Non-Official Translation

IN THE NAME OF THE REPUBLIC OF ARMENIA
DECISION OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF ARMENIA

ON THE CASE OF CONFORMITY OF PART 16 OF ARTICLE 61 OF THE RA LAW ON MILITARY SERVICE AND THE STATUS OF MILITARY PERSONNEL WITH THE CONSTITUTION OF THE REPUBLIC OF ARMENIA ON THE BASIS OF THE APPLICATION OF THE RA ADMINISTRATIVE COURT

Yerevan July 10, 2018

The Constitutional Court composed of H. Tovmasyan (Chairman), A. Gyulumyan, F. Tokhyan, A. Tunyan (Rapporteur), A. Khachatryan, H. Nazaryan, A. Petrosyan,

with the participation (in the framework of the written procedure)

the applicant: RA Administrative Court,

representatives of the respondent: representative of the RA National Assembly A. Kocharyan, Senior Legal Specialist of the Legal Expertise Division of the Legal Expertise Department of the RA National Assembly Staff,

pursuant to Point 1 of Article 168, Part 4 of Article 169 of the Constitution, as well as Articles 22, 40 and 71 of the Constitutional Law on the Constitutional Court,

examined in a public hearing by a written procedure the case on conformity of Part 16 of Article 61 of the RA Law on Military Service and the Status of Military Personnel with the Constitution of the Republic of Armenia on the basis of the application of the RA Administrative Court.

The RA Law on Military Service and the Status of Military Personnel (hereinafter referred to as the Law) was adopted by the National Assembly on 15 November 2017, signed by the President of the Republic on 29 November 2017, and entered into force on 16 December 2017.

The case was initiated on the basis of the application of the RA Administrative Court submitted to the Constitutional Court on 10 April 2018, which included the Decision “On suspension of the proceedings of the administrative case and applying to the Constitutional Court” on the case ՎԴ/5524/05/16 of 6 April 2018.

Having examined the application, the written explanation of the applicant, as well as having analyzed the relevant provisions of the Law and other documents of the case, the Constitutional Court **ESTABLISHES:**

1. Positions of the applicant

The applicant challenges Part 16 of Article 61 of the Law, titled "Pecuniary security for military personnel", according to which "Military personnel who retire from military service and have unused leave throughout military service and for the days of leave shall receive compensation no more than for retirement from military service and the days of leave not used over two years preceding the retirement, in the rate provided by the Government of the Republic of Armenia. In the case prescribed in this Part, in accordance with this Law the calculation of unused leave balances does not include the days not included in overall military service".

The applicant notes that Article 170 of the Labor Code does not grant leave commutation costs for unused leave. In addition, the right to compensation for unused leave is not limited also by the RA Laws on Public Service, on Civil Service, on Judicial Service, on Diplomatic Service, on Service in National Security Bodies, on Customs Service, on Tax Service, on State Service in the National Assembly Staff of the Republic of Armenia, on the Investigative Committee of the Republic of Armenia and on State Service at the Department of the Investigative Committee of the Republic of Armenia.

The applicant notes that regulations other than those prescribed by Article 170 of the Labor Code may be found in the RA Laws on Judicial Acts Compulsory Enforcement Service, on the Police Service and on the Rescue Service, according to the provisions thereof the RA Government is empowered to resolve the issue of compensation for unused leave.

Based on the foregoing, the applicant concludes that "in the matter of compensation for unused leave, the legislator has shown discriminated approach towards military personnel, on the one hand, and at least the employees in judicial, diplomatic, customs, and tax institutions as well as the employees in national security bodies, in the National Assembly Staff, investigators and employees in the Department of the Investigative Committee, on the other hand. In particular, the military personnel in comparison with the other listed employees are in a more unfavorable legal position, since they face limited a three-year term for such compensation when other employees do not". Moreover, according

to the applicant, the social and legal status of all these employees is identical, since they all carry out public civil service, i.e. a professional activity aimed at the implementation of the tasks and functions provided to state bodies by the legislation of the Republic of Armenia.

