**ON BEHALF OF THE REPUBLIC OF AZERBAIJAN**

**DECISION**

**OF THE PLENUM OF THE CONSTITUTIONAL COURT**

**OF THE REPUBLIC OF AZERBAIJAN**

*On complaint lodged by T.N. Rafiyev concerning verification of conformity of the decision of the Board on Civil Cases of the Supreme Court of the Republic of Azerbaijan of November 5, 2003 to Constitution and legislation of the Republic of Azerbaijan*

**23 July, 2004 Baku city**

The Plenum of the Constitutional Court of the Republic of Azerbaijan composed of Chairman F.Abdullayev, Judges F.Babayev, B.Garibov, R.Gvaladze, E. Mammadov, I. Najafov (Reporter Judge), S. Salmanova and A. Sultanov,

joined in the proceedings by the Court Clerk I. Ismayilov;

Applicant, Tofig Najafguly Rafiyev, experts R. Ramazanov, head of Legal Department of the Ministry of Defense of the Republic of Azerbaijan, S. Mukhtarov- head of State Customs Committee of the Republic of Azerbaijan, N. Aliyev- head of department of the Administration of Milli Mejlis of the Republic of Azerbaijan, U. Murshudov- Director of Pensions Department of the State Social Security Fund of the Republic of Azerbaijan and T. Mammadov- Senior economist of the State Social Security Funds,

in accordance with Article 130.5 of the Constitution of the Republic of Azerbaijan has examined in open court session via the procedure of constitutional proceeding the constitutional case on complaint lodged by Tofig Najafgulu Rafiyev concerning verification of conformity of the decision of the Board on Civil Cases of the Supreme Court of the Republic of Azerbaijan of November 5, 2003 to Constitution and legislation of the Republic of Azerbaijan.

Based on the letter No. 6K of the Chairman of Supreme Court of the Republic of Azerbaijan dated July 8, 2004, the case proceeded in absence of the respondent representatives.

Having heard the report of Judge I. Najafov, opinion of experts R. Ramazanov, S. Mukhtarov, N. Aliyev, U. Murshudov, T. Mammadov and having studied the materials of the case, Plenum of the Constitutional Court

**DETERMINED AS FOLLOWS:**

In accordance with decision of Board on Civil Cases of the Appeal Court of the Republic of Azerbaijan from August 19, 2003, the decision of Sabayil District Court of Baku from May 23, 2003 stating the rejection of the claim for pension of T. Rafiyev against the Finance Department of the Ministry of National Security, was remained unchanged.

On the basis of cassation complaint of the plaintiff Board on Civil Cases of the Supreme Court in its decision from November 5, 2003 has left the decision of the Board on Civil Cases of the Appeal Court unchanged.

In accordance with the letter of Chairman of the Supreme Court of the Republic of Azerbaijan from March 9, 2004 it was advised to T. Rafiyev that there is no basis for review of the case in additional cassation instance court.

T.N. Rafiyev in his complaint sent to the Constitution Court has indicated that court has made the wrong decision on the basis of incorrect interpretation and application of legislation and by this his rights for social security stipulated under Constitution and legislation were violated.

It was indicated in court acts that T.N. Rafiyev has served from February 12, 1965 to December 1991, thus for 26 years, in State National Security Agencies. On December 12, 1991 he has retired from service under long-services bonus and there was life pension allocated for him in accordance with Article 1 of the former USSR Law On Pension Payments to Military Servicemen from April 28, 1990. The Article 1, of the Law of April 29, 1992 On pension payment to Military Servicemen, there right of pension for the category of servicemen to which T.N. Rafiyev belongs was confirmed.

Upon the retirement, T.N. Rafiyev was employed from December 1991 to State Customs Committee of the Republic of Azerbaijan and currently works there as Head of the Security Service Department. From 1991 to December 2000 he was receiving the allocated pension and wages from his current job. Due to reaching the latest age in reserves, he was released from service at the rank of colonel-lieutenant by the Order No. 17/10 of April 18, 2000 of the Minister of National Security of the Republic of Azerbaijan.

From December 2000 T.N. Rafiyev has started to save his pension on the savings account. When on May 2001 he visited the savings bank to collect his six months pension, he was informed that Financial Department of the Ministry of National Security has issued the order on stoppage of the pension payment and return of payments made from December 2000 to May 2001, and collected the amount accumulated for the correspondent period. It was explained by the fact that plaintiff, T.N. Rafiyev upon retirement was employed by customs authorities.

Court in their decisions have deemed in their decisions that employment of T.N. Rafiyev in customs authorities does not allows the payment of allocated military pension.

