**ON BEHALF OF THE REPUBLIC OF AZERBAIJAN**

**DECISION**

**OF THE PLENUM OF CONSTITUTIONAL COURT**

**OF THE REPUBLIC OF AZERBAIJAN**

*On interpretation of Article 33.2 of the Law of the Republic of Azerbaijan* “*On Public Service”*

**8 December 2014                                                                           Baku city**

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

attended by the Court Clerk Faraid Aliyev,

representatives of interested parties – Mikail Yusifov, First Secretary of Department of Legal Coverage of the Ministry of Foreign Affairs of the Republic of Azerbaijan; Alvaz Gahramanova, Head of Sector of Legal Department of the Ministry of Finance of the Republic of Azerbaijan; Yunis Ismaylov, Advisor of the Department of Legislation for State Construction 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;

specialists – Subhan Agakishiyev, Lead Consultant of the Office of Social Normative Acts of the Head Legislation Department of the Ministry of Justice of the Republic of Azerbaijan, Fuad Nasirov, Head of Sector of Regulation of Legal Issues of the Law and Strategic Researches Department of the Staff of the State Social Protection Fund of the Republic of Azerbaijan;

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 Article 33.2 of the Law of the Republic of Azerbaijan “On Public Service”.

having considered the report of Judge Sona Salmanova, the reports of the legal representatives of the parties interested in special constitutional proceedings and specialists, conclusions of expert, and 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) having applied with the request to the Constitutional Court of the Republic of Azerbaijan (hereinafter referred to as the Constitutional Court) taking into consideration the Article 2.3 of the Law of the Republic of Azerbaijan “On Public Service” (hereinafter referred to as the Law “On Public Service”) asked for interpretation of the following issue: does a lump-sum payment in the six fold monthly pension amount, stipulated in the Article 33.2 of the same Law, concern the employees working in diplomatic service’s bodies?

In the request it is indicated that according to the Article 33.2 of the Law “On Public Service” in case of voluntary retirement of civil servant due to retirement age in accordance with relevant legislation, such person shall be granted lump-sum in amount of six fold monthly pension calculated in general order and tax shall not be withheld from this amount.

The requested body also indicates that the Law of the Republic of Azerbaijan “On Diplomatic Service” (hereinafter referred to as the Law “On Diplomatic Service”) establishes legal bases of organization of diplomatic service which is one of types of public service in the Republic of Azerbaijan and a legal status of the government employees who are on diplomatic service. According to the Article 22 of this Law regulation of labour relations of the persons exercising administrative and technical services of diplomatic service agencies shall be regulated by the Law of the Republic of Azerbaijan “On Public Service”, Labour Code of the Republic of Azerbaijan, as well as other normative-legal acts of the Republic of Azerbaijan.

Besides, despite the fact that in part IV of the Law “On Diplomatic Service” the maintenance of staff of bodies of diplomatic service, are stated in shape, different from the legal acts regulating activities of other bodies, they can also use the maintenance provided for the government employees. Thus, according to Article 24 of the Law “On Diplomatic Service” remuneration of staff of diplomatic service and the persons who are carrying out the administrative maintenance of bodies of diplomatic service is carried out on the basis of the relevant acts of the Republic of Azerbaijan.

At the same time, in a request it is noted that unlike the amount and a payment procedure of allowances for degree of qualification provided for government employees, payment and the sum of allowances to an official pay rate for a diplomatic rank is determined by “Rules of payments of allowances to an official pay rate for a diplomatic rank”, approved by the Resolution of Cabinet of Ministers of February 6, 2002 No. 23 taking into account positions and qualifications of staff of diplomatic service.

In point 4 of the Order of the President of the Republic of Azerbaijan “On increase of wages of governmental employees” of January 23, 2007 No. 1909 (hereinafter referred to as the Order of the President of the Republic of Azerbaijan of January 23, 2007) it is established that according to the Article 2.3 of the Law of the Republic of Azerbaijan “On Public Service”, payment of allowances, benefits, awards for the services duration provided for governmental employees who are on service in state bodies before adoption of the special law on service is applied also to persons who are in public service in bodies of foreign affairs (except of diplomatic missions, consulates and representative offices of other bodies of the Republic of Azerbaijan abroad).

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

According to Preamble of the Law “On Diplomatic Service” the present Law provides legal framework for organization of diplomatic service (which is a type of public service) and a legal status of public servants of diplomatic service in the Republic of Azerbaijan.

According to the Article 2 of the Law “On Diplomatic Service” the single system of diplomatic service agencies is composed of the relevant executive authorities of the Republic of Azerbaijan, diplomatic missions and consulates of the Republic of Azerbaijan, subsidiary bodies established to provide the activity of the relevant executive authorities of the Republic of Azerbaijan, as well as, the educational institutions of relevant executive authorities of the Republic of Azerbaijan. Appropriate executive authority of the Republic of Azerbaijan directs the single system of diplomatic service agencies of the Republic of Azerbaijan.