The applicant also notes that in such conditions, the stated discrimination will not violate Article 29 of the Constitution only if there is an objective and reasonable justification for a differentiated approach, and if it pursues a legitimate aim, and if a proportionate impact between the restriction and the aim pursued is observed.

At the same time, the applicant reiterates that, according to the Administrative Procedure Code, on the basis of the relevant claim, the Administrative Court applies the current legal norm, which in fact makes it impossible for the Administrative Court to issue decisions on the basis of legal norms that no longer are in legal force.

The applicant considers that the legislator's discrimination against the military personnel prescribed in Part 16 of Article 61 of the RA Law on Military Service and the Status of Military Personnel is unjustified, therefore there is a reasonable doubt that it is not in conformity with the requirements of Article 29 of the Constitution.

2. Positions of the respondent

The respondent notes that the adoption of the RA Law on Military Service and the Status of Military Personnel was based on the constitutional amendments. By adopting this Law, the legislator "expected to ensure the effectiveness of military security of the Republic of Armenia both in peace and war, increase citizens' confidence in compulsory military service and the reserve training process, and generate the will of citizens to perform compulsory and contractual military service".

To substantiate his positions, the respondent refers to the provisions of Article 10 ("Guaranteeing Ownership"), Articles 28 and 29 ("General Equality before the Law" and "Prohibition of Discrimination"), Article 60 ("Right of Ownership"), Article 82 ("Working Conditions") of the Constitution, and also refers to the relevant provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms, the International Covenant on Civil and Political Rights, the Revised European Social Charter, the Universal Declaration of Human Rights, and the "Holidays with Pay" Convention of the International Labour Organization.

Given the judicial practice of the bodies acting on the basis of international treaties on human rights ratified by the Republic of Armenia, as to whether the capacity of the state to establish a differentiated approach towards persons in a relatively equal position can be legitimate only if there is an objective and reasonable justification, as well as based on the context of a full juxtaposition of the above-mentioned international and domestic legal norms, the respondent states that the right to paid leave and, in case of not enjoying that right, the concept of a differentiated approach of the right to compensation for the corresponding unused leave should be considered solely in terms of pursuing the legitimate aim, objective and reasonable justification, as well as adherence to a clear proportional relationship between the aim pursued and the measures applied.

According to the respondent, as prescribed by the challenged provision, "in terms of reasonable and objective justification there are insufficient procedures for ensuring the effective exercise of the right to leave for the military".

Based on the foregoing, the respondent finds that the provision prescribed by Part 16 of Article 61 of the RA Law on Military Service and the Status of Military Personnel does not comply with the requirements of the Constitution.

3. Circumstances to be clarified within the framework of the case

When determining the constitutionality of the challenged provision in the present case, the Constitutional Court considers it necessary to address, in particular, the following issues:

- Is the provision of compensation for unused leave during the military service the positive duty of the state established by the Constitution, as well as by the international legal documents?

- In case of amendments in legal regulations regarding the provision of compensation for unused leave during military service, in particular in case of deterioration of the situation, does the person have legitimate expectations guaranteed by the Constitution, under which depriving the military personnel of the possibility of obtaining compensation for all days of unused leave violates the right to ownership of the person prescribed by the Constitution?

- Does the restriction of the possibility for military, in comparison with other state officials, to obtain compensation for unused leave violate the prohibition of discrimination granted by Article 29 of the Constitution?

On the basis of the foregoing, the Constitutional Court considers the constitutionality of the challenged legal regulation in the present case in the context of Articles 29, 60, 73 and 82 of the Constitution.

4. Legal positions of the Constitutional Court

4.1. Enshrining social rights and ensuring the implementation of these rights follows from the requirement of Article 1 of the Constitution, according to which the Republic of Armenia is a social state. Articles 82 of the Constitution is dedicated to working conditions, and as a legislative guarantee in the social sphere, it provided for each employee, inter alia, the right to annual paid leave.

According to Article 158 of the Labor Code (hereinafter referred to as the Code), annual leave is granted to an employee for rest and rehabilitation. Moreover, to ensure the effective exercise of the right to rest during the leave, the workplace (position) is retained after him and he is paid an average salary.

