**ON BEHALF OF THE REPUBLIC OF AZERBAIJAN**

**DECISION**

**OF THE PLENUM OF CONSTITUTIONAL COURT**

**OF THE REPUBLIC OF AZERBAIJAN**

*On interpretation of some provisions of the Laws of the Republic of Azerbaijan “On Provision of Pensions of Military Personnel” and “On Labour Pensions” from the point of view of application by time*

**27 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, Mahir Muradov, Jeyhun Garajayev (Reporter-Judge), Rafael Gvaladze, Isa Najafov and Kamran Shafiyev;

attended by the Court Clerk Faraid Aliyev,

representatives of interested parties – Museyb Bayramov, Judge Economic Court No.1 of Baku city; Eldar Askerov, Senior Advisor of the Department for Administrative and Military Legislation of Milli Mejlis of the Republic of Azerbaijan;

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

specialist – Aynur Atayeva, Head of Department of Law and Strategic Researches of the State Social Protection Fund of the Republic of Azerbaijan;

in accordance with the Article 130.6 of the Constitution of the Republic of Azerbaijan examined in open judicial session via special constitutional proceedings the case on inquiry of the Economic Court No.1 of Baku city on interpretation of some provisions of the Laws of the Republic of Azerbaijan “On Provision of Pensions of Military Personnel” and “On Labour Pensions” from the point of view of application by time.

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

**DETERMINED AS FOLLOWS:**

The Economic Court No.1 of Baku city having applied to the Constitutional Court of the Republic of Azerbaijan (hereinafter referred to as the Constitutional Court) asks to give interpretation to application by time of provisions of the Law of the Republic of Azerbaijan dated April 29, 1992 “On Provision of Pensions of Military Personnel” (hereinafter referred to as the Law “On Provision of Pensions of Military Personnel”) and the Law of the Republic of Azerbaijan dated February 7, 2006 “On Labour Pensions” (hereinafter referred to as the Law “On Labour Pensions”) on the cases considered in connection with the provision of pensions of military personnel.

In the inquiry it is specified that F. Aliyev, applied to court with the statement of claim against the Ministry of Defense of the Republic of Azerbaijan (hereinafter referred to as the Ministry of Defense) and to the State Social Protection Fund of the Republic of Azerbaijan concerning the granting of a long-service pension.

The claim was substantiated by the fact that, before introduction on September 13, 2004 of amendments to the Law “On Provision of Pensions of Military Personnel” his length of service on preferential terms constituted 19 years 1 months 16 days, and from the 2004 till August, 2006 - 1 year 11 months. The requirement to consider the period till September 13, 2004 on preferential terms (1 day as 3 days) the claimant motivated over the years services in the combat zone.

The representative of Ministry of Defense considering the claim as unreasonable showed in court that F. Aliyev, by the order of Ministry of Defense as of August 14, 2006, was transferred to the reserve from Armed Forces of the Republic of Azerbaijan. Before the specified date, the term of military service of the claimant constituted according to a calendar 8 years 11 months and 13 days, on preferential terms 13 years 8 months and 1 day, and generally - 22 years 7 months and 14 days. According to the existing regulatory legal acts, for acquisition of the pension right, the length of service of the military personnel shall constitute 20 and more calendar years.

According to a conclusion of applicant, application by time of various regulatory legal acts concerning the person passing a certain term of military service creates certain difficulties in practice.

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

The Azerbaijan State is a democratic, law-governed, secular, unitary republic. The supreme objective of the State is ensuring of human rights and civil liberties and an adequate standard of living for the citizens of Azerbaijan. The Republic of Azerbaijan ensures the improvement of the well-being of the people and every citizen, their social protection and normal living standard (Articles 7.1, 12.1 and 16.1 of the Constitution).

Implementation of these rights means that the state, first of all, exists for people and incurs the corresponding obligations in the sphere of real reflection, protection and maintenance of their requirements.

Right to social security as one their basic social and economic rights is reflected in Article 38 of the Constitution. According to this article, everyone has the right to social security. Everyone has the right to social security in old age, sickness specified by law, disability, when losing work ability or the breadwinner of the family, when unemployed and in other cases specified by law (parts I and III of Article 38 of the Constitution).

This right has found the reflection also in a number of international legal acts which party is the Republic of Azerbaijan. Thus, according to Article 22 of the Universal Declaration of Human Rights, everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his/her dignity and free development of his personality. At the same time the Article 9 of the International Covenant on Economic, Social and Cultural Rights provides the right of everyone to social security, including social insurance.