Thus, in accordance with Article 113 of the Charter of Customs Authorities approved by the Law of the Republic of Azerbaijan from December 7, 1999 pension payments of officers of customs authorities and their family members are regulated under the law on “Pension provisions of military servicemen”. This provision was interpreted by courts as return of T.N. Rafiyev to military service and it was deemed that in accordance with part one, Article 2 of the Law on Pension provisions of Military Servicemen” and Article 133 of Guidelines on “Allocation of pensions and bonuses for officers of Ministry of National Security of the Republic of Azerbaijan and their family members” he shall be deprived of his rights for pension.

In accordance with part I, Article 38 of the Constitution of the Republic of Azerbaijan every person in entitled to social provisions. In accordance with part III of the same Article every person who reaches the established age, suffers from illnesses, disability, loss of bread-winner, unemployment and other conditions stipulated under the legislation shall be entitled to social security. Constitutional social security rights of each citizen include his rights to obtain pensions applicable to his conditions and at the amount stipulated under legislation. In this case pension payments are the integral parts of the social security rights and are reflected in several international treaties to which Azerbaijan Republic is a signatory.

Plenary Session of Constitution Court in reviewing the disputed court decision for compliance with provisions of Constitution and legislation has considered the importance of analysis of applicable legislation and norms for determination of the status of military servicemen and payment of pensions by this status.

First of all it shall be notes that in accordance with Article 2 of the Law on Military Service from November 3, 1992 military service comprises of actual military service and service in reserves. Actual military service is special service in Military Forces of the Republic of Azerbaijan and other armed forces operating under the laws of the Republic of Azerbaijan. Reserve services comprised of calls for military training and mobilization to military services in the event of war.

In accordance with paragraph 3 of Military Service Charter approved by the Law of the Republic of Azerbaijan from October 3, 1997 persons engaged in actual military services shall be called military servicemen and citizens in reserve service shall be called military duty holders. In Article 16 of the Law on Military Service it is indicated that actual military servicemen who reached the latest age of the actual service shall be sent to reserves or shall be retired at peace-time.

In accordance with Article 18 of Law on Military Service and paragraph 156 of the Military Service Charter military servicemen, who reached the latest age at actual military service shall be released to reserves of Military Forces. In accordance with Article 19 of Law on Military Service, military servicemen, who reached the latest age established for reserves shall be retired. For military servicemen at the rank of colonel-lieutenant category three, reserve age is established at 55 years old. In accordance with Article 25 of Law on Military Service category three military duty holders, who reached the latest age for reserve services shall be withdrawn from military registration and retired.

Provisions of said Law exclude the possibility of return to military service of persons, who have been withdrawn from military registration and retired.

Besides, in accordance with Article 1 of the Law on Status of Military Servicemen are established the responsibilities, conditions of military services and status of military servicemen as determined by Law of the Republic of Azerbaijan on Military Forces.

Paragraph 1, Article 2 of the same law indicates that status of military servicemen shall be assigned to persons, citizens of the Republic of Azerbaijan or foreign countries having actual military service in Military Forces of the Republic of Azerbaijan, Border Patrol Forces of the Republic of Azerbaijan and other military detachments organized in accordance with legislation of the Republic of Azerbaijan, as well as military duty holders participating in training calls. In accordance with Article 3 of the Law citizens shall accept the status of military servicement in accordance with legislation of the Republic of Azerbaijan at the date when called to service by Military Forces of the Republic of Azerbaijan, voluntarily or on contractual basis have jointed the Military Forces of the Republic of Azerbaijan, have jointed military training calls, have enrolled into military training schools and shall lose their status of servicemen from the date of release from service from Military Forces of the Republic of Azerbaijan, excluded from lists of military detachment, were dismissed from military training schools, completed their training call program.

In accordance with part one, Article 1 of the Law on “Pension Payments to Military Servicemen, officers, sergeants, midshipmen and additional term servicemen of Military Forces of the Republic of Azerbaijan, relevant executive authorities of the Republic of Azerbaijan (Ministry of Defense of the Republic of Azerbaijan, Ministry of National Security of the Republic of Azerbaijan, Marshall Office of the Ministry of Justice of the Republic of Azerbaijan) other military detachments, privates and officers of relevant executive authorities (Ministry of Internal Affairs of the Republic of Azerbaijan and Department of Security of Senior State Power and Supervisory Authorities) shall be entitled to life pension in the event of service in these authorities for the period established under this Law.

As it seen from existing legislation since employees of customs authorities are not considered the military servicemen, customs service cannot be considered a military service. In accordance with part one of Article 7 of the Customs Code, customs regulation in Azerbaijan Republic is performed by law enforcement agency, which forms the uniform system of customs services.

