**ON BEHALF OF THE REPUBLIC OF AZERBAIJAN**

**THE DECISION**

**OF THE PLENUM OF THE CONSTITUTIONAL COURT**

**OF THE REPUBLIC OF AZERBAIJAN**

*On verification of conformity of resolution of the Cabinet of Ministers of the Republic of Azerbaijan No. 217 dated 28 September 2012 and resolution No. 399 dated 26 December 2014 with the Constitution of the Republic of Azerbaijan*

**2 June 2016                                                                        Baku city**

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

attended by the Court Clerk – Faraid Aliyev,

the representative of the applicant – Mahir Mammadov, Head of the Science-Analytical Department of the Commissioner for the Human Rights (Ombudsman) of the Republic of Azerbaijan,

the representatives of the respondent – Vugar Shafiyev, Head of the Financing Department for the Law Enforcement Bodies of the Ministry of Finance of the Republic of Azerbaijan and Jeyran Ganbarova, Head of the Legal Department of the Ministry of Finance of the Republic of Azerbaijan,

        the expert – Elshad Nasirov, Senior professor of the Department on Constitutional Law of the Faculty of Law of the Baku State University,

        the specialist – Rauf Kishiyev, Head of the Legal Department of the Ministry of Defense of the Republic of Azerbaijan, Colonel of Justice

in accordance with the Article 130.7 of the Constitution of the Republic of Azerbaijan examined in open judicial session via special constitutional proceedings the case on request of the Commissioner for the Human Rights (Ombudsman) of the Republic of Azerbaijan on the verification of the conformity of the resolution of the Cabinet of Ministers of the Republic of Azerbaijan No. 217 of 28 September 2012 and the resolution No. 399 of 26 December 2014 with Article 25 (Parts I, III, IV and V), Article 37 and Article 149 (Parts I and V) of the Constitution of the Republic of Azerbaijan.

Having heard the report of Judge K. Shafiyev, the arguments of representatives of applicant and the respondent, the expert opinion and having considered materials of the case, Plenum of the Constitutional Court

**DETERMINED AS FOLLOWS:**

The Commissioner for the Human Rights (Ombudsman) of the Republic of Azerbaijan having appealed to the Constitutional Court of the Republic of Azerbaijan (hereinafter referred to as Constitutional Court) asked the Constitutional Court to verify the conformity of the resolution of the Cabinet of Ministers of the Republic of Azerbaijan No. 217 of 28 September 2012 on “The determination of the mechanism of the payment of the compensation and the calculation of the amount due for the unused regular vacation period for the benefit of military personnel (other than the drafted actual military personnel) that do not take a vacation for any reason in a calendar year, as well as in other calendar years during the actual military service (hereinafter referred to as the resolution of the Cabinet of Ministers No. 217 of 28 September 2012) and the resolution No. 399 of 26 December 2014 on “The determination of the mechanism of the payment of the compensation and the calculation of the amount due for the unused regular vacation period for the benefit of military personnel (other than the drafted actual military personnel) in reserve or released (or resigned) from actual service from 1 February 1994 until 12 June 2010 (hereinafter referred to as the resolution of the Cabinet of Ministers No. 399 of 26 December 2014) with Article 25 (Parts I, III, IV and V), Article 37 and Article 149 (Parts I and V) of the Constitution of the Republic of Azerbaijan (hereinafter referred to as the Constitution).

It has been set forth in the petition that in contrast to other military personnel the resolution of the Cabinet of Ministers No. 217 as of 28 September 2012 and the resolution of the Cabinet of Ministers No. 399 as of 26 December 2014 touch upon neither the status of military personnel (judges, clerks, security personnel, organizational personnel etc.) who have served in military tribunals (military courts), who are in reserve or who have been released (or resigned) from actual service nor what government authority is in charge of providing the compensation determined in accordance with applicable law for calendar years (from 1 February 1994 until 12 June 2010) that such military personnel elected not to take vacation.

By the opinion of applicant body, unlike similarly situated persons who had received compensation, such uncertainty is a cause of a violation of constitutionally prescribed rights of equality, rest, social protection and similar rights indicating discrimination towards the military personnel (judges, clerks, security personnel, organizational personnel etc.) who had actually served in military tribunals (military courts) but failed to receive compensation determined in accordance with applicable law for calendar years.

Taking into account the subject of the request and the provisions of Article 32.5.7 of the Law of the Republic of Azerbaijan “On Constitutional Court”, the Plenum of the Constitutional Court declares that the subject matter of the current constitutional proceeding is the verification of the conformity of the resolution of the Cabinet of Ministers No. 217 of 28 September 2012 and the resolution of the Cabinet of Ministers No. 399 of 26 December 2014 with Article 37 of the Constitution.

