

IN THE NAME OF THE REPUBLIC OF ARMENIA

**THE DECISION OF THE CONSTITUTIONAL COURT OF
THE REPUBLIC OF ARMENIA**

**ON THE CASE CONCERNING THE DETERMINATION OF THE ISSUE REGARDING
THE CONFORMITY OF ARTICLE 47 PARTS 2 AND 3 OF THE RA LAW ON “STATE
PENSIONS” (LA – 519 – N OF 19 NOVEMBER, 2002) WITH THE RA CONSTITUTION**

Yerevan

29 January 2008

The Constitutional Court of the Republic of Armenia composed of G. Harutyunyan (presiding judge), K. Balayan, H. Danielyan, F. Tokhyan, V. Hovhanissyan (rapporteur), Z. Ghukhassyan, H. Nazaryan, R. Papayan, V. Poghosyan,

with the participation of the Applicant, Human Rights Defender of the Republic of Armenia: A.Harutyunyan;

the respondent: the representative of the National Assembly of the Republic of Armenia, the head of the Department of Analysis of Legislation of the Staff of the RA National Assembly A.Khachatryan,

Invited: the head of the State Social Security Service of the RA Ministry of Labor and Social Affairs V.Khachikyan;

pursuant to Article 100, point 1, Article 101, point 8 of the RA Constitution, Articles 25 and 68 of the RA Law on “The Constitutional Court”;

examined in an oral procedure in public the case concerning the determination of the issue regarding the conformity of Article 47 parts 2 and 3 of the RA Law on “State Pensions” (LA – 519 – N of 19 November, 2002) with the RA Constitution.

The case was initiated by the application of 02.10.2007 submitted to the Constitutional Court by the Human Rights Defender of the Republic Armenia.

Having heard the report of the case rapporteur, the explanations of the representatives of the Applicant and Respondent, having examined the RA Law on “State Pensions”, the analysis of the representatives of the RA Court of Cassation in the Constitutional Court and other documents in the case, the Constitutional Court of the Republic of Armenia **FOUND**

1. The RA Law “On state pensions” was adopted by the RA National Assembly on November 19, 2002 and came into force on April 10, 2003.

Article 47 of the Law, taking into consideration the amendment made by the LA-247-N law of November 19 2007, states: “the work record card and since January 1992, also the document confirming the making of social payments or reception of salary, are the main documents confirming the available length of service of the insured person before the coming into force of the present Law and the formation of the base of individual registration. In case of absence of a work-record card or corresponding records in it or other documents confirming the experience

envisaged by the legislation, the length of service is proved by the archival inquiry, and in case of its absence - judicially.

In case of existence of the required insurance experience (25 years), the experience is not proved judicially.

The deficient part of required length of service, but not more than ten years' experience, can be proved judicially.”

According to Article 18, Parts 1 and 2 of the RA Constitution, “Everyone shall be entitled to effective legal remedies to protect his/her rights and freedoms before judicial as well as other public bodies. Everyone shall have a right to protect his/her rights and freedoms by any means not prohibited by the law.”

The RA Constitutional Court had stated its legal positions regarding the right of judicial protection, particularly, in the Decisions DCC-652 (point 6) of October 18 2006, DCC-665 (point 5) of November 16, 2006, DCC-673 (points 8-9) of January 16 2007, DCC-719 of November 28 2007.

2. The applicant party considers that the challenged norm, according to which “In case of existence of the required insurance experience (25 years), the length of service is not proved judicially.”

The deficient part of required length of service, but not more than ten years' experience, can be proved judicially”, contradicts the RA Constitution by the following reasons:

According to Article 18 Part 1 of the RA Constitution, everyone shall be entitled to effective legal remedies to protect his/her rights and freedoms before judicial as well as other public bodies.

Among the social rights, the pension right of citizens, which is regulated by the RA Law on “State pensions,” is especially important. The mentioned law sets forth coefficients applied for the appointment of pensions where the insurance experience is greatly valued. Hence, the restriction of the term concerning the acknowledgement of the experience, and the interdiction of its acknowledgement in case of existence of the required insurance experience (25 years) set forth by the RA Law on “State pensions” violates the constitutional right of everyone, envisaged by the RA Constitution, on the enjoyment of effective remedies of legal protection.