According to the Article 6 of given law, persons holding diplomatic office in diplomatic service agencies shall be considered diplomatic service officers.
Persons carrying out administrative and technical services of diplomatic service agencies shall not be deemed diplomatic service officers. Legal status and professional degrees of such persons are regulated in accordance with the relevant legislative acts of the Republic of Azerbaijan (Articles 6.1 and 6.2 of the Law “On Diplomatic Service”).

Assignment to a position of the staff of diplomatic service working in bodies of diplomatic service and assignment of diplomatic ranks are regulated by the Law “On Diplomatic Service”.

Assignment to a position of persons exercising administrative maintenance of bodies of diplomatic service, assignment of corresponding ranks to them and other issues, are exercised according to the Law “On Public Service” and according to this law they are considered as government employees.

The post shift of persons exercising administrative – technical services of diplomatic service agencies and the diplomatic service officers shall be carried out related with professional necessity considering the professional, vocation and rotation principles. Rotation of the officers of diplomatic service agencies shall be executed by the relevant executive authority of the Republic of Azerbaijan. Considering the professional training and specialties of persons exercising administrative – technical services of diplomatic service agencies and the diplomatic service officers in the frames of rotation, they shall be appointed to the diplomatic missions or consulates of the Republic of Azerbaijan, or execute their duties in relevant executive authorities (Articles 12.1, 13.1 and 13.2 of the Law “On Diplomatic Service”).

At the same time, in the specified Law are established the assignment of staff of diplomatic service and the persons exercising the administrative maintenance of bodies of diplomatic service in higher educational institutions and their privileges, immunities, obligations, a recall, responsibility (Article 15-19 of the Law “On Diplomatic Service”).

In view of the above, it is possible to come to such conclusion that though according to the Law “On Public Service”, the persons exercising the administrative maintenance of bodies of diplomatic service are considered as government employees, nevertheless, issues of passing by them of service (the persons exercising the administrative maintenance of bodies of diplomatic service in diplomatic missions and consulates of the Republic of Azerbaijan) are regulated by the Law “On Diplomatic Service”.

Apparently, legislator established regulation of legal status of the staff of diplomatic service working in the bodies of diplomatic service and persons exercising the administrative maintenance of bodies of diplomatic service by both the Law “On Diplomatic Service” and the Law “On Public Service”.

Such regulation found reflection also in the Section IV of the Law “On Diplomatic Service” named “Provision of diplomatic service, contribution and payments, material and social maintenance of persons exercising administrative and technical services of the diplomatic service officers and diplomatic service agencies”. In this Section it is told about financial security and material-economic maintenance of diplomatic service, providing staff of diplomatic service during their work in diplomatic missions and consulates, and the compensations paid to them, compensation of staff of diplomatic service and persons exercising the administrative maintenance of bodies of diplomatic service, their remunerations, issues, etc.

It should be noted that in this Section the legislator, regulating only general bases of equipment of diplomatic service, the providing and payments, a material and social assistance of staff of diplomatic service and persons exercising the administrative maintenance of bodies of diplomatic service established that their specific decision is exercise based on other legal acts of the Republic of Azerbaijan.

Thus, according to Article 24 of the Law “On Diplomatic Service” reward of the persons exercising administrative and technical services of diplomatic service agencies and of the diplomatic service officers employed in the territory of the Republic of Azerbaijan shall be subject of the legislation of the Republic of Azerbaijan. According to Article 25.1 of the given Law the persons exercising administrative and technical services of diplomatic service agencies and of the diplomatic service officers shall enjoy the rights of vacations specified in the legislation of the Republic of Azerbaijan.

With the purpose of ensuring of execution of the Decree of the President of the Republic of Azerbaijan dated September 3, 2001 No. 572 “On application of the Law of the Republic “On Diplomatic Service”, by the Resolution of the Cabinet of Ministers dated February 6, 2002 No. 23 the “Rules of payment of allowances to an official pay rate for a diplomatic rank” were approved. According to these Rules was established payment procedure of allowances to an official pay rate of staff of diplomatic service for the appropriated diplomatic rank, taking into account the positions and qualifications held by them.

According to part 1 of the Decree of the President of the Republic of Azerbaijan dated July 9, 2008, was established the additional monthly cash cover in the amount of 25 percent of an official pay rate to the employees of the Ministry of Foreign Affairs of the Republic of Azerbaijan having a diplomatic rank, working at the territory of the Republic of Azerbaijan for a covering of the entertainment expenses connected with execution of powers.

Apparently, in the specified acts there are no reflections of issues of material and social security to persons carrying out administrative maintenance of bodies of diplomatic service. The issue of material and social security of these persons is regulated on an equal basis with material security of government employees.

