

Information on correspondent submitting the Communication

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Facts of the Communication

Facts about participation in public hearings on the draft environmental impact assessment for the Kok Zhailau mountain ski resort

Public hearings on the draft environmental impact assessment for the Kok Zhailau mountain ski resort took place on 5 May 2014. They were organized by the City of Almaty Department of Tourism, which is a ‘local executive agency’ in the terminology of the Rules, and is hereinafter referred to as ‘Organizer 1’. This Department also took part in the public hearings as Project Owner, concurrently with its role as Organizer. Under the Rules for the Conduct of Public Hearings approved by Order No. 50 of the Minister for Environmental Protection of the Republic of Kazakhstan of 26 May 2013 (‘the Rules’) in force at the time, the Organizer/Local Executive Agency and the Project Owner may be different. Minutes were drawn up as a result of the hearings: their conclusions included an overview of questions and comments expressed directly during the hearings, written suggestions (comments) sent in from an unknown source and a table recording public opinion of the environmental impact assessment for the Kok Zhailau mountain ski resort. The Minutes also noted that the hearings were conducted in accordance with the Environmental Code of the Republic of Kazakhstan and with the Rules.

I participated in the public hearings on the basis of my rights as provided for by the Environmental Code of the Republic of Kazakhstan and by the Rules. In accordance with the provisions of Rule 15, I wished to express my opinion of the draft, based on my study of the two volumes of materials entitled ‘Kok Zhailau Mountain Ski Resort. Environmental Impact Assessment’, which are available on Organizer 1’s website, and also of the speaker’s report. However, a wide range of violations committed during the public hearings, as well as violations committed by

Organizer 1 in compiling the Minutes, resulted in non-compliance with the legislation in force in the Republic of Kazakhstan, leading to impairment of my rights and the rights of the public. The impairment of my rights lay in the fact that I was not given the opportunity to present my opinion of the draft concerned in a full, reasoned argument: this meant I was not given the opportunity to influence the decision-making process, which has subsequently given the respondents the right to continue work on building the Kok Zhailau resort, entailing significant breaches of environmental legislation. Thus, Organizer 1 failed to comply with the requirements of the Aarhus Convention, an international agreement ratified by Kazakhstan in 2000, with the requirements of the Environmental Code of the Republic of Kazakhstan and with the Rules for the Conduct of Public Hearings, according to which ‘The Rules are based on the principles of ensuring the constitutional rights of the citizens and public organizations of the Republic of Kazakhstan to receive **reliable, full and timely information about the state of the environment** and to public participation in the process of making environmentally significant decisions’ (Rule 2) and ‘public hearings **offer everyone equal rights to express their considered opinion on the issue under discussion**, based on studying documents containing relevant, non-confidential information’ (Rule 5).

In accordance with the Rules, since I disagreed with the outcomes of the public hearings (specifically, with consideration of my comments), on 17 June I initiated court proceedings against Organizer 1 in Almalinsky District Court 2, requesting that the public hearings be declared invalid and that the Minutes of the public hearings on the environmental impact assessment for construction of the Kok Zhailau mountain ski resort also be declared invalid.

My claims against Organizer 1 are set out in the copy of the application filed, which is appended to this Communication. An overview of my claims is set out below, in the section ‘*Main claims concerning the facts of participation in two public hearings*’.

On 22 December 2014, Judge N.Z. Zheksembiev, sitting at Almalinsky District Court 2, considered my civil suit against Organizer 1. The judge dismissed my claim that the public hearings on the environmental impact assessment for construction of the Kok Zhailau mountain ski resort should be declared invalid. In addition, the judge determined that proceedings on the section of my claim requesting that the Minutes of the public hearings on the environmental impact assessment for construction of the Kok Zhailau mountain ski resort be declared invalid should be terminated, since this part of the case was not subject to consideration and settlement in civil proceedings. The court completely ignored all the information I submitted, took no steps to do the necessary research into the issues and based its ruling on the respondent’s explanation.

On 6 February 2015, the Appeal Panel of the Civil and Administrative Division of Almaty City Court, with Presiding Judge S.S. Tashpolatov sitting alone, heard my appeal against the ruling of the lower court and upheld the ruling in full. In addition, the Appeal Panel determined that the District Court’s determination on my private complaint should be upheld in full.

On 8 April 2015, the Judicial Review Panel of Almaty City Court, consisting of Presiding Judge A.Z. Eshtai sitting with Judge G.K. Primbetova and Judge L.U. Kusherbaeva, heard my appeal on a point of law against the judgment of the Appeal Panel and upheld the judgment in full.

