**ON BEHALF OF THE REPUBLIC OF AZERBAIJAN**

**DECISION**

**OF THE PLENUM OF CONSTITUTIONAL COURT**

**OF THE REPUBLIC OF AZERBAIJAN**

*On verification of conformity of Article 37.3.4 of the Law “On Labor Pensions”*

*with the Constitution of the Republic of Azerbaijan*

**14 November 2014                                                                             Baku city**

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

attended by the Court Clerk Faraid Aliev,

representative of the addressed body – Asad Mirzaliyev, Judge of the Supreme Court of the Republic of Azerbaijan,

representative of respondent body – Hasan Shirinov, adviser of Sector of Labor Legislation of Secretariat of the Milli Majlis of the Republic of Azerbaijan,

specialists - Subhan Aghakishiyev, lead adviser of the Department of Social-Normative Acts of Chief Administration of Legislation of the Ministry of Justice of the Republic of Azerbaijan; Elnur Aliyev, adviser of the Department of Law and Strategic Research of the State Social Protection Fund of the Republic of Azerbaijan; Bakhtiyar Mammadov, Senior adviser of the Department of Labour Policy of the Ministry of Finance of the Republic of Azerbaijan; Natig Huseynov, Head of Legal Support and Information Department of the Office of the Prosecutor General of the Republic of Azerbaijan; Bagir Asadov, PhD,

in accordance with the Article 130.5 of the Constitution of the Republic of Azerbaijan examined in open judicial session via special constitutional proceedings the request of the Supreme Court as of December 27, 2013 regarding constitutional case on verification of conformity of the Article 37.3.4 of the Law “On Labor Pensions” with Preamble, the Article 12.1, Article 16.1, parts I, III, IV and V of Article 25, Article 29.4, Articles 35, 38 and 71 of the Constitution of the Republic of Azerbaijan.

Having heard the report of Judge R. Ismaylov, the reports of legal representatives of the participating parties and specialists, the Plenum of Constitutional Court of the Republic of Azerbaijan

**DETERMINED AS FOLLOWS:**

The Supreme Court of the Republic of Azerbaijan having applied to the Constitutional Court of the Republic of Azerbaijan (hereinafter referred to as the Constitutional Court) asked to verify the conformity of Article 37.3.4 of the Law of the Republic of Azerbaijan “On Labor Pensions” (hereinafter referred to as Law “On Labor Pensions”) with Preamble, Articles 12.1, 16.1, parts I, III, IV and V of the Articles 25, 29.4, 35, 38 and 71 of the Constitution of the Republic of Azerbaijan (hereinafter referred to as the Constitution).

In the request it is noted that according to the Article 20 of the Law “On Labor Pensions” with respect to work pension of persons listed in this article allowances for duration of service are appointed. These allowances are included in work pension and constitute pension’s component. According to the Article 37.2 of this Law, payment of allowance with respect to work pension is made together with work pension and according to rules of payment of work pension.

In accordance with the Articles 20.1.1, 20.1.10 and 20.1.14 of the Law “On Labor Pensions” to the persons are paid 50% of the supplements to labor pensions for length of service at the indicated positions, in the other cases, the full amount is paid. In case of work of these persons (from among the persons specified in Articles 20.1.5, 20.1.14, 20.1.18 and 20.1.20 of this Law - except for having at least 25 years of a service length in these bodies), at the position taken as a basis for determination of the allowance to a work pension for a service length the payment of the allowance to them stops.

In a sense of the Article 37.3.4 of the Law “On Labour Pensions”, a payment procedure to the persons provided by the Articles 20.1.5, 20.1.14, 20.1.18 and 20.1.20 of this Law (in the presence of at least 25 years of a service length in these bodies), the allowance to a work pension for a service length of 50 percent in case of work at the positions specified in these articles does not extend on the persons working at other positions specified in Article 20 of this Law.