The right to social security that found its reflection in the Constitution and international legal acts in the cases and a framework established by the law implies also the right to pension. The pension right is the component of social security and its most important form established by the law. The pension right of everyone acts as a subjective type of a right to social security that is constitutional right.

On initial stage of pension reforms in the Republic of Azerbaijan, the Law “On Provision of Pensions of Military Personnel” dated September 23, 1992 and the Law of the Republic of Azerbaijan “On Provision of Pensions of Citizens” of April 29, 1992 (hereinafter referred to as the Law “On Provision of Pensions of Citizens”) were adopted.

By the Law “On Provision of Pensions of the Military Personnel” in the territory of the Republic of Azerbaijan was fixed the single public pension system for an officer personnel, the ensigns, warrant officers and the military personnel of extended service and also commanding and ordinary structures of relevant organs of the executive authority of the Republic of Azerbaijan and members of their families.

Article 2 of this Law provides for granting of pensions and its payment for the military personnel having the right to provision of pensions after their dismissal from military.

In the mentioned legal acts the types of the labor and social pensions granted to citizens including as a part of labour pensions of an old-age pension (on an old age), on disability, in connection with loss of breadwinner and for long service are established.

The essence of the long-service pension provided in the specified legal acts was explained by specific features of certain labor spheres (fields of activity). This is connected with the impossibility of continuation by the person who a long time fulfill hard and responsible work, of these activities after a certain period in connection with his/her psychological and emotional weight. The purpose of a long-service pension is release of such persons from need of continuation of the former work in connection with decrease or disability. From this point of view, for granting of a retirement pension for long service, the fact of achievement of a certain age limit by the individual did not represent the legal importance.

Conditions of appointment of a long-service pension to military personnel found the reflection in the Article 12 of the Law “On Provision of Pensions of Military Personnel”. According to point “a” of this article the military personnel, who before dismissal from service, served on military service 20 and more years, has the right for long service pension.

Apparently, for emergence of the right of the military personnel to a long-service pension, the special seniority acts as the main legal fact. The special seniority as one of types of a seniority was determined by implementation of the person of a labor activity or work in special conditions on a certain profession or specialty. The special seniority is meant as the period of the work that is carried out under certain conditions work and at certain positions. This period gives to the persons possessing special years of service, an opportunity to receive on preferential terms of certain types of social security, including a pension entitlement.

The legal relationship connected with acquisition of a special seniority, as a rule, come to the end before achievement by the person of retirement age. The serviceman who accumulate the seniority necessary for granting of a retirement pension on preferential terms can replace a type of activity or not be engaged in a labor activity at all.

Proceeding from the above, it should be noted that the seniority as the legal fact forming legal relations in the sphere of provision of pensions acts as the basic legal fact of acquisition of the pension right connected with special labor working conditions.

In addition, during calculation of pension for long service the legislator provided preferential terms in case of calculation of a seniority for persons of some categories.

Thus, according to the second paragraph of Article 68.1 of the Law “On Provision of Pensions of Citizens” providing privileges in case of calculation of a seniority, the period of service and hired work as a part of warring army during fighting, and also the period of stay in the troops and unions of self-defense registered in the Ministry of Defense of the Republic of Azerbaijan includes in working years of service in a triple size.

But in compliance with Article 16 of the Law “On Provision of Pensions of Military Personnel”, for granting of pension to serviceman in connection therewith the Law, the order of calculation of a length of service was established by the Cabinet of Ministers of the Republic of Azerbaijan.

According to the Resolution of Cabinet of Ministers of the Republic of Azerbaijan of November 23, 1992 No. 631 “On order of calculation of long-term service for appointment and payment of pensions to the persons relating to the officer personnel, ensigns, warrant officers, the military personnel of extended active service, persons relating to commanding and to the private of structures of law-enforcement bodies, justice, customs, migrations, courier communication on emergency situations and their families” (hereinafter referred to as the Resolution of Cabinet of Ministers of November 23, 1992), in case of granting of pension to serviceman, the periods of participation in combat operations for sovereignty, territorial integrity and independence of the Republic of Azerbaijan, was decided to consider the one month of service as three months.

However, by the Law dated September 1, 2004 No.728-IIQD “On modifications and additions to the Law of the Republic of Azerbaijan “On Provision of Pensions of Military Personnel” (hereinafter referred to as the Law dated September 1, 2004) the words “20 years” in point “a” of the Article 12 of this Law are changed to words “20 calendar years”, and was established that for long service the military personnel who served in state services or in military service 20 and more calendar years before dismissal has a right to long service pension.