In 2016, a new Civil Procedure Code came into force in the Republic of Kazakhstan, which included an amended procedure for challenging judicial acts. Because of my weak legal background, I failed to pick up on these amendments. Nevertheless, on 11 May 2016, I petitioned the Judicial Review Panel of the Supreme Court – now the highest appeal body – for review of judicial acts, with an application for an extension of the legal limitation period. On 6 June, Judge A.S. Smailov of the Judicial Review Panel of the Civil Division of the Supreme Court of the Republic of Kazakhstan ordered the return of my petition on the basis that the limitation period had expired.

This exhausted the domestic remedies available to me.

Facts about participation in public hearings on the environmental impact assessment for construction of a road to the Kok Zhailau mountain ski complex

Public hearings on the environmental impact assessment for construction of a road to the Kok Zhailau mountain ski complex took place on 19 January 2015. They were organized by Almaty City Highways Authority, which is a ‘local executive agency’ in the terminology of the Rules, and is hereinafter referred to as ‘Organizer 2’. Again, the Authority was also the Project Owner. The agenda for the hearings included confirmation of the programme for the public hearings, a report by a representative of the design organization on a section of the environmental impact assessment for the Kok Zhailau Mountain Ski Complex Road Construction Project, Igor Alexandrovich Sukhov, Chief Engineer, Kazakh Promtransprojekt Ltd, and answers to the public’s questions.

The public hearings were held in the Kurultai Conference Room at the Astana International Hotel (113, Baitursynov Street, Almaty), starting at 9 o’clock in the morning. There were 207 registered participants, including myself. Minutes were drawn up as a result of the hearings: their conclusions included questions and comments expressed directly during the hearings and a table recording public opinion of the environmental impact assessment for the Kok Zhailau Mountain Ski Complex Road Construction Project.

In a similar way to my attempt to participate in the public hearings on the EIA for the Kok Zhailau mountain ski resort, described above, I attempted to exercise my rights as provided for by the Environmental Code of the Republic of Kazakhstan and by the Rules. However, in absolutely the same way, a wide range of violations committed during the public hearings, as well as violations committed by Organizer 2 in compiling the Minutes, resulted in non-compliance with the legislation in force in the Republic of Kazakhstan, leading to impairment of my rights and the rights of the public. The impairment of my rights lay in the fact that I was not given the opportunity to present my opinion of the draft concerned in a full, reasoned argument: this meant I was not given the opportunity to influence the decision-making process, which has subsequently given the respondents the right to continue work on building a highway to the Kok Zhailau resort, entailing significant breaches of environmental legislation. Thus, Organizer 2 failed to comply with the requirements of the Aarhus Convention, an international agreement ratified by Kazakhstan in 2000, with the requirements of the Environmental Code of the Republic of Kazakhstan and with the Rules for the Conduct of Public Hearings, according to which ‘The Rules are based on the principles of ensuring the constitutional rights of the citizens and public organizations of the Republic of Kazakhstan to receive **reliable, full and timely information about the state of the environment** and to public participation in the

process of making environmentally significant decisions’ (Rule 2) and ‘public hearings **offer everyone equal rights to express their considered opinion on the issue under discussion**, based on studying documents containing relevant, non-confidential information’ (Rule 5).

In accordance with the Rules, since I disagreed with the outcomes of the public hearings (specifically, with consideration of my comments), on 11 February 2015 I initiated court proceedings against Organizer 2 in Bostandyksky District Court 1, requesting that the public hearings be declared invalid and that the Minutes of the public hearings on the environmental impact assessment for construction of the Kok Zhailau mountain ski resort also be declared invalid.

The claims against Organizer 2 are set out in the copy of the application filed, which is appended to this Communication. The main claims, which are similar to my claims concerning participation in the public hearings on the EIA for construction of the Kok Zhailau mountain ski resort, are set out below.

On 22 June 2015, Judge E.C. Ospanova, sitting at Bostandyksky District Court 1, considered my civil suit against Organizer 2. The judge dismissed my claim that the Minutes of the public hearings on the environmental impact assessment for construction of a road to the Kok Zhailau mountain ski resort should be declared invalid.

On 22 September 2015, the Appeal Panel of the Civil and Administrative Division of Almaty City Court, with Presiding Judge B.S. Abdrakhmanova sitting alone, upheld the ruling of the lower court in full.

On 29 April 2016, Judge E.Z. Ismailov, after preliminary examination of my petition for review of judicial acts on a point of law, refused to forward it to the Judicial Review Panel of the Civil Division of the Supreme Court of the Republic of Kazakhstan for further consideration.