According to Article 164 of the Code, annual leave for each working year is granted in a given year.

The transfer of annual leave is allowed in exceptional cases, and, as a rule, the transferred annual leave is granted in the same working year, but not later than within 18 months starting from the end of the working year for which the employee was not granted or was partially granted an annual leave.

Based on the provisions of Part 7 of Article 7 of the Code, namely, that “labor (official) relations of persons holding political, discretionary or civil positions, as well as civil servants, employees of other state (special) services and local self-government bodies prescribed by the law ... shall be regulated by this Code, unless otherwise provided by the relevant laws”, Article 49 of the Law prescribed a provision according to which “if due to sickness or any other valid reason, the contractual military personnel has not used the regular and/or additional leave prescribed by Point 1 of Part 1 of Article 50 of this Law, he is granted leave during the first half of next year”.

In addition, according to the same Article, “The cancellation of a regular leave of the contractual military personnel is allowed only in case of emergency, by order of the commanding officer (the

senior officer). In this case, the portion of the unused leave taken is provided the same year, if it is 15 or more calendar days. At the request of the contractual military personnel, the unused leave days are added to the days of the regular leave for the next year". That is, the aforementioned legal regulations are aimed at ensuring that employees, including contractual military personnel, take benefit of the possibility for rest provided to them.

Article 12 of "Holidays with Pay" Convention (no. 132) of the International Labor Organization dated June 24, 1970 (hereinafter referred to as the ILO Convention), according to which: agreements to relinquish the right to the minimum annual holiday with pay or to forgo such a holiday, for compensation shall be prohibited and void.

As for the established practice of granting leaves to military personnel, it should be noted that the Minister of Defense of the Republic of Armenia by letter ՊՆ/510-819 of 12.06.2018 (in response to the letter LCC-14 of June 5, 2018) stated that "... according to the requirements of the law, for the contractual military personnel who for some reason has not used the regular leave during the year, the regular leave for the previous year is granted during the first 6 months of the next year, which has formed the current practice".

Considering the above-mentioned, the Constitutional Court states that the constitutional right to annual leave is aimed at ensuring the need for rest and vocational rehabilitation, on the basis of which the legal regulations, as a rule, prohibit the substitution of annual leaves with pecuniary compensation. At the same time, using annual leave is the right of a person, and the state shall be responsible for establishing the procedure for granting leaves. Even in cases when the procedure for granting leaves is breached with the consent of the employee or at his request, cases, when non-used days of annual leave are accumulated as a result of not-using this right during work or service, cannot be excluded.

Taking into account the right of a person to annual paid leaves prescribed by the Constitution, Article 170 of the Code provided for the possibility of receiving pecuniary compensation for the unused annual leave. In particular, if an employee who has acquired the right to annual leave cannot be granted an annual leave due to the termination of the employment contract, or in case the employee does not wish to be granted a leave, then he will obtain pecuniary compensation (Part 1). Moreover, compensation shall be paid for all unused days of the leave with no time limit (Part 2).

Regulation of such content is also provided for in Article 11 of the above-mentioned ILO Convention, according to which: an employed person shall obtain a leave with pay proportionate to the length of

service for which he has not obtained such a leave, **or compensation in lieu thereof,** or the equivalent leave credit.

Based on the foregoing, the Constitutional Court states that the provision of legal regulation envisaging compensation for the unused days of an annual leave during military service is the positive obligation of the State prescribed by the Constitution, as well as by other international legal documents.

4.2. Given the circumstance that compensation for the unused days of an annual leave is paid upon termination of an employment contract or dismissal from service, the Constitutional Court reiterates necessary to consider the challenged legal regulations in the light of the retroactivity of laws and other legal acts provided for in Article 73 of the Constitution. In particular, according to the aforementioned provision of the Constitution, laws and other legal acts that aggravate a person's legal situation shall have no retrospective effect, and legal acts improving a person's legal situation shall have retrospective effect if such acts so provide.