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

The Cabinet of Ministers adopted the Resolution No. 217 of 28 September 2012 to ensure the fulfillment of Paragraph 1.3 of the Decree No. 281 of the President of the Republic of Azerbaijan of 10 June 2010 on application of the Law of the Republic of Azerbaijan No. 1005-IIIQD as of 11 May 2010 in respect of the Addendum to the Law of the Republic of Azerbaijan “On Status of Military Personnel” and the Regulations on Military Service approved by the Law of the Republic of Azerbaijan No. 377-IQ of 3 October 1997.

Subsequently, the Cabinet of Ministers asked the Constitutional Court to interpret the Article 11, Section 1, Paragraph 20 of the Law of the Republic of Azerbaijan “On Status of Military Personnel” and the Article 121.2 of the Regulations on Military Service approved by the Law of the Republic of Azerbaijan No. 377-IQ of 3 October 1997.

The Plenum of the Constitutional Court by its Decision of 28 March 2014 determined that the right to receive compensation for a unused regular vacation for calendar years period envisaged in Article 11, Section 1, Paragraph 20 of the Law of the Republic of Azerbaijan on the Status of Military Personnel and the Article 121 (Part II) of the Regulations on Military Service approved by the Law of the Republic of Azerbaijan No. 377-IQ of 3 October 1997 is also applicable to military personnel in reserve or who had been released (or resigned) from military service up until 12 June 2010. At the same time, it was recommended to the Cabinet of Ministers in the reasoning part of the Resolution in accordance with the legal positions set forth therein to establish rules and regulations for the determination of the compensation due and methods of payment for military personnel in reserve or who had been released (or resigned) from actual military service up until 12 June 2010 for a unused regular vacation for a calendar year.

Taking into consideration the legal opinion stated in the decision of the Plenum of the Constitutional Court of 28 March 2014, the Cabinet of Ministers adopted the Resolution No. 399 as of 26 December 2014.

However, as it was stated in the request, unlike other military personnel the uncertainty regarding the compensation for unused regular vacation for judges of military tribunals, members of the military board of the Supreme Court and military personnel who had served, had been released to the reserve or had resigned from military service has not been sorted out in the respective resolutions of the Cabinet of Ministers.

The Plenum of the Constitutional Court considers necessary to review and analyze the norms of the Constitution and certain applicable legislative acts in connection with the matters raised in the request.

According to Article 37 of the Constitution, everyone has the right for rest. For those working based on labor agreements 8-hour working day, national holidays and at least one paid vacation with duration of at least 21 calendar days are guaranteed.

The right to rest and the right to a paid vacation are also reflected in Article 24 of the Universal Declaration of Human Rights, Article 7 (d) of the International Covenant on Economic, Social and Cultural Rights and Article 3.1 of the Annual Holidays With Pay Convention (No. 132, 1970) adopted by the International Labor Organization.

By enjoying the right to rest, an individual released from carrying out tasks and functions ensuing from a labor relationship. The free time allows an individual to spend time, as one deems desirable, and most importantly, improves moral and physical strength, restores working abilities and strengthens health of an individual. Furthermore, another important objective of the right to rest is to develop and to improve an individual’s skills and talents and to ensure participation in an individual’s personal and social life.

In connection with the analysis of the matters raised in the request, it is necessary to determine the scope of individuals falling under the status of a military service member and to determine whether judges of military tribunals, members of the military board of the Supreme Court and the individuals who have served in their respective organizations fall under the foregoing status.

According to the legal opinion expressed in the Decision of the Plenum of the Constitutional Court of 28 March 2014, the legislator within the authorities enumerated in the Constitution in defining the special legal status of military personnel determines respective allowances or restrictions to their rights and freedoms, as well as imposes particular obligations arising out of duties, principles, functions and characteristics of military service of such personnel.

According to Article 2 and Article 3 of the Law of the Republic of Azerbaijan “On Status of Military Personnel”, citizens of the Republic of Azerbaijan and citizens of other states, as well as military officials in military camps who engage in actual military service of the Armed Forces of the Republic of Azerbaijan, troops of border service of the Republic of Azerbaijan and other military units established under the laws of the Republic of Azerbaijan have the status of military personnel. In conformity with the prescribed regulations of the laws of the Republic of Azerbaijan, citizens attain the status of a military service member from the day they (i) are enlisted in the Armed Forces of the Republic of Azerbaijan, (ii) volunteer to serve or (iii) contract to serve or enlisted in military camps or military schools in the Armed Forces.