According to a petitioner, in the Articles 20.1 and 37.3.4 of the Law “On Labour Pensions” the various rules connected with payment of allowances to work pensions of the working pensioners are established, such legal regulation does not correspond to relevant provisions of the Constitution. Thus, the right to work and a right to social security are established in Constitutions as the independent rights. Such regulation limits a right to social security in case of implementation of a right to work and does not correspond to part II of Article 71 of the Constitution.

In the request it is also noted that the order fixed in the Article 37.3.4 of Law “On Labor Pensions” is not compatible with the principle of equality of everybody with respect to law and court enshrined in the Article 25.1 of the Constitution. Thus, non payment of allowances to work pensions to one part of the persons mentioned in Article 20.1 of the Law “On Labor Pensions” and the putting difference between them is not compatible with right to equality.

The petitioner considers that nonpayment to the working pensioners of the allowance to a work pension for a service length means their deprivation of already earned property. It contradicts to principle of security of property enshrined in the Article 29 of the Constitution. Work pension, being monthly money payment made to citizens according to the rules and conditions provided by the law, constitutes their property. According to the Article 1 of Protocol No. 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as the Convention), no one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. According to the case law of the European Court of Human Rights (hereinafter referred to as the European Court), right to a pension falls within the scope of Article 1 of Protocol No1.

In a request it is specified that according to requirements of the labor law employment and preserving a place of employment of the persons receiving a work pension is fulfilled in a special order. Thus, based on Article 10.1 of the Labor Code of the Republic of Azerbaijan in the organizations financed from the government budget, the limiting age qualification constitutes 65 years. On contents of this article preserving a place of employment of the persons occupied in the organizations financed from the government budget is established as the right of state body and the head of organization, but not the worker. This rule is applied usually to highly professional workers whose work is demanded. In this case, the nonpayment to the working pensioners of the allowance to a work pension for a service length does not correspond to an essence and content of a right to work and right to social security.

Taking into consideration the content of request and requirements of Article 32.5.7 of the Law of the Republic of Azerbaijan “On Constitutional Court” the Plenum of Constitutional Court noted that matter of this constitutional case basically consist in verification of conformity of Article 37.3.4 of the Law “On Labour Pensions” with the Articles 25.1, 29.4 and 71.2 of the Constitution.

In connection with the request, Plenum of the Constitutional Court notes the following.

The right to social security being of one of the basic socio-economic rights is fixed in Article 38 of the Constitution. According to the first part of this article, everyone has the right to social security.

This right is also reflected in a number of international legal instruments on human rights. Thus, according to Article 22 of the Universal Declaration of Human Rights “everyone being a member of society has a right to have social security and is entitled to realization, through national effort, international co-operation and in accordance with organization and resources of each State, of economic, social and cultural rights indispensable for his/her dignity and free development of his/her personality”. According to the Article 9 of the International Covenant on Economic, Social and Cultural Rights, everyone has a right to social security.

The right for social security which found reflection in the Constitution according to part III of Article 38 of the Basic Law in the cases and limits set by the law includes also the right to pension. The pension entitlement is a component of social security and its major form established by the law. The pension entitlement of everyone acts as a subjective type of a right to social security.

Having repeatedly analyzed the content of the right for social security, the Plenum of the Constitutional Court has noted that, despite a guarantee of protection and security 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 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 “On conformity of Article 8.1 and 8.3 of the Law of the Republic of Azerbaijan “On Labour Pensions” with the Constitution of the Republic of Azerbaijan” as of December 1, 2010).

At the same time, it is necessary to consider that in case of implementation of the social rights the importance is represented not a legal discretion, but approach of the legislator to the principles of rendering of social services, an economic situation of the state, availability of need of a government assistance or support for society or its part.

In this connection the legislator, regulating these rights, has broad freedom of a discretion. In this context it should be noted that in case of regulation of types of pensions, their calculation, granting and receipt of pensions, including the general bases and rules of granting of pensions to citizens, some categories on favorable 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 (decision of the Plenum of the Constitutional Court “On interpretation of some provisions of Laws of the Republic of Azerbaijan “On Provision of Pensions of Military Personnel” and “On Labour Pensions” dated March 27, 2014).