According to the point 12 of “Regulations on types and order of remuneration of government employees”, approved by the Decree of the President of the Republic of Azerbaijan of August 24, 2002 No. 774, with the purpose of remuneration of government employees, the additional resources in volume of 3-fold the size of the fund of the monthly salary (except for allowances to an official pay rate) established for government employees of these bodies. According to point 1 of the Decree of the President of the Republic of Azerbaijan “On some privileges for government employees” of October 23, 2003 No. 948, since January 1, 2003 at granting of the regular leave the benefit in the amount of a monthly additional salary is paid to the government employee that covers also the persons who exercise the administrative maintenance of bodies of diplomatic service.

And it allows to come to such conclusion that issues of material and social security to the staff of diplomatic service working in the bodies of diplomatic service and persons exercising the administrative maintenance of bodies of diplomatic service are regulated by the Laws “On Diplomatic Service”, “On Public Service” and normative-legal acts following from them.

As evident from the analysis of the above-stated normative-legal acts in these acts a material and social assistance of staff of diplomatic service and the persons who exercise the administrative maintenance of bodies of diplomatic service is depends on their status following from the Law “On Diplomatic Service”.

Therefore, the Plenum of the Constitutional Court considers necessary the solution of the problem lifted in the request from the point of view of this status.

It also follows from the Article 22 of the Law “On Diplomatic Service. According to given article the labour relations of the persons exercising administrative and technical services of diplomatic service agencies and of the diplomatic service officers is regulated by the Law of the Republic of Azerbaijan “On State Service”, Labour Code of the Republic of Azerbaijan, by this Law as well as, other normative-legal acts of the Republic of Azerbaijan.

According to the Article 33.2 of the Law “On Public Service” in case of voluntary retirement of civil servant due to attainment of retirement age in accordance with relevant legislation, such person shall be granted with lump-sum in the amount of six fold monthly pension calculated in general order and tax shall not be withheld from this amount.

Apparently, the legislator in this case lays down two main conditions:

- governmental employee has reached a retirement age;

- has left public service at his/her own will.

Article 33.2 of this Law encourage the government employee to retirement because of achievement of a retirement age, at own will and pursues the aim of creating favorable conditions for forming of new personnel potential and staff rotation.

From contents of the specified article it also becomes clear that here is meant the retirement age stipulated in the Article 7 of the Law “On Labour Pensions”. According to this article, the men who reached age of 62 years and the women who reached age of 57 years in the presence of at least 12 years of insurance years of service (except for persons to whom the old-age pension is granted before entering in force of this Law) have the right to retirement pension. Taking into account a part “Note” of this article, a retirement age at present constitutes for men is 63 years, and for women 59,5 years (until January 1, 2016 this age limit annually has been raised for six months).

According to the Article 32.1 of the Law “On Public Service”, the age line for the government employee in public service is 65 years.

According to the Article 2.3 of the Law “On Public Service”, service of civil servants employed in prosecutor’s office, bodies of justice, national security, border service, internal affairs, custom, tax, foreign affairs and field-chasseur service, in the National Bank of the Republic of Azerbaijan shall be regulated by other laws of the Republic of Azerbaijan considering provisions related to the right of citizens of the Republic of Azerbaijan to be recruited for public service, recruitment for public service on competition and transparency basis, performance appraisal of the civil servants and other principles of public service, and the service in these bodies is a special type of public service.

There are sectoral legal acts regulating activities of a number of the state bodies that are a special type of public service and the rules of service in these bodies are listed in this article.

Thus, in Laws of the Republic of Azerbaijan “On Service in Bodies of Prosecutor's Office”, “On Service in Bodies of Emergency Situations”, “On Service in Judicial Authorities”, in the Provisions “On Service in Migratory Bodies”, “On Service in Customs Authorities” and other legal acts the social security of persons working in these bodies, including, provision of lump sum payment in case of retirement and so forth shall be provided.

Apparently, the stipulated in the Article 33.2 of the Law “On Public Service” provision of lump sum payment in connection with retirement of the government employee at own will, the legislator concerns also to the persons working in the state bodies established in Article 2.3 of this Law which are a special type of public service.

According to the above, the Plenum of the Constitutional Court comes to such conclusion that, up to adoption of the special law concerning service, the Article 33.2 of the Law “On Public Service” shall extend to the staff of diplomatic service working in bodies of diplomatic service.

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. Up to adoption of the special law concerning service, the Article 33.2 of the Law of the Republic of Azerbaijan “On Public Service” shall extend to the staff of diplomatic service working in bodies of diplomatic service.

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

3. The decision shall be published in “Azerbaijan”, “Respublika”, “Xalq Qazeti” and “Bakinskiy Rabochiy” newspapers, and “Bulletin of the Constitutional Court of the Republic of Azerbaijan”.

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