At the same time, by the same Law to Article 16 of the Law “On Provision of Pensions of Military Personnel” made change and is added the second part of the following content: “One year of service for the military personnel who was involved in combat operations in combat conditions is counted as two service years. Counting of services of one year as two for the military personnel who was involved in combat operations in combat conditions is fulfilled based on the decision of relevant organ of the executive authority. In this case, in this decision the period of duration of combat conditions shall be specified”. Noted changes came into force since September 13, 2004.

After that, by the Law of the Republic of Azerbaijan dated September 1, 2005 No. 977-IIQD “On modification of some legal acts of the Republic of Azerbaijan in connection with application of the Law of the Republic of Azerbaijan “On modifications and additions to the Law of the Republic of Azerbaijan “On Provision of Pensions of Military Personnel”, the second paragraph of Article 68.1 of the Law “On Provision of Pensions of Citizens” was given in the following edition: “the period of participation of the military personnel in combat operations in combat conditions (based on the decision of relevant organ of the executive authority) – in a double size”.

Also, by the Resolution of the Cabinet of Ministers of the Republic of Azerbaijan dated July 1, 2005 “On modifications and additions to some resolutions of the Cabinet of Ministers of the Republic of Azerbaijan”, has been changed the Resolution of the Cabinet of Ministers dated November 23, 1992, and for participants of combat operations in combat conditions has been established to count the one year of service as two (one day of service as two).

Apparently, preferential terms of an order of a counting of service years in case of receipt of right to a pension by the military personnel were cancelled by these changes in the above-stated legal acts. If before of these changes of right to receive the long service pension in general the 20 years of military service were required (including a preferential counting), then after these changes receipt of such right required 20 calendar years.

The Plenum of the Constitutional Court notes that in case of regulation of types of pensions, their calculation, appointment and receipt of pensions, including the general bases and rules of award of pension to citizens of some categories on preferential terms, and also in case of introduction of amendments to the current legislation in this sphere, the legislator, taking into account requirements of the Constitution, has freedom of judgment.

According to a legal position of the Plenum of the Constitutional Court concerning it, in connection with the legal nature of social rights it is necessary to consider that, despite a guarantee of protection and protection of social rights in an identical order on a level with other rights fixed in the Constitution (personal, economic, political and cultural) the ensuring and realization of these rights has a number of specific characteristic. Thus, in difference from personal, economic and in a sense the political and cultural rights the rational realization of social rights is connected with financial possibilities of the state which can provide these rights (decision of the Plenum of Constitutional Court of December 1, 2010 On conformity of Article 8.1 and 8.3 of the Law of the Republic of Azerbaijan “On Labour Pensions” to Constitution of the Republic of Azerbaijan).

Nevertheless, the Plenum of the Constitutional Court considers that the pension right acquired according to requirements of the legislation existing before entry into force of the new legal regulation connected with acquisition of the person of the pension right has to remain.

Thus, according to Article 1.1 of the Law “On Provision of Pensions of Military Personnel” an officer personnel, the ensigns, warrant officers and military personnel of extended service of relevant organs of the executive authority, other military forming of the Republic of Azerbaijan commanding and ordinary structures of relevant organs of the executive authority, in the presence of the period of service established by this Law on military service and in bodies have the right to a life pension.

Besides, according to Article 9.8 of the Law “On Labour Pensions”, pensions to the persons who had at day of the introduction of this Law in force the complete seniority in the cases specified in Article 9 of this Law, granting the pension right on preferential terms are appointed on age and years of service according to requirements of earlier existing legislation.

Apparently, by the Law “On Provision of Pensions of Military Personnel” the legislator established that the person who served a certain term in state bodies and military service has the right to a life pension, and the Law “On Labour Pensions” provided to grant pensions to these persons in the order established by earlier existing legislation.

Thus, in view of the fact that the rights of the citizen in the sphere of provision of pensions follow from his labor or other socially useful activity recognized in a legislative order, the state fulfill certain duties before the citizen who has already acquired this right.

From this point of view, the Plenum of the Constitutional Court notes that granting of pension to the serviceman who acquired on preferential terms the right to a life pension for long service before entry into force of the Law dated September 1, 2004 (i.e. till September 13, 2004), is fulfilled according to the requirements established in the Law “On Provision of Pensions of Military Personnel” existing at the time of receipt of this right.

Regulation of an issue in other form can be regarded as refusal of the state of the public liabilities following from the legislative regulation existing earlier in a certain sphere of legal relations.

