**ON BEHALF OF THE REPUBLIC OF AZERBAIJAN**

**DECISION**

# OF THE PLENUM OF THE CONSTITUTIONAL COURT

**OF THE REPUBLIC OF AZERBAIJAN**

## 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

**1 December, 2010 Baku city**

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

attended by the Court Clerk I.Ismayilov,

representative of the addressed body – Mahir Mammadov, senior advisor of the Scientific and Analytical Sector of the Staff of the Representative for Human Rights of the Republic of Azerbaijan (Ombudsman),

representative of the respondent body – Adil Veliyev, representative of the Staff of Milli Majlis 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 – Bagir Asadov, judges of the Supreme Court of the Republic of Azerbaijan, candidate of legal sciences; Urfat Murshudov, deputy head of the Department for Pension Policy of the Ministry of Social Security and Labour; Gunay Bagirova, acting head of the Law Department of the State Fund of Social Security of the Republic of Azerbaijan and Elshan Mamedaliev, head of Labour Pensions Policy Department of the State Fund of Social Security of the Republic of Azerbaijan,

has examined in open session via special constitutional proceedings in accordance with Article 130.VII of the Constitution of the Republic of Azerbaijan the constitutional case on the basis of inquiry of the Representative for human rights (Ombudsman) of the Republic of Azerbaijan of 30 July 2010 on conformity of Article 8.1 of the Law of the Republic of Azerbaijan “On Labour Pensions” to Articles 25, 38, 71 and 147, to parts I and III of Article 149 of the Constitution of the Republic of Azerbaijan , Article 8.3 of the Law of the Republic of Azerbaijan “On Labour Pensions” to Article 25 of the Constitution of the Republic of Azerbaijan .

Having heard a report of Judge S.Salmanova and statements of the representatives of the parties and opinions of experts, studied materials and examined the case, the Plenum of the Constitutional Court of the Republic of Azerbaijan

**DETERMINED AS FOLLOWS:**

Ombudsman of the Republic of Azerbaijan, having submitted to the Constitutional Court of the Republic of Azerbaijan (hereinafter referred to as Constitutional Court) an inquiry asked for verification of conformity of Articles 8.1 and 8.3 of the Law of the Republic of Azerbaijan “On Labour Pensions” on 7 February 2006 (hereinafter referred to as the Law “On Labour Pensions”) according to Articles 25, 38, 71 and 147, to parts I and III of Article 149 and Article 25 of the Constitution of the Republic of Azerbaijan (hereinafter referred to as the Constitution).

According to Article 8.1 of the Law “On Labour Pensions” the woman given birth to five and more children and brought them up till eight-year age and having not less than 10 years of the social insurance record have the right to labour pension on age with reduction for 1 year for each child of age limit established according to Article 7 of this Law.

According to a conclusion of applicant body the provision of this article “given birth to children and brought them up till eight-year age” to become the reason of discrimination and leaving aside of women of some categories from the privileges established by the law in sphere of the right of social protection. So, the legislator provides reduction for 1 year of an age limit for each child that giving the opportunity to get a labour pension on age only concerning women g given birth to five and more children and brought them up till eight-year age. Thereby, mothers who adopted five and more children and brought them up till eight years age or the stepmother who brought up children till eight years age stand aside from the specified privileges.

According to Article 8.3 of the Law “On Labour Pensions” the fathers who alone have brought up 5 and more children to eight-year age in view of death of mother or divorce with mother, or deprivations of mother of the parental rights, without entering the subsequent marriage, and also the fathers who have adopted and alone brought up 5 and more children to eight-year age, and also the trustees-men who alone have brought up 5 and more children to eight-year age, if there is not less than 10 years of the social insurance record have the right to labour pension on age with reduction of 5 years of the age limit established according to Article 7 of this Law.

In inquiry also specified that providing of privileges for tutors and men who adopted five and more children and not providing of these privileges concerning women is a reason of sexual discrimination.

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

The Constitution, having proclaimed Azerbaijan as democratic, legal, secular and unitary Republic, has fixed the ensuring of the rights and liberties of a person and a citizen, appropriate (adequate) standard of living for the citizens of the Republic of Azerbaijan as the highest objective of the State (Article 7.1 and Article 12.1 of the Constitution). Realization of these positions means that the state first of all exists for people and bears corresponding obligations in the field of real reflexion, protection and protection of their requirements. According to article 16.1 of the Constitution the state of Azerbaijan takes care on improvement of prosperity of all people and each citizen, their social protection and proper living conditions.

According to parts I and II of Article 71 of the Constitution the observation and protection of rights and liberties of a human being and citizen specified in the Constitution is responsibility of bodies of legislative, executive and legal power. No one may restrict implementation of rights and liberties of a human being and citizen.

According to parts I and III of Articles 149 of the Constitution the normative legal acts must be based on law and justice (equal benefit, equal attitude). Laws must not contradict to the Constitution. Application and implementation of only published laws shall be mandatory for all citizens, legislative, executive bodies and judiciary, legal entities and municipalities.