3. The respondent party considers that the applicant’s statements are grounded, and there is an obvious discrepancy in the separate provisions of the RA Law on “State pensions” and the RA Constitution, which has the following motivation. According to Point 1 of Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms of November 4, 1950, “In the determination of his/her civil rights and obligations ... everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.” According to Article 13 of the same Convention, “Everyone, whose rights and freedoms as set forth in this Convention, are violated, shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.” According to Part 1, Article 18 of the RA Constitution, “Everyone shall be entitled to

effective legal remedies to protect his/her rights and freedoms before judicial as well as other public bodies.” Actually, the law has limited the right of citizens to address for judicial protection with the purpose of protection of the pension rights.

4. The law stipulates, among others, the principle of obligatoriness of the state pension social insurance and the principle of assignment and maintenance of payment of pensions on the basis of data on the payments made for pension insurance reflected in individual (personalized) insurance accounts as a principle of the organization and realization of the provision of state pensions and the state pension insurance.

According to these principles the law, making the rate of pension conditional on the made insurance payments and the duration of the insurance experience (Article 40), gives the right to insurance pension (age-related, by favourable terms, for long-term service, for disability, in case of the loss of the breadwinner, partial) only to those persons who made obligatory pension social insurance payments. In particular, the persons, who are 63 years of age, are entitled to the right of age-related insurance pension, in case of existence of 25-year insurance experience.

According to the logic of the law, the rate of pension is conditioned by the insurance payments and the duration of the insurance experience. This conclusion directly follows from Article 40 of the Law and indirectly from separate principles and provisions stipulated by the Law (in particular, Articles 2, 9 of the Law).

In the case, when a person is deprived of an opportunity to confirm the factual insurance experience, this logic is broken, as it is possible that the person has actually made insurance payments, but, is deprived of an opportunity of reception of the pension at a rate conditioned by making of this payments, owing to the fact of absence of the corresponding documents.

5. On the basis of the law, a common database of the individual (personalized) registration of the persons, who are subject to pension insurance, is formed. The data of the base of the pension social insurance are used for the assignment, calculation (recalculation) and payment of the pension. After the coming into force of the Law and the formation of the mentioned base of individual registration, the insurance experience acquired by an insured person, is calculated based on the data of the individual (personalized) registration. The length of the service of an insured person, which s/he had before, is calculated based on corresponding documents on the insurance experience. According to Article 47 of the Law, these documents are the work record card, and since January 1992 the document confirming the making of obligatory social payments or reception of salary. The decision of the RA Government on “Ensuring of application of the RA Law “On state pensions” by #793-N of May 29, 2003 defines the list of those documents which confirm the insurance experience in case of absence of a work record card.

The analysis of both the challenged and other provisions of the Law indicates that the question of acknowledgement of the insurance experience can arise only regarding the insurance experience, acquired before the creation of a common database of the individual (personalized) registration

of persons, who are subject to pension insurance on the basis of the challenged provision of the Law.

6. According to Article 12 of the Law, the existence of 25 years of the insurance experience (the required experience) is a precondition for acquiring the right of age-related pension. According to Article 16 of the Law, the rate of the pension is calculated from the sum of the basic part and the insurance part of the pension. The insurance part of the pension is calculated based on the insurance experience acquired before the introduction of the personalized registration, and the information on payments made for the pension insurance, reflected on individual insurance accounts after the introduction of the personalized registration. In Article 16 of the Law, the formula for calculation of pension is given.

The analysis of the mentioned formula indicates that for the determination of the rate of pension not only the required insurance experience, but also the actual insurance experience are essential.

7. Occurrence, change or termination of property or personal non-property rights is connected with certain circumstances, which are given legal value by the law (the legal facts). The insurance experience is the legal fact based on which the right of insurance pension occurs. Chapter 34 of the RA Civil Procedure Code concerns the procedure of consideration of cases concerning the acknowledgement of the legal facts. Article 189 of the mentioned Code defines not exhaustive list of those legal facts, which are subject to acknowledgement by the court. Point 3 of this Article states that the court considers other facts, which have legal value, in the cases stipulated by the law. Pursuant to the subject matter norms the legislator authorized the court to confirm the insurance experience, however, at the same time, has subjected the realization of this power to restrictions on the formal basis by the challenged provision, depriving the person of an opportunity to apply to the court for acknowledgement the legal fact necessary for the occurrence of his/her right, and the court- of an opportunity to carry out effectively and fully the power given to it by the law.

8. The legislation allows to confirm the legal facts not only judicially, but also in administrative, notarial procedure, and through other bodies.

