

Burden of proof and standards of proof under the APPC

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Introduction

In light of the imminent entry into force of the Administrative Procedure and Process-Related Code of the Republic of Kazakhstan ("**APPC**") on July 1, 2021, this article examines the changes to the legislation on administrative proceedings.

Among the most significant innovations are the new rules regarding the distribution of the burden of proof in public law disputes resolved in accordance with the APPC. A special rule of paragraph 2 of Article 72 of the Civil Procedure Code of the Republic of Kazakhstan ("**CPC**") - which states that the burden of proof in the cases specified in Chapter 29 of the Burden of proof and standards of proof under the APPC

CPC shall be placed on the administrative body, the official whose acts, actions (inaction) are appealed - will become invalid from July 1, 2021.

At the same time, the APPC directly indicates that the provisions of the CPC must be applied in administrative proceedings, unless a different procedure is provided for by the APPC.¹ Thus, the rule of distribution of the burden of proof will be applied in accordance with paragraph 1 of Article 72 of the CPC, which remains in force. The rule states that each party must prove the circumstances to which it refers as the basis for its claims and objections. This general rule will apply subject to the particularities of the APPC.²

For the analysis of the rules for the distribution of the burden of proof and the application of the standard of proof under the APPC, it is important to note that, according to subparagraph 15 of paragraph 1 of Article 4 of the APPC, the respondent may only be an administrative body or an official. Furthermore, according to paragraph 1 of Article 131 of the APPC, certain types of administrative claims may be filed.

Burden of proof and its specifics

According to paragraph 1 of Article 129 of the APPC, claimants are obliged to participate in the collection of evidence in accordance with their capabilities. Accordingly, claimants should understand that depending on how the court assesses their capabilities, they may be charged with collecting certain evidence in the case.

In addition, according to paragraph 1 of Article 129 of the APPC, claimants are required to prove when they became aware of the violation of their rights, freedoms and legitimate interests, as well as the amount of losses incurred. In respect of losses, this approach seems to be objective, but given the fairly short term for going to court,³ the claimants may be forced to prove circumstances that are against their interests.

According to paragraph 2 of Article 129 of the APPC, the burden of proof is distributed between the claimant and the

respondent depending on the claim being filed. This is therefore an important consideration when choosing a strategy for participation in the administrative proceedings. For example, in a claim for challenging an onerous administrative act, the burden of proof will be borne by the respondent, while in other types of claims there will be specific rules. In particular, the burden of proof will be allocated depending on whose interests are in play.

Moreover, according to paragraph 4 of Article 130 of the APPC, the court may shift the burden of proof, regardless of the rules established by paragraph 2 of Article 129 of the APPC, if the persons participating in the administrative case destroy or hide any evidence or otherwise impede its assessment, making it impossible or difficult to obtain evidence.

By virtue of paragraph 3 of Article 129 of the APPC, the respondent may refer only to those justifications mentioned in the administrative act. Practice will show how broadly the court will interpret the concept of "justifications", but this rule must become a powerful tool in matters of proof in administrative proceedings.

Another interesting novelty of the APPC is the norm provided for by sub-paragraph 3 of paragraph 2 of Article 130 of the APPC: "The court shall not be bound by a party's statement on the admissibility of evidence, which is permitted in the final judgment." Probably, the admissibility of evidence at the request of the parties will be established only when a final decision is made, and not after a person submits an application on the inadmissibility of evidence, nor after hearing the opinion of the persons participating in the case.

At the same time, given the active role of the court, according to paragraph 2 of Article 130 of the APPC, "if the evidence presented by the participants in the administrative process is insufficient, the court shall collect it on its own initiative". In addition to this, according to paragraph 3 of Article 130, the participants in the administrative process are required to submit documents requested by the court, such as electronic documents, documents or extracts from them to which they refer.

Standards of proof

The rules for the distribution of the burden of proof are closely related to the concepts of presumptions and standards of proof. According to paragraph 1 of Article 15 of the APPC, "when carrying out an administrative procedure, the materials, objects, documents and information provided by a participant in the administrative procedure shall be considered reliable until the administrative body or an official establishes the contrary".

This norm imposes on an administrative body or an official the burden of proving the unreliability of the materials, objects, documents and information of a participant in the administrative procedure. Moreover, according to paragraph 2 of Article 15 of the APPC, "an administrative body or an official is obliged to independently verify the authenticity of the materials, objects, documents and information in case of doubt about their authenticity".

It is important to take into account that the application of the presumption of credibility in accordance with Article 15 of the APPC is possible in the execution of the administrative procedure. At the same time, in administrative proceedings, this rule should not be applied, as the rules for the distribution of the burden of proof established by Article 129 of the APPC apply instead.