Article 38.1of the Constitution established the right of social security of everyone alongside with other social rights. According to article 38.3 of the Constitution fixing the right of social security, including the pension right as one of its basic elements, everyone has the right for social protection on reaching specific age according to legislation, in case of illness, disability and loss of bread-winner in the family, due to unemployment and in other cases envisaged by legislation.

However 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. So, 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. Noted feature also has found the reflexion in the international acts. So, according to sense of Article 2 of the **International Covenant on Economic, Social and Cultural Rights** the obligation of provision of these rights within maximum of its available resources is established.

In particular it is necessary to notice that the legislator is independent (is free) in regulation of general bases and usages at fixing of kinds of pensions, their computation, fixing and obtaining of pensions, and also at fixing of pensions with preferential terms for some categories of citizens. However, in all cases such regulation should be based on the equality right, including that which in the Constitution normative-legal acts should be based on the right and justice (equal relations to equal interests) and should be executed according to requirements of not contradictions to Constitution. In this sense at regulation of any legal relations, including relations in sphere of the right of social security observance by the legislator of a principle of legal definiteness is required. At the same time legal regulation concerning pension system, should be created on the basis of important constitutional principles, be performed taking into account a role and value, as social estimation of work and other socially useful activity in socially directed market economy.

The basic legal act establishing grounds of labour pension rights of the citizens of the Republic of Azerbaijan, the rules of exercising these rights and the system of labour pension provision is the Law “On Labour Pensions”.

In Article 4 of this Law kinds and composition of labour pensions (labour pension on age, a labour disability pension and labour pension for the loss of a breadwinner) are established. In the second section of this Law referred to as “labour pension on age” positions concerning conditions and manner of fixing of labour pensions on age, and also concerning a circle of persons of having the right labour pensions on preferential terms are reflected.

According to Article 7 of the Law “On Labour Pensions” men attaining age 62, women age 57 (age limit is risen by 6 months every year for men from 1 January 2010 till 1 January 2012; for women from 1 January 2010 till 1 January 2016) with at least 12 years of social insurance record (except for persons by whom the labour pension on age is fixed before entry into force of the present act) have right for pension granting.

According to Article 8.1 of the Law “On Labour Pensions” the woman given birth to five and more children and brought them up till eight-year age and having not less than 10 years of the social insurance record have the right to labour pension on age with reduction for 1 year for each child of age limit established according to Article 7 of this Law. As evident from the content of the specified norm, to have the right to labour pension on preferential terms for these women the legislator has established three conditions: to give birth five and more children, to bring up these children till eight years and availability not less than 10 years of the social insurance record . In the absence of one of these conditions according to article 8.1 of the Law women do not have a right to labour pension on preferential terms.

As it is specified above, the legislator is free in an establishment of kinds of pensions, their calculation, fixing and receptions, including a number, objective circumstances having great value, to grant the right to pension on preferential terms to some categories of persons. However the specified distinction according to the right to equality fixed in the Constitution is possible in a case and in a form in which these conditions would base on objective circumstances, would justify itself, would serve to the purposes having the constitutional values and were proportional to the used legal means for achievement of these purposes.

The principle of legal equality considered as one of basic principles of the lawful state, reflected in the Article 25 of the Constitution, provides a guarantee of equality of the rights and freedom of everyone without an assumption the state of any discrimination. The principle of legal equality warranting elimination of all kinds of discrimination in realization of the rights and freedom in the field of provision of pensions serves for prevention of distinction of the pension right of persons concerning the same category. Otherwise non application in an identical order concerning persons with an identical legal status of the privileges established by the legislator in the field of social security may lead to infringement of a social justice and balance. In the same time, assumption of discrimination between subjects with an identical legal status at legal regulation of relations in the field of social security can lead to defectiveness of such regulation concerning all subjects.

It is necessary to notice that Article 8.1 of the Law “On Labour Pensions” having established concessionary terms for acquiring of pension, for women given birth to five and more children and brought them up till eight-year age in itself are not created the contradiction with parts II and III of Article 25, parts I and III of Article 38 and parts I and III of Article 149 of the Constitution. However, according to the aforesaid because of the right to pension on preferential terms provided in this norm of the Law concerns only to women given birth to five and more children, from the point of view of the constitutional principle that laws should be based on “equal relations to equal interests”, puts in an unequal legal status of women adopted five and more children and not native mothers.

Family as a basic element of society is under special protection of the state. Maternity, paternity and childhood are protected by the law (article 17.1, article 34.3 of the Constitution).

According to Article 5 of the Law of the Republic of Azerbaijan “On children rights” of 19 May 1998 the state structures, all individuals and legal persons in its activity should put interests of the child above the others, create conditions for provision of their rights. Regulatory legal acts of the Republic of Azerbaijan and the resolution of relevant organs should not contradict to interests of the child and their execution should not cause the life damage, to development and education of child.