Article 48 of the challenged Law also prescribes administrative procedure for acknowledgement of the insurance experience. Point 5 of this Article, particularly, defines that in case of impossibility of acquisition of the documents confirming the insurance experience, as a result of wars, military actions, natural disasters, accidents, and other emergency situations, the Government of the Republic Armenia creates commissions for the determination of the insurance experience which involves representatives of the executive authorities, employers, trade unions or other representatives authorized by workers. Such a commission was created by the decision of the RA Government on “Creation of the commission determining the insurance experience of the citizens of the former administrative are of Spitak because of impossibility of acquisition of documents confirming the insurance experience, owing to earthquake of 1988, and on confirmation of the rules of procedure of the commission” number 820-N of June 21, 2007.

However, the framework of action of Point 5 of Article 48 of the Law, in a certain degree is limited, i.e. this provision concerns only those cases when the documents were not kept owing to emergency (force majeure) circumstances specified in this Article.

However, even the existence of the opportunity of acknowledgement of the insurance experience in the abovementioned administrative procedure should not deprive the persons of the right to apply to court on the issue of acknowledgement of the legal facts, as Article 18 of the RA Constitution guarantees unlimited opportunity of judicial protection of the rights of citizens.

Simultaneously, it is necessary to note that unlike the acknowledgement of the insurance experience judicially, in the case of acknowledgement of the insurance experience in administrative procedure, the RA Law on “ State pensions ” does not prescribe any temporary restriction of the insurance experience, which does not provide uniformity of the settlement of the same social relations, as well as makes senseless the enjoyment of the right of judicial protection in case of loss of the documents confirming the insurance experience, owing to emergency situations from the point of view of interests of the person.

9. The study of the challenged provisions of the RA Law on “State pensions” and other articles of the Law systemically interrelated with them indicates that the challenged provisions are connected not only with Article 18 of the Constitution, but also with requirements of other articles of the Constitution. In particular, Article 37 of the RA Constitution defines that “Everyone shall have the right to social security in case of old age, disability, disease, loss of breadwinner, unemployment and other cases prescribed by law. The extent and forms of social security shall be prescribed by law.”

From the contents of this article follows that powers for defining the extent and forms of pensions, the conditions and the procedure of their assignment belong to the RA National Assembly. In case of satisfaction of the conditions for assignment of pension, he/she acquires the right of pension, and the obligation of ensuring the realization of this right lays on the state. Depriving the person of an opportunity to confirm his/her available actual insurance experience, the legislator directly limits the pension right of the person, which is a part of the right of social security. This restriction, in particular, can be observed when the person, who has not an opportunity to prove the existence of the insurance experience, which exceeds the required experience (25 years), loses the opportunity to receive more pension as the years of the insurance experience exceeding the required experience, have essential value for the determination of the rate of pension.

10. Article 14.1 of the RA Constitution stipulates the principle of equality before the law. According to the requirements of this Article, the positive constitutional obligation of the state is to provide such conditions which will give equal opportunity to the people with identical status to exercise, and in case of infringement, to protect their rights, otherwise not only the constitutional principles of equality, prohibition of discrimination, but also the rule of law and legal definiteness will be violated. The forms of pension, the procedure and conditions of their assignment are determined at the discretion of the state; however, the state is obliged to observe the above-stated principles while using this discretion. Meanwhile, the challenged norms do not

give an opportunity to the persons, whose documents on insurance experience are not available, to enjoy equally the right which is enjoyed by the persons who possess documents concerning the insurance experience. By the implementation of the challenged norm unequal position between the persons who possess the identical insurance experience is created on a formal basis (absence of documents proving the experience).

Proceeding from the results of consideration of the case and being governed by Articles 100 (Point 1), 102 of the RA Constitution, Articles 63, 64, and 68 of the RA Law on “The Constitutional Court”, the Constitutional Court of the Republic of Armenia **DECIDES**:

1. To declare Article 47 Parts 2 and 3 of the RA Law on “State pensions” contradicting Articles 18 and 37 of the Constitution of the Republic of Armenia and invalid.
2. On the basis of Article 68 Part 12 of the RA Law on “The Constitutional Court” to extend the present decision to the legal relations preceding its coming into force.
3. Pursuant to Article 102 Part 2 of the RA Constitution this decision is final and enters into force from the moment of announcement.

President

G. Harutyunyan

29 January 2008

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