**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 Civil Board of the Supreme Court of the Republic of Azerbaijan as of 8 June 2011 to Constitution and laws of the Republic of Azerbaijan in connection with the claim of R.Jafarov*

**18 May 2012 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, Rafael Qvaladze, Isa Nadjafov and Kamran Shafiyev (reporter judge),

with participation of the secretary I.Ismayilov,

representative of body lodged the request Natiq Huseynov, Head of Department of Legal Coverage of the Prosecutor’s Office of the Republic of Azerbaijan,

representative of respondent body – Bagir Asadov, Judge of the Supreme Court of the Republic of Azerbaijan

expert: expert – Mais Aliyev, Doctor of Law, acting Professor of Civil Process, Labour and Ecological Law Board of Baku State University,

specialists – Eldar Askerov, senior adviser of Department for Administrative and Military Legislation of Milli Majlis of the Republic of Azerbaijan; Gunay Bagirova, acting head of the Law Department of the State Fund of Social Security of the Republic of Azerbaijan and Elshan Mamedaliev,

examined in open judicial session via special constitutional proceedings the case on verification of conformity of decision of the Civil Board of the Supreme Court of the Republic of Azerbaijan as of 8 June 2011 to Constitution and laws of the Republic of Azerbaijan on request of the Prosecutor’s Office of the Republic of Azerbaijan.

Having heard the report of Judge K.Shafiyev, speech of representatives of interested bodies, conclusions of experts, having considered and discussed the materials of the case, Plenum of the Constitutional Court

**DETERMINED AS FOLLOWS:**

From request and materials of a civil case it is evident that R. Jafarov addressed to the State Fund of Social Protection of the Republic of Azerbaijan (hereinafter referred to as the State Fund of Social Protection) with a request to enlist the 5 years period of getting the higher education and about 7 years period of work at a position of the presiding judge in a length of service in prosecutor's office, to grant him since July, 2001 the pension for 25 years of service in prosecutor's office to count since then and to pay pension to him. However, by the letter of the State Fund of Social Protection dated May 22, 2007 to R. Jafarov he was refused of labor pension on favorable terms as he has no minimum 25 years length of service in bodies of prosecutor's office. R. Jafarov having appealed with the claim to court, proved the requirement that from 1972 to 1977 he got an education at law department of the Azerbaijan State University after graduation of which began work in bodies of prosecutor's office. Since August 1, 1977 till September 1, 2000 he continuously worked in bodies of prosecutor's office at positions of investigator, assistant prosecutor and prosecutor, and since September 1, 2000 till July 27, 2007 – at a position of the chairman of Guba District Court. Based on it R. Jafarov came to a conclusion that the State Fund of Social Protection has to include term of his study and work in court in term of service in prosecutor's office and to provide the pension right from the moment of its emergence for a 25-year experience in bodies of prosecutor's office.

By the decision of Yasamal district court of Baku city dated December 17, 2007 the claim was partially satisfied; it was decided to include the period of work of R.Jafarov at a position of the Chairman of Guba District Court into his length of public prosecutor's service and to grant him the pension, as to the prosecutor.

Subsequently within 4 years, the civil case was repeatedly considered in courts of appeal and cassation instances and various decisions were adopted.

By the decision of Civil Board of the Supreme Court (hereinafter referred to as the CB of the Supreme Court) of June 8, 2011 it was decided to add the period of work of R.Jafarov at a position of the presiding judge by 23 years 1 month and 3 days – to the term which worked in prosecutor's office, and since August 1, 2002 to grant him the preferential pension for 25 years of service in prosecutor's office, to charge its recalculation and payment according to the law to Nasimi regional office of the State Fund of Social Protection.

The inquirer body appealed for verification of compliance of the decision of CB of the Supreme Court of June 8, 2011 to part II of the Article 127, part III of Article 129 of the Constitution of the Republic of Azerbaijan (hereinafter referred to as the Constitution), to Articles 32.4, 32.5 of the Law of the Republic of Azerbaijan of November 15, 2001 “On service in bodies of prosecutor's office” (hereinafter referred to as the Law “On Service in Bodies of Prosecutor's Office”) and to Articles 9.4, 9.8 of the Law of the Republic of Azerbaijan of November 28, 2008 “On labor pensions” (hereinafter referred to as the Law “On Labour Pensions”).

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

The constitutional law doctrine recognizes a principle of legal certainty as one of basic elements of rule of the law, found its the reflection in a preamble of the Constitution of the Republic of Azerbaijan. The principle of legal certainty, along with other requirements, provides for clearness and definiteness concerning an existing legal situation in the most general sense (decision of Plenum of the Constitutional Court of the Republic of Azerbaijan dated May 27, 2008 “On Article 228.5 of the Civil Code of the Republic of Azerbaijan”). Sometimes inevitable incompleteness or uncertainty of legal norms is eliminated by means of jurisprudence.