The Constitutional Court considers necessary to note that prior to the entry into force on 21 June 2005 of the Labor Code, adopted in 2004, Article 246.1 of the previous Labor Code prescribed a provision according to which, in the event of an employee's dismissal, pecuniary compensation for the unused leave was paid for not more than two working years.

Further, neither the Labor Code in force, nor the legislation in the sphere of military service (prior to the supplementing with Point 15.1 the Decision no. 778 of the RA Government dated November 27, 2000 "On the activities for ensuring the application of the RA Law on Social Security of Military Personnel and their family members" with the Decision no. 1075-N of October 2, 2014) prescribes any time limit in regard with obtaining compensation for the unused days of regular leaves.

In the context of the above-mentioned, the Constitutional Court considers it necessary to refer to the case-law judgments of the European Court of Human Rights concerning the disclosure of the content of Article 1 of Protocol No. 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter - the Convention). In particular, the Court noted that the concept of "possessions" includes not only existing material means, but also legitimate expectations of acquiring material means. (***Trgo v. Croatia, 11 June 2009***).

In this aspect, the "legitimate expectation" of acquiring assets may also be protected by Article 1 of Protocol No. 1 to the Convention. At the same time, "legitimate expectations" are out of the question if in the domestic law there is no sufficient basis for the latter.

By the Decision DCC-741 of 18 March 2008, the Constitutional Court also noted that protection of the right to property guaranteed by the Constitution is granted to those whose property rights are already recognized in the manner prescribed by law or who by virtue of the law have a legitimate expectation of acquiring the right to property.

Based on the foregoing, the Constitutional Court states that in such conditions of legal regulation, when in a specific period of time there was no time limit on receiving compensation for unused days of leave, however, the military personnel was denied the possibility to use those days of leave or to demand and obtain compensation for those days without dismissal from service, hence the grounds for "legitimate expectations" for military personnel existed. Therefore, in these cases, a person's possibility to obtain compensation must be guaranteed as the realization of the protection of the right to property provided for by the Constitution.

4.3. According to Part 3 of Article 3 of the RA Law on Public Service, the civil service includes judicial service, civil service, diplomatic service, customs service, tax service, rescue service, military service (except for compulsory military service in the rank, carried out through conscription to compulsory military service provided for by law), service in the national security bodies, service in the police, penitentiary service, judicial acts compulsory enforcement service, court registrars service.

Military service, inter alia, is considered a form of public service, where the relations, by virtue of Part 7 of Article 7 of the Code, may be regulated by the Code only if the relevant laws do not provide otherwise. Meanwhile, Part 16 of Article 61 of the Law prescribes regulation other than provided by the Code. In particular, unlike Article 170 of the Code, which allows, in case of dismissal from work, receiving **compensation for unused leave without time limits**, the Law provided for the right to obtain compensation only in case of dismissal from military service and for the days of unused leave for the previous two years, and Article 72 of the Law specifies the scope of military personnel and persons assimilated thereto, to whom the social guarantee under consideration applies. These are employees in the relevant service in the defense system, the police, the republican executive bodies of national security of the Republic of Armenia, as well as the employees in compulsory enforcement service of the Ministry of Justice of the Republic of Armenia.

Unlike other employees, **the same social guarantee in a smaller volume** is provided for by Article 72 of the Law for military personnel and persons assimilated thereto. And this was set forth in consonance with Part 7 of Article 7 of the Code.

Another issue is whether the legislator was authorized for some categories of employees to establish a different volume of social guarantee provided for all persons in labor relations.

The Constitutional Court deems it necessary to consider the said legal regulation from the perspective of the principle of the prohibition of discrimination provided for by the Constitution and the European Convention for the Protection of Human Rights and Fundamental Freedoms.

In particular, Article 29 of the Constitution, titled "Prohibition of discrimination", states that any discrimination based on sex, race, skin color, ethnic or social origin, genetic features, language, religion, worldview, political or any other views, belonging to a national minority, property status, birth, disability, age, or other personal or social circumstances shall be prohibited.