It is also necessary to consider that in case of a specification of types of the right to social security which is not depending on the payments made by the person and financed by means of government budget, freedom of a discretion of the state is broader in comparison with regulation of the pensions depending on earlier effected payments in the special budget.

At the same time guaranteeing by the Constitution of a right to social security introduces certain restrictions for freedom of a discretion of the legislator.

First, the legislator cannot refuse to ensure the effective implementation of this right. Therefore in case of regulation of this right the legislator is faced by the liability not only by determination of the types of social security which are directly specified in Article 38 of the Constitution but also establishment of the stable, predictable, effective and fair system of the social security which answer to pro rata criteria of social security, allowing to accumulate the funds necessary for pension payment and benefits, including implementation of corresponding payments.

Secondly, though the ensuring of social rights depends on material resources of the state, nevertheless, based on the content of Article 38.4 of the Constitution the state has to provide these rights at the minimum level.

If the legislator in addition to the specified positive liabilities which are directly following from Article 38 of the Constitution within the constitutional powers concretized content of a specific type of social security in laws, then its protection also represents the constitutional value. In case of observance of the conditions of receipt of any type of social security by the person established by the law the state shall guarantee their implementation.

For the purpose of verification of compliance of the issue of Article 71.2 of the Constitution challenged in a request the Plenum of the Constitutional Court considers necessary to establish content of the right of receipt of the allowance to a work pension for a service length.

Noted right is not directly provided by the Constitution. Establishing the conditions of acquisition of this right, the legislator referred it to a certain category of the persons, which are in official or employment relationships with the state. The right of the working pensioners to receipt of allowances to a work pension for a service length is the additional social guarantee provided by the law, and the right of their obtaining depends not on the social insurance premiums paid by the person, but on his corresponding status (availability of office or employment relationships with the state).

Therefore the right of receipt of the allowance to a work pension for a service length only then can fall under action of Article 38 of the Constitution if stipulated by the legislation requirements for acquisition of given allowances are observed. In other words, establishing in the legislation an order and conditions of the right of receipt of the allowance to a work pension for a service length, the state undertook such positive liability as providing this right, only on condition that the persons having these rights meet relevant requirements of the Law “On Labour Pensions”.

Based on the above-noted and according to requirements of Article 37.3.4 of the Law “On Labour Pensions” the non-payment of these allowances to a number of the working pensioners provided by Articles 20.1.1-20.1.10 and 20.1.14-20.1.21 of this Law during the work at the positions taken as a basis for granting of allowances to a work pension for a service length, does not lead to violation of Article 71.2 of the Constitution concerning these persons.

As for the principle of equality of everyone with respect to the law and court established by Article 25.1 of the Constitution, the Plenum of the Constitutional Court considers necessary to bring to attention the following.

According to the legal position created by the Plenum of the Constitutional Court concerning the content of the principle of equality with the persons which are in identical or similar situation the identical treatment is required. Various treatment concerning such persons is possible only if there is an objective and reasonable ground. At the same time, the principle of equality recognizes possible various treatment concerning the persons, which are in various situation, and even demands it (decision of the Plenum of the Constitutional Court of February 25, 2014 on complaint of O. Gerekmezli).

For assessment of a question of whether one or another challenged norm corresponds to the Article 25.1 of the Constitution, it is important to find out what persons are in identical or by certain criteria – similar situation whether the challenged norm contains identical or various treatment concerning such persons, and whether there is an objective or reasonable ground for such treatment.

In the decision of Grand Chamber of European Court on case of Stummer v. Austria of July 7, 2011 it is noted that discrimination means treating differently, without an objective and reasonable justification, persons in relevantly similar situations. “No objective and reasonable justification” means that the distinction in issue does not pursue a “legitimate aim” or that there is not a “reasonable relationship of proportionality between the means employed and the aim sought to be realised” (§87).

European Court also indicated that a wide margin is usually allowed to the State under the Convention when it comes to general measures of economic or social strategy. Because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is in the public interest on social or economic grounds, and the Court will generally respect the legislature’s policy choice unless it is “manifestly without reasonable foundation” (decision of Grand Chamber on case of Carson and others v. the United Kingdom §61).