According to the legal position created by Plenum of the Constitutional Court, court of cassation, verifying the correctness of the law and explaining it, not only corrects the errors committed in case but also directs the jurisprudence to the exact and uniform application of the law. This serves to unification of the jurisprudence deriving from the provisions of part I of Article 131 of the Constitution, as well as part I of Article 77 of the law of Republic of Azerbaijan "On Courts and Judges" (decision of Plenum of the Constitutional Court of the Republic of Azerbaijan of February 28, 2012 “On interpretation of Article 420 of the Civil Procedure Code of the Republic of Azerbaijan”).

According to the legal position expressed in the decision of the European Court of Human Rights on the case of Skordino v. Italy (no. 1) in accordance with its case-law on the interpretation and application of domestic law, while the Court’s duty, under Article 19 of the Convention, is to ensure the observance of the engagements undertaken by the Contracting Parties to the Convention, it is not its function to deal with errors of fact or law allegedly committed by a national court unless and in so far as they may have infringed rights and freedoms protected by the Convention. Moreover, it is primarily for the national authorities, notably the courts, to interpret and apply domestic law. The Court is therefore required to verify whether the way in which the domestic law is interpreted and applied produces consequences that are consistent with the principles of the Convention, as interpreted in the light of the Court’s case-law. This is especially true where, as the Italian Court of Cassation has quite rightly observed, the domestic law refers explicitly to the provisions of the Convention. This supervisory role should be easier in respect of States that have effectively incorporated the Convention into their legal system and consider the rules to be directly applicable, since the highest courts of these States will normally assume responsibility for enforcing the principles determined by the Court (no. 36813/97, 29 of March, 2006, §§ 190-191).

Plenum of the Constitutional Court in this sense notes that interpretation and application by court of cassation instance of the domestic legislation has to correspond in accuracy to provisions of the Constitution and the legislation. Thus, the jurisprudence created on any issue has to correspond in all cases to the purpose and an essence of the applied legal norms, its sense should not be distorted, in particular practice of application has to be created in such form that not to become a cause of infringement of the rights and freedoms of the person fixed in the Constitution.

From this point of view it should be noted that according to Article 32.4 of the Law “On Service in Bodies of Prosecutor's Office” the workers who served in prosecutor's office not less than 25 years before achievement of age limit have the right for pension on a length of service, and passing of service by them can be stopped at their request. At the same time Article 9 of Law “On Labor Pensions” devoted “To the other persons having the right for labor pension on preferential terms" also affirms the right for labor pension of prosecutors who served in bodies of prosecutor's office not less than 25 years (Article 9.4.1.).

For an explanation of concept of service of bodies of prosecutor's office it is necessary to consider Article 32.5 of the Law “On Service in Bodies of Prosecutor's Office”. Thus, according to this article, at transfer of prosecutors to work to judicial authorities, judicial authorities and other law enforcement agencies the term of their service in prosecutor's office join to term of service in these bodies. Terms of service of the workers employed in prosecutor's office from these bodies and from the positions connected with coordination, legislative or organizational support of activity of law enforcement agencies join in term of service in prosecutor's office in the order established by the Prosecutor General of the Republic of Azerbaijan.

Thus, for acquisition by prosecutors of right for labor pension two opportunities – 25-year service in bodies of prosecutor's office or at transfer to work to prosecutor's office inclusion of term of service in other appropriate authorities, including in judicial authorities in term of service in prosecutor's office are provided in the legislation. In that case, upon transition of the person working as the judge for service in bodies of prosecutor's office and inclusion of terms of service in judicial authorities in term of service in prosecutor's office this person can have a right for preferential pension, as prosecutor. On the other hand, getting preferential pension, as prosecutor, the person who worked the main part of length of service in bodies of prosecutor's office, but transferred from bodies of prosecutor's office into other appropriate authorities including to a judicial position before execution of 25 years of service, with association of the subsequent judicial length of service over the years of service in prosecutor's office is not provided in the above acts.