In the legislation acting in this field along with an equilibration of legal statuses of adopted and the own children, adoptive fathers and native parents, adoption acts as the legal fact that create certain legal consequences.

So, according to Article 134.1 of the Family Code of the Republic of Azerbaijan the adopted children and their posterity in relation to adopters and their relatives, and adopters and their relatives in relation to adopted children (and to their posterity) are equated in personal non-interest and interest rights and obligations to relatives by origin.

According to Article 1159.1 of the Civil code of the Republic of Azerbaijan during intestate succession following persons first of all are considered as equal heirs - children of decedent, child born after testator (testatrix)’s decease, wife (husband), parents (adoptive parents). According to Article 1159.1.2 of the same Code adopted person and his (her) children are considered equal with children and grandchildren of adoptive person as his (her) heirs or relatives.

It is necessary to note, that in Article 14 of the Law of the Republic of Azerbaijan “On pension provision of citizens” acting till January 2006 the right to pension on preferential terms of mothers having many children, mothers of children-invalids and single fathers and the trustees who are independently bringing up children has been provided. In this article only concerning the stepmother this question has partially been solved positively. In the third paragraph of the article it was established that at fixing the pension on age on the terms of the present article not adopted children of died mother are considered on a level with the own children of the stepmother under on condition that if in a new family their actual education was performed till eight-year age.

In connection with other question specified in inquiry the Constitutional Court notices that the providing in Article 8.3 of the Law “On Labour Pensions” of rights to pension on preferential terms to trustees to the men who are independently bringing up five and more children till eight-year age, instead of the providing in the relation of women of such privileges should be regarded as infringement of a guarantee of equality between men and women.

The Republic of Azerbaijan, having signed in 1995 the Convention of the United Nations of 1979 “On elimination of all forms of discrimination against women” has undertaken obligations on provision of gender equality with elimination of all forms of discrimination against women, at creation of equal conditions to men and women in political, economic, social, cultural and in other spheres of public life.

According to Article 15.2 of the Law of the Republic of Azerbaijan “On gender equality” of 10 October 2006 regulating provision of a principle reflected in Article 25 of the Constitution in connection with a prohibition of sexual discrimination, the state ensures creating equal opportunities for males and females to exercise the right to social security, recieve targeted social aid and other social compensations. In this sense, both in the Constitution and in the said Law discrimination on a sexual character between the rights of social security of men and women is unequivocally prohibited.

According to specified, Plenum of the Constitutional Court comes to conclusion that from the point of view of a principle of legal equality effective realisation of the right to pension by subjects of relations of the right of social security, and in particular women, stepmothers adopted five and more children, women of trustees grown up five and more children in the Law “On Labour Pensions”, demands urgent regulation of acquisition in an identical order of the pension right on preferential terms.

According to a principle of separation of powers, reflected in Article 7 of the Constitution, the Constitutional Court not a law-making body, that is body making normative-legal acts concerning regulation of any legal relations, and body possessing initiative of introduction of amendments and modifications, but the supreme body of the constitutional justice performing constitutional control over the acts accepted by bodies of the legislative, executive both judicial authorities and local governments on the basis of inquiries and appeals of plenipotentiary subjects, individual complaints.

According to Article 94.1.16 of the Constitution the Milli Majlis of the Republic of Azerbaijan establishes general rules concerning the labor relationships and social maintenance. According to requirements of parts II and III Article 25, parts I and III Article 149 of the Constitution to recommend to Milli Majlis of the Republic of Azerbaijan, taking into consideration the legal positions reflected in this Decision, to bring to conformity pension on age of mothers adopted and grown up five and more children to eight-year age, of stepmothers brought up five and more children to eight-year age with Article 8.1 of the Law “On Labour Pensions”, pension on age of trustees women grown up five and more children to eight-year age with Law Article 8.3 “On Labour Pensions”.

Being guided by parts VII, IX and Х of article 130 of the Constitution of the Republic of Azerbaijan, Articles 52, 62, 63, 65-67 and 69 Law of the Republic of Azerbaijan «On the Constitutional Court», Plenum of the Constitutional Court of the Republic of Azerbaijan

**DECIDED:**

1. To recognize Article 8.1 of the Law “On Labour Pensions” as corresponding to Article 38 of the Constitution of the Republic of Azerbaijan.
2. According to requirements of parts II and III of Article 25, parts I and III of Article 149 of the Constitution, to recommend to Milli Majlis of the Republic of Azerbaijan, taking into consideration the legal positions reflected in this Decision, to bring to conformity pension on age of mothers adopted and grown up five and more children to the age of eight years, of stepmothers brought up five and more children to the age of eight years with Article 8.1 of the Law “On Labour Pensions”, pension on age of trustees women grown up five and more children to the age of eight years with Article 8.3 of the Law “On Labour Pensions”.
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 can not be cancelled, changed or officially interpreted by any body or official.