Granting of pension on other more disadvantageous conditions to the serviceman who acquired the right to a life pension for long service on preferential terms can lead to violation of the provisions enshrined in Articles 12 and 16 of the Constitution, proclaiming the Republic of Azerbaijan as the social state, rights to social insurance, enshrined in Article 38 of the Constitution, and also the principle of legal certainty as one of basic elements of the rule of law following from a preamble of the Constitution and its important element - the principle of observance of trust of citizens to the law.

The Plenum of the Constitutional Court considers necessary once again to note that the principles of justice and legal certainty forming a basis of implementation of human rights, including social rights demand predictability of legislative policy. The principle of legal certainty, installing at participants of the corresponding legal relations of confidence in preliminary knowledge of results of the behavior and invariance of the officially recognized legal status of the acquired rights, increases trust to legal policy of the state.

It should be noted that within the pension reforms undertaken in the Republic of Azerbaijan on February 7, 2006 was adopted the Law “On Labour Pensions”. This Law establishes grounds of emergence of citizens’ rights to labour pension, a procedure of these rights and system of providing a labour pension in the Republic of Azerbaijan.

In the new pension legislation three types of labour pension are provided – labour retirement pension, labour pension on disability and a labour pension in connection with loss of bread winner (Article 4.1 of the Law “On Labour Pensions”).

Apparently, unlike the former pension legislation, in the Law “On Labour Pensions” the long-service pension is not specified as a type of a labour pension. Though, the type of a labour pension for long service is similar with labour retirement pension, its main distinctive sign is emergence of a pension entitlement based on the corresponding office years, without achievement of an age limit. Two legal facts – achievement of a certain age limit by the person and presence at him of the corresponding years of service of social insurance are in accordance with general practice necessary for granting of a retirement pension on age.

In addition, in the Law “On Labour Pensions” the right to labour retirement pension on favorable terms and a circle of people, having such rights is established. The right to labour retirement pension on preferential terms for the military personnel is provided in Article 9 of this Law, along with persons of other categories (except for the military personnel deprived of military ranks, military personnel of the valid compulsory military service).

According to Article 9.5.1 of the Law “On Labour Pensions” the military personnel who served 20 and more calendar years before dismissal from military service has a pension entitlement on preferential terms.

In case of implementation of pension reforms the legislator, in view of a reliance principle of citizens to the law, established allowances to a work pension for long service. Thus, according to Article 20.14.1 of the Law “On Labour Pensions” the serviceman who served before dismissal from military service 20 and more calendar years for 20 years of military service the allowance is calculated in the amount of 50 percent, for discharged from military service on age or due to illness – in the amount of 55 percent, for every year of military service over 20 years (taking into account a preferential part of military service) – in the amount of 3 percent of the corresponding expenses on maintenance.

Apparently, according to the existing pension legislation, calculation of term of military service on the preferential bases even though does not influence on emergence of a pension entitlement of the serviceman, but creates a basis for increase in a service length and by that, for calculation of increment to a labour pension.

Thus, at calculation of increment on pension of the military personnel for a service length under Article 20.14.1 of the Law “On Labour Pensions” concerning the military personnel who served military service or in state bodies during acting of the Law “On Provision of Pensions of Military Personnel” a preferential part of military service shall be considered.

Considering the above the Plenum of the Constitutional Court comes to the following conclusion:

- Granting of pension for the military personnel who acquired on preferential terms the right to a life pension for long service before entering into force of the Law of September 1, 2004, shall be fulfilled according to the requirements established in acting at the time of receipt of this right of the Law “On Provision of Pensions of Military Personnel”.

- According to Article 20.14.1 of the Law “On Labour Pensions” at calculation of increment on pension of the military personnel for a service length for the military personnel who served military service or in state bodies during acting of the Law “On Provision of Pensions of Military Personnel” a preferential part of military service shall be considered.

Being guided by the Article 130.6 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. Granting of pension for the military personnel who acquired on preferential terms the right to a life pension for long service before entering into force of the Law of the Republic of Azerbaijan of September 1, 2004 No. 728-IIQD “On modifications and additions to the Law of the Republic of Azerbaijan “On Provision of Pensions of Military Personnel” shall be fulfilled according to the requirements established in acting at the time of receipt of this right of the Law of the Republic of Azerbaijan “On Provision of Pensions of Military Personnel”.

2. According to the Article 20.14.1 of the Law of the Republic of Azerbaijan of February 7, 2006 “On Labour Pensions” at calculation of increment on pension of the military personnel for service length for the military personnel who served military service or in state bodies during acting of the Law of the Republic of Azerbaijan dated April 29, 1992 “On Provision of Pensions of Military Personnel” a preferential part of military service shall be considered.

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.