulations and the principles, the commonly accepted principles, laws and decrees of the President of the Republic of Azerbaijan. In this connection the resolutions of Cabinet of Ministers adopted in connection with implementation of laws shall meet the purpose of this law, not change its content, regulate the issues established in the law.

From contents of the Law of May 11, 2010 and the Decree of June 10, 2010 it is evident that though the Cabinet of Ministers has power of establishment of the amount and procedure of payment of compensation for unused regular leave, nevertheless it cannot regulate a circle of people, having rights of receipt of compensation. Other circumstance can become a cause of infringement, following from Article 37 of the Constitution of the power of legislature on providing the paid leave, and Article 149.5 of the Constitution granted by the law.

In this connection, the Plenum of the Constitutional Court considers that it shall be recommended to the Cabinet of Ministers to establish the amount and procedure of payment of compensation to the military personnel who was transferred to the reserve and resignation till June 12, 2010 for unused regular leave for calendar years during active duty.

Considering the above, the Plenum of the Constitutional Court comes to such conclusion that:

- the right of receipt of compensation for unused regular leave for calendar year provided in the twentieth paragraph of Article 11.1 of the Law “On Status of Military Personnel” and in Article 121.2 of the Regulation «On Performing of Military Service” extends also to the military personnel who was transferred to the reserve and resignation till June 12, 2010.

- according to the legal positions reflected in a descriptive and motivation part of this decision to recommend to the Cabinet of Ministers to establish the amount and procedure of payment of compensation to the military personnel who was transferred to the reserve and resignation till June 12, 2010 for unused regular leave, for calendar years during active duty.

Being guided by the Article 130.4 of the Constitution of the Republic of Azerbaijan and Articles 60, 62, 63, 65-67 and 69 of the Law of the Republic of Azerbaijan “On Constitutional Court”, Plenum of the Constitutional Court of the Republic of Azerbaijan

**DECIDED:**

1. The right of receipt of compensation for unused regular leave for calendar year provided in the twentieth paragraph of Article 11.1 of the Law “On Status of Military Personnel” and in Article 121.2 of the Regulation “On Performing of Military Service” approved by the Law of the Republic of Azerbaijan of October 3, 1997, No. 377-IQ shall extend also on military personnel transferred to reserve and resignation till June 12, 2010.

2. According to legal positions reflected in a descriptive and motivational part of this decision to recommend to the Cabinet of Ministers to establish the amount and procedure of payment of compensation to the military personnel transferred to the reserve and resignation till June 12, 2010 for unused regular leave, for calendar years during active duty.

3. The decision shall come into force from the date of its publication.

4. 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”.

5. The decision is final, and may not be cancelled, changed or officially interpreted by any institution or official.