According to the Article 1.1 of the Law of the Republic of Azerbaijan “On Military Tribunals” (hereinafter referred to as the Law “On Military Tribunals”) acting till 30 November 2001, military tribunals are the courts of the Republic of Azerbaijan, belong to the unified court system and carry out their functions under the auspices of the Armed Forces of the Republic of Azerbaijan. The legislator relying on this specific provision noted that the activities of military tribunals were organized within the Armed Forces of the Republic of Azerbaijan.

The Article 6 of the same Law determined the requirements put forth to become a military tribunal judge, a member of the military board of the Supreme Court and a candidate to become a people’s assessor. According to the same article, citizens of the Republic of Azerbaijan who has: (i) reached the age of 25, (ii) been in actual military service, (iii) have higher legal education and (iv) a rank of a soldier in the officer personnel could have been selected as military tribunal judges and members of the military board of the Supreme Court in accordance with the rules and regulations of the laws of the Republic of Azerbaijan. Irrespective of age, a citizen of the Republic of Azerbaijan in actual military service could have been selected as a people’s assessor of the military tribunal. Citizens of the Republic of Azerbaijan who reached the age of 25 and were in actual military service could been selected as a People’s assessor of the military board of the Supreme Court of the Republic of Azerbaijan. The selection of members of military tribunals and military boards of the Supreme Court and identification of other matters within their authorities were determined by the legislation of the Republic of Azerbaijan.

As evident from the meaning of the aforementioned article, the legislator had determined that actual military service was the main requirement for any candidates to become a military tribunal judge, a member of the military board of the Supreme Court or a candidate to become a public assessor of the military tribunal.

In relation to the meaning of the analyzed article and according to existing legislation, an individual who has not been in actual military service could not been selected as a military tribunal judge, a member of the military board of the Supreme Court or could not become a candidate for a people’s assessor of the military tribunal.

Also the Article 21 of the Law “On Military Tribunals” envisages provisions in relation to the structure, positions and staffing of military tribunals. In accordance with the same article, the Ministry of Justice of the Republic of Azerbaijan jointly with the Ministry of Defense of the Republic of Azerbaijan determined the organizational structure and staffing plan of the military tribunals. The Supreme Court of the Republic of Azerbaijan jointly with the Presidium of the Supreme Court of the Republic of Azerbaijan and the Ministry of Defense of the Republic of Azerbaijan determined the organizational structure and the staffing plan of its military board. The financing, the maintenance and the security of the military tribunals and the military board of the Supreme Court were directly funded by the Ministry of Defense of the Republic of Azerbaijan.

As evident, the financing and the maintenance of the military tribunal and the military board of the Supreme Court were directly funded by the Ministry of Defense of the Republic of Azerbaijan.

It can be further adduced from the analysis of the aforementioned norms by the legislation that judges of military tribunals, members of the military board of the Supreme Court and military personnel who have served in their respective organizations are included within the scope of the meaning “military service member” of the resolution of the Cabinet of Ministers of the Republic of Azerbaijan No. 217 of 28 September 2012 and the resolution No. 399 of 26 December 2014.

In such cases, the payment of compensation for unused regular vacation period of judges of military tribunals, members of the military board of the Supreme Court and military personnel who have served in their respective organizations is not excluded from the disputed resolutions of the Cabinet of Ministers.

Considering the above, Plenum of the Constitutional Court comes to conclusion that there are no contradiction between the resolution of the Cabinet of Ministers of the Republic of Azerbaijan No. 217 of 28 September 2012, the Resolution No. 399 of 26 December 2014 and Article 37 of the Constitution of the Republic of Azerbaijan.

However, the Plenum of the Constitutional Court notes that the mechanisms of remuneration or payment of compensation for the unused regular vacation period for judges of a military tribunal, members of the military board of the Supreme Court of the Republic of Azerbaijan and military staff served in their respective organization in the period commencing on 1 February 1994 and up to the entering into force of the Law “On Military Tribunals” should be specified by the Cabinet of Ministers.

Being guided by Article 130.7 of the Constitution of the Republic of Azerbaijan and Articles 52, 62, 63, 65-67 and 69 of the Law of the Republic of Azerbaijan “On the Constitutional Court”, the Plenum of the Constitutional Court of the Republic of Azerbaijan

**DECIDED:**

1. Taking into consideration that remuneration or payment of the compensation for the unused regular vacation period for judges of a military tribunal, members of the military board of the Supreme Court of the Republic of Azerbaijan and military staff served in their respective organization is not excluded from the resolution of the Cabinet of Ministers of the Republic of Azerbaijan No. 217 dated 28 September 2012 and Resolution No. 399 as of 26 December 2014, these resolutions do not contradict to Article 37 of the Constitution of the Republic of Azerbaijan.

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 body or official.