Nevertheless, one of the main functions of the court is to establish the circumstances that are relevant to the case,⁴ through the application of the standards of proof. The standard of proof is understood, in particular, as a certain degree of conviction of the court in the circumstances of the case, achieved by the fulfilment of the burden of proof by the party, on which this burden is put.⁵

The concept of standard of proof is not typical for Kazakh law and is more typical for the common law system. The standards of proof in the English jurisdiction are applied depending on the case, for example: the standard "beyond reasonable doubt" is applied in criminal cases, while the standard "balance of probabilities" is applied in civil cases.

The “beyond reasonable doubt” standard means the need to achieve such degree of conviction of the court in the circumstances of the case, although it need not reach certainty, but it must carry a high degree of probability.⁶ The “balance of probabilities” standard means the need for a reasonable degree of conviction, but not as high as in criminal cases. If the evidence is such that the tribunal can say: “We think it more probable than not,” the burden is discharged but, if the probabilities are equal, it is not”.⁷

On the contrary, Kazakh law and law enforcement practice in all forms of legal proceedings adhere to the principle of the judge's inner conviction when assessing evidence. With minor differences, this boils down to the fact that the judge assesses evidence according his or her own inner conviction, as guided by law and conscience.⁸

At the same time, for the resolution of a civil case, evidence is required that indisputably confirms the circumstances that are relevant to the case, and are not refuted by the other party.⁹ The resolution of a criminal case requires evidence without any doubt and indisputably establishing the truth about all and each of the circumstances to be proved.¹⁰

Given that Kazakh legal proceedings, regardless of their form, actually tend to require evidence that indisputably confirms the circumstances of the case, such degree of conviction of the court in the circumstances of the case may be considered (unless equal) more stringent in comparison with the standard "beyond reasonable doubt" in English jurisdiction.

In practice, in the overwhelming majority of cases, there is not enough evidence to reach the truth (indisputability of evidence). Such cases are provided for in paragraph 4 of Article 129 of the APPC, which states: “if after examining all the evidence, any fact that determines the outcome of the administrative case remains unproven, then the negative consequences of the results of the consideration and resolution of the administrative case shall be borne by the party bearing the burden of proving this fact”.

At the same time, given the active role of the court, in accordance with paragraph 2 of Article 130 of the APPC, “if the evidence presented by the participants in the administrative process is insufficient, the court shall collect it on its own initiative”. Thus, the court has the power to either continue to collect evidence to the point of incontestability of the fact (to reach the standard of proof), or to recognize this or that fact as unproven (not to reach the standard of proof).

Thus, each of the parties is entrusted with the burden of proving certain circumstances of the case, and must take all measures in its power to collect and present evidence, as well as to convince the court of the presence or absence of a specific fact. If there is insufficient evidence, the court will determine the absence of circumstances and, as a result, will rule against the party on which the burden of proof is placed.

This concept seems to be objective, since otherwise the court would be forced to assume the existence of certain circumstances. However, it is important to understand that the court cannot base its decision on assumptions about the circumstances of the case.

Conclusions

Compared to the rules established by the current CPC, the APPC introduces significant changes to the rules of proof in public law disputes. It regulates the distribution of the burden of proof and the possibility of its shift, limits the presentation of new justifications by the respondent, and sets out the active role of the court in proving the circumstances of the case.¹¹

At the same time, one of the most daring innovations is the normative consolidation of the consequences of failure to achieve the standard of proof. Thus, the APPC has a great potential, which, if properly applied, can allow it to become an effective tool in protecting the rights, freedoms and legitimate interests of both individuals and businesses in the

sphere of public law relations.

1. See sub-paragraph 2 of paragraph 3 of Article 1 of the APPC.
2. See Article 128 of the APPC.
3. See Article 136 of the APPC.
4. See paragraph 1 of Article 225 of the CPC, paragraph 1 of Article 155 of the APPC.
5. A.G. Karapetov, A.S. Kosarev "Standards of proof: analytical and empirical research" [2019] 5 (63) Bulletin of economic justice of the Russian Federation, 10.
6. *Miller v Minister of Pensions* [1947] 2 All ER 372.
7. Ibid
8. See paragraph 1 of Article 16 of the CPC.
9. See paragraph 6 of Article 68 of the CPC.
10. See paragraph 6 of Article 125 of the Criminal Procedure Code of the Republic of Kazakhstan.
11. See paragraph 4 of clause 11 of the Normative Resolution of the Supreme Court of the Republic of Kazakhstan dated July 11, 2003 N 5 "On the Court Decision".

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