This exhausted the domestic remedies available to me.

Main claims concerning the facts of participation in two public hearings

Summarizing the story of my participation in the public hearings, I can draw the following conclusions.

The public hearings procedure exists especially to enable public participation in making important decisions, in particular on matters relating to environmental impact: yet, in both the instances cited, the procedure was conducted on a purely formal basis and so could not fill its main function. The way in which public hearings are conducted by the public authorities significantly restricts the possibility of public opinion being taken into account. Thus, at the first public hearings, it was not even theoretically possible for me to express my comments on the draft EIA: the time allowed for the hearings was three hours and the time allowed for one comment (or suggestion) was three minutes. Of the comments I had prepared, I was able to voice only two during the meeting – and these do not appear in the Minutes. I was forced to send my 42 remaining comments in writing to Organizer 1 after the public hearings.

In both the instances cited, the system for consideration of comments – the main point of public hearings – was designed on a purely formal basis. Officially, there are six levels for monitoring the consideration of comments – two during the public hearings procedure and four in the judicial challenge procedure. The first stage is the contribution of suggestions and comments throughout the period of the public hearings, on the basis of Rule 10 and Rules 15-17; the second stage is the submission

of comments on the Minutes of the public hearings, on the basis of the first paragraph of Rule 19.

In fact, as far as the public hearings I attended were concerned, there was only one stage at which comments could be considered. In both public hearings, the second stage was, for various reasons, not put into effect. Furthermore, in the course of judicial review at all stages – that is, review by the courts of first, second (appeal) and last instance – there was no investigation of whether or not my comments were eligible to be considered. In addition, all the procedural violations that had allowed the Organizers to neglect the second stage were ignored throughout the judicial review process.

It is my belief that, in becoming a Party to the Convention, the Republic of Kazakhstan acknowledged the right of the public to receive information, to participate in decision-making and to have access to justice in environmental matters. However, according to most of the comments made during this specialized public participation procedure, the Organizers of the public hearings (public authorities which were also the Project Owners concerned) have refused to fulfil the public's right to receive information about decision-making. Moreover, the Organizers have denied the public its right to participate in decision-making. Not only the courts of first instance but also all the higher-level courts have defended the Organizers' actions, thus denying the public its right of access to justice, in breach of the legislation in force.

Nature of alleged non-compliance

The Communication concerns cases of non-compliance with the provisions of the Convention on access to information and the right of access to justice.

Provisions of the Convention relevant for the Communication

article 4, paragraph 1, and article 4, paragraph 7; article 6, paragraph 6; article 9, paragraph 1.

Use of domestic remedies or other international procedures

In response to the fact that my rights were impaired during the public hearings on the EIA for the Kok Zhailau mountain ski resort, from 17 June 2014 onwards I sought judicial remedies: I filed an application to the court of first instance, followed by an appeal, an appeal on a point of law and a petition to the Supreme Court for review of judicial acts on a point of law. My application was dismissed by the court of first instance, and all my further appeals were rejected by the higher-level courts.

In response to the fact that my rights were impaired during the public hearings on the EIA for construction of a road to the Kok Zhailau mountain ski complex, from 11 February 2015 onwards I sought judicial remedies: I filed applications to the court of first instance, followed by an appeal, an appeal on a point of law and a petition to the Supreme Court for review of judicial acts on a point of law. Again, my application was dismissed by the court of first instance, and all my further appeals were rejected by the higher-level courts.

The international procedures governing the issues that form the subject matter of this Communication were not applicable because Kazakhstan is not a member of the Council of Europe.

Confidentiality

Not required

Supporting documentation (copies, not originals)

Environmental Code of the Republic of Kazakhstan

Article 13(1)(7): ‘Public associations and individuals, in carrying out their environmental protection activities, have a right to receive timely, full and reliable environmental information from public authorities and government organizations’;

Article 163: ‘Environmental information shall be publicly available to all’;

Article 5: ‘The basic principles of the environmental legislation of the Republic of Kazakhstan are: ... (5) the mandatory nature of measures to prevent pollution of the environment and harm to the environment in any other forms; ... (15) the presumption that proposed economic and other activities pose an environmental risk, and the mandatory assessment of their impact on the environment and human health when making a decision to engage in such activities’.

Law of the Republic of Kazakhstan on the Procedure for Consideration of Communications from Individuals and Legal Entities

Article 9(1): ‘Organizations and officials shall, within the limits of their competence, 1) ensure objective, all-encompassing, timely consideration of communications from individuals and legal entities, with their participation when necessary;... 3) inform applicants about the outcome of consideration of their communications and about the measures taken’.