Charter on Service in Customs Authorities stipulated rules for service in customs bodies and entities, defines the legal basis for status of executives of customs authorities, and has considered the service in customs authorities of the Republic of Azerbaijan and specific professional state service provided within specific functions, roles and responsibilities. In accordance with Chapter 6 of the Charter the provisions on servicing in customs authorities, work conditions, work hours, implementation of payments, rules for social privileges and vacations, temporary replacement on position and other issues are regulated by labor legislation, which is different from regulations for military servicemen.

Plenary Session of the Constitution Court of the Republic of Azerbaijan, with consideration of above deems that position to which T.N. Rafiyev is employed shall not be considered as military, bur civil position. Courts, however, are making the conclusion that servicing in customs authorities is equivalent to military service, did not provide reference to any applicable legislation.

In accordance with paragraph one of Article 60 of Constitution everybody is entitled to protect his rights and freedoms in the court of law. In accordance with Article 217.1 of the Civil Procedures Code the decision of court shall be legally grounded. In accordance with Article 220.4 of the same Code the decision of the court shall contain the reference to legislation on the basis of which the decision is made.

Plenary Session of Constitution Court decides that application of the Law on Pension Payments to Military Servicemen to officers of customs authorities and their family members shall not be the basis for considering the service in customs authorities as military service. This norm is just a guiding standard, and only stipulates the calculation of pensions for officers of customs authorities and their family members in accordance with Law on Pension Payments to Military Servicemen. By this the legislation does not equalize the service in customs authorities with military service, but only applies pension privileges of military servicemen to pensions payable to customs officers and their family members.

All this proves the reference to Article 2 of the Law on Pension Payments to Military Servicemen as wrong for decision of courts.

It is indicated in Article 48 of the Law on Pension Payments to Military Servicemen, that pensions allocated in accordance with this law shall be paid independent of any other wages or other profits made by the pensioner. It shall also be notes that there are no provisions stipulating the stoppage of pension payments to military servicemen. Thus, since existing legislation stipulates payment of the life pension and does not contain any provisions for the stoppage of its payment, there are no legal basis to stop the payment of pension to T. Rafiyev.

Plenary Session of Constitution Court specially notes that payment of pension is stipulated under the legislation and stoppage of payment is not, the stoppage of payment is not allowed as per provisions of legislation.

It is indicated in Article 13.2 of Civil Procedures Code that court, if while reviewing the case court finds any contradictive provisions, it shall use the force of prevailing legal act and base its decision on such. Therefore, when courts have made the disputable decision they should have used provisions of Law on Pension Payments to Military Servicemen rather than provisions of above Guideline. And in Article 38 of his Law there were not any terms specified for stoppage of the payment of allocated pension, including the disputed condition.

Board on Civil Cases of Supreme Court has made the wrong decision on leaving the decision of the Sabayil District Court, and the decision of Board on Civil Cases of the Appeal Court due to wrong interpretation and application of Article 113 of the Guideline on Services in Customs Authorities and Article 2 of the Law on Pension Payments to Military Servicemen, and deeming the equivalence of the military service and service in customs authorities. However, cassation instance court reviews the correct application of material and procedural legal norms by appeal instance court (Article 416 of Civil Procedures Court) and if wrong application of material and procedural norms is established shall cancel the decision of the appeal instance court (Article 418.1 of the Civil Procedures Code).

As a result applicable legislation was not applied and decision was made, which affected the right of plaintiff for social provisions stipulated under the Constitution.

With consideration of above, Plenary Session of Constitution Court draws the conclusion that decision of Board on Social Cases of the Supreme Court shall be cancelled due to incompliance with Article 38 of Constitution and Articles 416, 418.1 of the Civil Procedures Code and case shall be revised in accordance with procedures of procedural legislation.

Using the guidance of parts V, IX and X of Article 130 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 Constitution Court” the Plenary Session of the Constitution Court of the Republic of Azerbaijan

**DECIDED:**

To recognize the decision of the Board on Civil Cases of the Supreme Court of the Republic of Azerbaijan of November 5, 2003 made under the claim of Tofig Najafgulu Rafiyev against the Finance Department of the Ministry of National Security for payment of pension as null and void because of its contradiction to Article 38 of the Constitution of the Republic of Azerbaijan, and Articles 416 and 418.1 of the Civil Procedures Code of the Republic of Azerbaijan and the case shall be processed on the basis of this Decision and via the procedure specified in the Civil Procedure Code of the Republic of Azerbaijan.

2. The decision of the Constitutional Court of the Republic of Azerbaijan comes into force from the date of its publication.

3. The decision is subject to publication in the "Azerbaijan", “Respublika”, “Xalg gazeti”, “Bakinsky rabochiy” newspapers and “Bulletin of the Constitutional Court of the Republic of Azerbaijan”.

4. The decision is final and cannot be cancelled, changed or officially interpreted by any body or official.