The European Court also comes to conclusion that Convention provisions, do not prevent, in principle, Contracting States from introducing general policy schemes by way of legislative measures whereby a certain category or group of individuals is treated differently from others, provided that the interference with the rights of the statutory category or group as a whole can be justified under the Convention (decision of Grand Chamber on case of Ždanoka v. Latvia §112).

Considering the above, the Plenum of the Constitutional Court considers what for verification of conformity of the legal situation which developed in Article 37.3.4 of the Law “On Labour Pensions”, Article 25.1 of the Constitution it needs to be established what persons are in identical or by certain criteria – in a similar situation.

At the same time, it is necessary to consider that two groups of persons (situations) never are absolutely identical, that is on the basis of all possible criteria of comparison there are cannot be a full equality. Thus, at the choice of criterion for comparison among the numerous features concerning the compared situations (persons) it is necessary to select answering a question of whether the relevant provisions are equal or not, only in the context of the challenged fact.

It should be noted that all working pensioners having the right of receipt of allowances to a work pension for a service length, could be characterized by one general element: they are in service or employment relationships with the state. Relying on this criteria, it should be noted that all persons also specified in Article 20 of the Law “On Labour Pensions”, being in the similar situation, have the right to receive allowances to a work pension for a service length. However, this fact in itself does not provide similarity of conditions of receipt of allowances to a work pension for a service length for all categories, including in case of continuation of a labor activity. In this case, the importance is represents the nature and features of the executed work and service.

If the legislator does not provide a possibility of obtaining by a part of specified persons of allowances to a work pension for a service length at all, then shall prove objectively conformity of various treatment caused by such settlement with the Article 25 of the Constitution.

In this connection, it should be noted that all persons specified in Article 20 of the Law “On Labour Pensions” in an order and on the conditions established by this Law have the right to allowances to a work pension for a service length. At verification of conformity of absence at some working pensioners specified in Article 20.1 of the Law “On Labour Pensions” unlike the persons provided by Articles 20.1.5, 20.1.14, 20.1.18 and 20.1.20 of this Law during the work at the position taken as a basis for granting of allowances to a work pension for a service length, the rights to these allowances with the Article 25.1 of the Constitution it is important to consider the legislator's purpose.

Apparently from the text of Article 37.3.4 of the Law “On Labour Pensions”, during the work of the person at the position taken as a basis for granting of allowances to a work pension for the service length established by this article, the right of receipt of these allowances in the amount of 50 percent has exclusive character and extends only on the persons specified in Articles 20.1.5, 20.1.14, 20.1.18 and 20.1.20 of this Law having at least 25 years of a service length in state bodies.

Recognition of so long service life as the basis for receipt of the appropriate right is connected with the purpose pursued by the legislator – mediation (stimulation) in strengthening of stability of public service in relevant organs. To some extent, it is confirmed also by the changes made to Article 37.3.4 of the Law “On Labour Pensions”. Thus, based on the first change made to Article 37.3.4 by the Law of the Republic of Azerbaijan of November 28, 2006 N 184-IIIQD, the right of receipt of allowances to a work pension for a service length in the amount of 50 percent was granted irrespective of service length duration.

However, in the Law of the Republic of Azerbaijan of November 6, 2007 No. 474-IIIQD the words “specified persons” (in the first brackets of the second sentence of Article 37.3.4 of the Law) were replaced by the words “from specified persons -only the persons having at least 25 years of a service length in these bodies”. As a result, the legislator established reasonable and real criterion for achievement of noted purpose.

Thus, obtaining by the persons specified in Articles 20.1.5, 20.1.14, 20.1.18 and 20.1.20 of the Law “On Labour Pensions” of appropriate right, stipulated in Article 37.3.4 of given Law is relies only on importance of ensuring of stability of office activities of officials of these state bodies. Therefore the persons noted in Articles 20.1.5, 20.1.14, 20.1.18 and 20.1.20 of the Law cannot be perceived as the persons which are in a similar situation with other persons, stipulated in Article 20.1.