Besides that point 2.2.3 of the Rules “On Additional Payments to Prosecutors for Length of Service” of the Cabinet of Ministers of the Republic of Azerbaijan No. 168 approved by the Resolution of October 31, 2002 “On material and social Protection of employees of bodies of prosecutor's office” belongs only to the right of the prosecutor for receiving of additional payments and according with Article 32.5 of the Law “On Service in Bodies of Prosecutor's Office” establishes inclusion of the period of work of the person at a judicial position in his length of service in prosecutor's office only for receiving additional payments. At the same time Article 18.5 of the Law of the Republic of Azerbaijan of May 26, 2006 “On Service in Judicial Bodies” (hereinafter referred to as the Law “On Service in Judicial Bodies”) also similar to Article 32.5 of the Law “On Service in Bodies of Prosecutor's Office”, regulates a social status of employees of judicial bodies.

Respectively point 2.2.3 of the specified Rule and Article 18.5 of the Law “On Service in Judicial Bodies” cannot become legal basis for getting the preferential pension for an employee of prosecutor's office bodies.

As it follows form the aforementioned it is possible to come to such conclusion that the decision of court of cassation instance dated 8 June 2011 that the person who was transferred to work into other appropriate authorities (including judicial position before 25 years of service in bodies of prosecutor's office) has the right to preferential pension subsequently as the prosecutor on the basis of point 2.2.3 of the Rules “On Additional Payments to Prosecutors for Length of Service” and the Article 18.5 of the Law “On Service in Judicial Authorities” cannot be recognized as corresponding to Article 32.5 of the Law “On Service in Bodies of Prosecutor's Office”, and also Article 9.4.1 of the Law “On Labour Pensions” and Article 60 of the Constitution providing a guarantee of the legal protection.

At the same time, it should be noted that according to Article 125.2 of the Constitution  the judicial power is exercised by the Constitutional Court of the Republic of Azerbaijan, Supreme Court of the Republic of Azerbaijan, courts of appeal of the Republic of Azerbaijan, general courts and other specialized courts of the Republic of Azerbaijan. At the same time, Article 133 of the Constitution devoted to Prosecutor's Office of the Republic of Azerbaijan is included in chapter VII under the name “Judicial authority”.

In other European countries also there is a similar approach. Thus, in the Law of the French Republic “On Status of Judicial Authority” as of December 22, 1958 it is specified that judicial authority along with judges also consists of prosecutors.

From the above interpreted it becomes clear that from the point of view of social security between person who worked the most part of office experience in bodies of prosecutor's office and turned into refereeing before 25 years of service and person who transferred from judging to public prosecutor's service there was a distinction of preferential character.

In this regard it is necessary to consider that according to Article 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as the Convention) the enjoyment of rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

According to the case law of the European Court the Court has established in its case-law that for an issue to arise under the Article 14 there must be a difference in the treatment of persons in analogous, or relevantly similar, situations. Article 14 prohibits differences in treatment based on an identifiable, objective or personal characteristic, or “status”, by which persons or groups of persons are distinguishable from one another.  Such a difference of treatment is discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realized (decision on case of Rangelov v. Germany, on March 22, 2012, §§ 85-86).

From this point of view, Plenum of the Constitutional Court notes that such distinction in social security in a issue of preferential pension between persons who are in similar provisions in judicial authority does not lean on any objective and reasonable reasons.

On the basis of specified, Plenum of the Constitutional Court comes to conclusion that:

It has to be recommended to Milli Mejlis of the Republic of Azerbaijan to improve the provisions of the legislation concerning social security of prosecutors and judges from the point of view of chapter VII of the Constitution, and Article 14 of the Convention;

The decision of CB of the Supreme Court of June 8, 2011 on a civil case on the basis of R. Jafarov's claim has to be recognized as not corresponding to Article 60 of the Constitution, and to Article 32.5 of the Law “On Service in Bodies of Prosecutor's Office” and Article 9.4.1 of the Law “On Labour Pensions” and 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.

At the same time, because of that that solution of a civil case, corresponding to requirements of the Constitution, and to the Convention causes need of improvement of regulation for a legislative order of the right of prosecutors for preferential pension, Plenum of the Constitutional Court considers that the civil case on R. Jafarov's claim has to be reconsidered in a judicial proceeding after carrying out of the corresponding improvement by the legislator.

Being guided by Article 130.3 of the Constitution of the Republic of Azerbaijan, Articles 52, 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 recommended to Milli Mejlis of the Republic of Azerbaijan to improve the provisions of the legislation concerning social security of prosecutors and judges from the point of view of chapter VII of the Constitution, and Article 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

2. To recognize the decision of Civil Board of the Supreme Court dated June 8, 2011 related to claim by R. Jafarov as contradictory to the Article 60 of the Constitution, to the Article 32.5 of the Law “On Service in Bodies of Prosecutor's Office” and to the Article 9.4.1 of the Law “On Labour Pensions” and to reconsider the case according to the present decision, in order and terms established by civil procedure legislation of the Republic of Azerbaijan.

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 body or official.