By the Decision DCC-1224 of 7 July 2015, the Constitutional Court stated that: "… discrimination occurs when a differentiated approach is displayed to one or another person or persons within the same legal status, in particular, they are deprived of any rights, or the latter are limited, or they gain privileges".

In another Decision DCC-967 of 7 June 2011 regarding the prohibition of discrimination it is noted that: "the Constitutional Court considers that in the case of alleged discrimination there should be a situation where a differentiated approach is manifested in relation to this particular subject in comparison with other subjects in the same situation whose attitude is more favorable."

Article 14 of the Convention, which prescribes the prohibition of discrimination, establishes that the enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

According to the case law of the ECHR, there must be a distinction between the treatment of persons in comparable situations for the emergence of the issue of prohibition of discrimination. According to the European Court, not every differentiation or distinction can be considered discrimination. In particular, in the ***Abdulaziz, Cabales and Balkandali v. the United Kingdom***, 28 May 1985 Judgment, the European Court noted that "... a difference in treatment is discriminatory if it has no objective and

reasonable justification, that is if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realized".

In addition, referring to the law enforcement practice in relation to the prohibition of discrimination enshrined in Article 14 of the Convention, the Constitutional Court states that the European Court of Human Rights has emphasized that the Convention shall be applicable not only to civilians, but also to military personnel. In particular, in the ***Markin v. Russia, 22 March 2012*** Judgment, the European Court noted that when interpreting and applying the norms of the Convention, it is necessary to take into account the peculiarities of military life and the impact they have on certain personnel. On the other hand, persons called up for military service have the same rights and freedoms as other citizens, and the restriction of these rights and freedoms should be due to the need to ensure order in the field of military service.

The Constitutional Court also considers it necessary to refer to Article 1 of the Convention No. 111 of the International Labour Organization "Concerning Discrimination in Respect of Employment and Occupation" (for the Republic of Armenia entered into force on July 29, 1995), according to which: not only any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation, but also such other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation shall be deemed to be discrimination, that is, both direct and indirect discrimination. In this aspect, according to Part 2 of Article 81 of the Constitution, restrictions of fundamental rights and freedoms may not exceed the restrictions prescribed by the international treaties of the Republic of Armenia.

Based on the above-mentioned, the Constitutional Court considers that the right to leaves is a comprehensive right and extends both to persons holding public positions and public servants, as well as to individuals who are in an employment relationship. Military personnel are both public servants and, in a broad sense, persons performing work, and right to leave and rest cannot be not guaranteed by law.

Although, according to Article 82 of the Constitution, the authority to define the content of the right to annual leave with pay is vested to the legislator, nevertheless, the Constitution, inter alia, excludes

both the general failure to guarantee this right by law and the discriminatory approach to guaranteeing it.

The Constitutional Court argues that the Law guarantees this right also for military personnel, but establishes a narrower scope of its protection, without defining and justifying the criteria by which it would be possible to make a legitimate differentiation on the one hand between military personnel and persons assimilated thereto, and other government officials, on the other hand.

In this aspect, the Constitutional Court states that ensuring uniform legal regulations for receiving compensation for unused days of leave is within the competence of the legislator.

Based on the above, the Constitutional Court finds that in this case the differentiation is not objective; it is unfounded and does not pursue a legitimate aim.

Based on the review of the case and governed by Point 1 of Article 168, Part 4 of Article 169, Part 4 of Article 170 of the Constitution of the Republic of Armenia, Articles 63, 64 and 71 of the Constitutional Law on the Constitutional Court, the Constitutional Court of the Republic of Armenia **HOLDS:**

1. To declare Part 16 of Article 61 of the RA Law on Military Service and the Status of Military Personnel, in part of limiting the possibility for the military personnel of receiving compensation for the days of unused leave in case of dismissal from military service and for the days of unused leaves for the previous two years, contradicting Articles 29, 60, 73 and 82 of the Constitution and void.

2. Pursuant to Part 2 of Article 170 of the Constitution this Decision shall be final and shall enter into force upon its promulgation.

Chairman **H. Tovmasyan**

10 July 2018
DCC -1424