Rules for the Conduct of Public Hearings approved by Order No. 50 of the Minister for Environmental Protection of the Republic of Kazakhstan of 26 May 2013

Rule 2 (1. General provisions) ‘The Rules are based on the principles of ensuring the constitutional rights of the citizens and public organizations of the Republic of Kazakhstan to receive reliable, full and timely information about the state of the environment and to public participation in the process of making environmentally significant decisions.’

Rule 5 (1. General provisions) ‘Public hearings offer everyone equal rights to express their considered opinion on the issue under discussion, based on studying documents containing relevant, non-confidential information.’

Rule 10 (1. General provisions) ‘Starting from the date of the official announcement of the organization of public hearings on projects that, if implemented, could directly affect the environment and the health of citizens, and (or) draft plans, the Project Owner is to ensure access for members of the public to these projects/drafts and arrange for comments and suggestions made electronically or on paper to be received and recorded.’

Rule 15 (2. Procedure for the conduct of public hearings) ‘All those wishing to express their opinions at the hearings and ask questions of the speakers are to do so in accordance with the rules laid down for the meeting. The speakers are to reply to questions put by members of the public.’

Rule 16 (2. Procedure for the conduct of public hearings) ‘The Project Owner must record and collect reports, questions, answers and statements. All participants in public hearings must be informed if audio and visual recordings are being made by official media representatives.’

Rule 17 (2. Procedure for the conduct of public hearings) ‘The outcomes of public hearings are to be compiled in the form of minutes of the public hearings on the project and (or) draft plan (‘Minutes of Public Hearings’), which are to be signed by the chair and secretary. For a project, one copy of the Minutes of Public Hearings is to be sent to the local executive agencies, for a draft plan – to the environmental protection authority, pursuant to Article 71(3) of the Environmental Code of the Republic of Kazakhstan. The Minutes of Public Hearings are to be drawn up using the form specified in the Annex to these Rules.’

From the Annex: ‘Questions, suggestions and comments from members of the public: (summary of questions and answers, suggestions and comments; indicate people concerned and the organization or target audience they represent; where a volume of written suggestions and comments was submitted, append them to the Minutes).’

Rule 19, second paragraph (2. Procedure for the conduct of public hearings) ‘A communication from the public is to be considered under the Law of the Republic of Kazakhstan on the Procedure for Consideration of Communications from Individuals and Legal Entities’ [and in accordance with the requirements of that Law].

Rule 20, first paragraph (2. Procedure for the conduct of public hearings) ‘On the basis of a communication from the public, the local executive agency is to make relevant amendments to the Minutes of Public Hearings, or refuse to do so and state the reasons for refusal.’

CONSTITUTION OF THE REPUBLIC OF KAZAKHSTAN, adopted 30 August 1995 (as amended, 10 March 2017)

Article 18

(3) Government bodies, public associations, officials and the mass media are obliged to provide all citizens with the opportunity to familiarize themselves with documents, decisions and other sources of information affecting their rights and interests.

Article 20

(2) Everyone shall have the right to freely receive and disseminate information by any means not prohibited by law. The list of items of information that constitute state secrets of the Republic of Kazakhstan shall be determined by law.

Article 31

(1) The state shall aim to protect the environment to the benefit of human life and health.

(2) Officials shall be held accountable in accordance with the law for concealing facts and circumstances that pose a threat to human life and health.

Article 33

(1) Citizens of the Republic of Kazakhstan shall have the right to participate in government of the state's affairs directly and through their representatives, to apply in person and to send individual and collective communications to public bodies and local authorities.

Annexes to the Communication

Application for review before a court of law, requesting that public hearings be declared invalid and that the Minutes of the public hearings on the environmental impact assessment for construction of the Kok Zhailau mountain ski resort be declared invalid

Annex to Application for review before a court of law

An electronic version of the ruling and determination of Almalinsky District Court 2 of 22 December 2014, Judge N.Z. Zheksembiev, and electronic versions of the judgments of the higher-level courts are available at: <http://office.sud.kz/> via the 'Search court cases' tab.

Application for review before a court of law, requesting that public hearings be declared invalid and that the Minutes of the public hearings on the environmental impact assessment for construction of a road to the Kok Zhailau mountain ski complex be declared invalid.

An electronic version of the ruling of Bostandyksky District Court 1 of 22 June 2015, Judge E.C. Ospanova, and electronic versions of the judgments of the higher-level courts are available at: <http://office.sud.kz/> via the 'Search court cases' tab.

P.M. Krasovitsky

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