Based on above-noted the challenged issue cannot be considered as not corresponding to Article 25.1 of the Constitution.

As for assessment of nonpayment to some working pensioners of allowances to a work pension for a service length as deprivation of their already earned property contrary to the principle of a security of property established by Article 29 of the Constitution, the Plenum of the Constitutional Court emphasizes the following.

The European Court in a number decisions indicated that as for the measures of social support, irrespective of conditionality production of the previous payments, all principles applied in general on cases on Article 1 of the Protocol of the Convention equally remain in force (decision of Grand Chamber of April 12, 2006 on case of Stec and others v. the United Kingdom §47-53; decision of Grand Chamber of February 18, 2009 on case of Andreyeva vs. Latvia §76-77). However, European Court considering that the Article 1 of Protocol No. 1 only applies to a person’s existing possessions and does not guarantee the right to acquire possessions (decision of June 13, 1979 on case of Marckx vs. Belgium §47), in the ruling of June 14, 2011 on case of Maria Elisabeth Puricel vs. Romania the Court mentioned that there is no right under Article 1 of Protocol No. 1 to receive a social security benefit or pension payment of any kind or amount, unless national law provides for such an entitlement § 21.

Considering the case law of the European Court on the matter, the Plenum of the Constitutional Court notes that the allowance to a work pension for a service length is considered as “property” and falls under action of Article 1 of Protocol No. 1 of the Convention only in case of observance of all conditions established by the legislation concerning its obtaining.

Apparently from content of Article 37.3.4 of the Law “On Labour Pensions”, receipt of allowances to a work pension for a service length in the amount of 50 percent is caused concerning a number of the working pensioners by termination of work at the position taken as a basis for granting of allowances to a work pension for a service length. Therefore because allowances to a work pension of the working pensioners in case of availability of the specified condition are not considered as property, the nonpayment of allowance to these persons because of this condition cannot be regarded as the action contradicting to the principle of immunity of the property right.

At the same time, the Plenum of the Constitutional Court considers that gradual enhancement by the legislator within the powers of an order and conditions of calculation of allowances to work pension for a service length to the persons provided by Articles 20.1.5, 20.1.14, 20.1.18 and 20.1.20 of the Law “On Labour Pensions” would serve for purpose of strengthening of stability of activities of the state bodies specified in these articles.

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

- based on Article 37.3.4 of the Law “On Labour Pensions” unlike the persons specified in Articles 20.1.5, 20.1.14, 20.1.18, 20.1.20 of this Law (only having at least 25 years of a service length), to other working pensioners listed in Articles 20.1.1-20.1.10 and 20.1.14-20.1.21 of this Law during the work at this position payment of allowances to a work pension for a service length stops, that does not constitute discrepancy with Article 25.1, Article 29.4 and Article 71.2 of the Constitution;

- enhancement of an order and conditions of calculation of allowances to work pension for a service length to the persons provided by Articles 20.1.1-20.1.10 and 20.1.14-20.1.21 of the Law “On Labour Pensions” for the purpose of strengthening of stability of activities of state bodies can be implemented gradually in a legislative order.

Being guided by Article 130.3 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. Based on the Article 37.3.4 of the Law of the Republic of Azerbaijan “On Labour Pensions” unlike the persons specified in the Articles 20.1.5, 20.1.14, 20.1.18, 20.1.20 of this Law (only having at least 25 years of a service length), to other working pensioners listed in the Articles 20.1.1-20.1.10 and 20.1.14-20.1.21 of this Law during the work at this position payment of allowances to a work pension for a service length stops, that does not constitute discrepancy with the Articles 25.1, 29.4 and 71.2 of the Constitution of the Republic of Azerbaijan.

2. Enhancement of an order and conditions of calculation of allowances to work pension for a service length to the persons provided by Articles 20.1.1-20.1.10 and 20.1.14-20.1.21 of the Law of the Republic of Azerbaijan “On Labour Pensions” for the purpose of strengthening of stability of activities of state bodies can be implemented gradually in a legislative order.

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.