

(unofficial)

Regulatory Resolution of the Constitutional Court of the Republic of Kazakhstan dated January 10, 2024 № 40-RR ‘On Consideration for Compliance with the Constitution of the Republic of Kazakhstan of Part Two of Article 124, Part Nine of Article 127 and Part Four of Article 171 of the Administrative Procedural Code of the Republic of Kazakhstan dated June 29, 2020’

IN THE NAME OF THE REPUBLIC OF KAZAKHSTAN

The Constitutional Court of the Republic of Kazakhstan composed of the Chairperson E.A. Azimova, Judges A.K. Yeskendirov, K.T. Zhakipbayev, K.S. Mussin, B.M. Nurmukhanov, R.A. Podoprigora, E.Zh. Sarsembayev and S.F. Udartsev, with the participation of:

the appellant N.S.Kalizhanov,

Representatives:

the Prosecutor General's Office of the Republic of Kazakhstan – Advisor to the Prosecutor General T.B. Adamov,

the Judicial Administration of the Republic of Kazakhstan – Deputy Head A.S. Musralinov,

the Ministry of Justice of the Republic of Kazakhstan – Vice-Minister A.K. Mukanova,

the of the Republican Bar Association – Chairman of the Scientific Advisory Council S.V.Sizintsev,

the of the Apparatus of the Mazhilis of the Parliament of the Republic of Kazakhstan – Chief Consultant of the Legislation Department R.T.Baitelenov,

the of the Office of the Senate of the Parliament of the Republic of Kazakhstan – Deputy Head of the Legislation Department N.A. Sartaeva,

considered in open session the appeal of N.S. Kalizhanov on verification of compliance with the Constitution of the Republic of Kazakhstan (hereinafter - the Constitution) of part two of article 124, part nine of Article 127 and part four of Article 171 of the Administrative Procedural and Procedural Code of the Republic of Kazakhstan dated 29 June 2020 (hereinafter - APPC).

Having heard the rapporteur - Judge of the Constitutional Court of the Republic of Kazakhstan K.S. Mussin and participants of the session, having studied the materials of constitutional proceedings, having analysed the norms of legislation of the Republic of Kazakhstan and some foreign countries, the Constitutional Court of the Republic of Kazakhstan (hereinafter - the Constitutional Court)

HAS ESTABLISHED:

Determination of the Specialized Inter-district Administrative Court of Astana (hereinafter - SMAC of Astana) from 25 April 2023, when considering the administrative case on the claim of A.M. Auesbaev on the representative of the plaintiff N.S. Kalizhanov on the basis of the fourth part of Article 127 of the APTC was imposed a monetary penalty in the amount of 20 monthly calculation indices (hereinafter - MPI) for contempt of court.

By the decision of the SIAS of Astana dated May 16, 2023, a repeated monetary penalty in the amount of 30 MCI was imposed on N.S. Kalizhanov for failure to comply with the court ruling on the imposition of a monetary penalty dated April 25, 2023 on the basis of part nine of Article 127 and part four of Article 171 of the APPC.

By the decision of the SIAC of Astana dated May 29, 2023, for failure to comply with the court ruling on the imposition of a monetary penalty dated May 16, 2023, a repeated monetary penalty in the amount of 40 MCI was imposed on N.S. Kalizhanov.

The above judicial acts were not executed by the subject of the appeal due to disagreement with them. The subject of the application also did not appeal against judicial acts in the manner prescribed by the APPC by virtue of the requirements of Part 2 of Article 124 of the APPC.

The author of the appeal believes that Part 2 of Article 124 of the APPC, which allows appealing against a ruling on the application of a measure of procedural coercion in the form of a pecuniary penalty only after its execution, restricts his right to access to justice, and the provisions of Part 9 of Article 127 and Part 4 of Article 171 of the APPC create conditions under which judges can abuse the possibility of repeated application of measures of procedural coercion to the participants in the process by imposing a pecuniary penalty for the same violation.

In considering the constitutionality of the challenged APPC rules in relation to the subject matter of the application, the Constitutional Court proceeds from the following.

1. The Republic of Kazakhstan, asserting itself as a democratic, secular, legal and social state, the highest values of which are a person, his life, rights and freedoms (paragraph 1 of Article 1 of the Constitution), guarantees everyone the right to judicial protection of their rights and freedoms (paragraph 2 of Article

13 of the Constitution), which is not subject to restriction in any case (paragraph 3 of Article 39 of the Constitution).

In the final decisions of the Constitutional Council, then of the Constitutional Court, it was emphasized that the elevation of a specific type of rights or freedoms to the constitutional level and the declaration in the Constitution of their guarantee means that the state assumes the obligation to ensure the implementation of these rights and freedoms (regulative resolutions of the Constitutional Council of October 28, 1996 № 6, of March 12, 1999 № 3/2, dated February 27, 2008 № 2, the Constitutional Court dated May 22, 2023 № 16-NP and others).

In accordance with paragraph 2 of Article 75 of the Constitution, judicial power is exercised through civil, criminal and other forms of legal proceedings established by law.

The constitutional division of forms of legal proceedings into civil, criminal and other types is implemented in the Civil Procedure Code of the Republic of Kazakhstan dated December 31, 2015 (hereinafter – the CPC), the Criminal Procedure Code of the Republic of Kazakhstan dated July 4, 2014 (hereinafter – the CPC), the Code of the Republic of Kazakhstan on Administrative Offenses dated July 5, 2014 (hereinafter – the Code of Administrative Offenses) and the APPC. Each of these normative legal acts, on the basis of equality of the parties, establishes the procedure for the consideration of cases on criminal and administrative offenses, on disputes arising from civil, family, labor, housing and other legal relations, as well as the procedure for administrative proceedings, respectively.

The objectives of administrative proceedings, established by the legislator in Part 2 of Article 5 of the APPC, are the fair, impartial and timely resolution of administrative cases for the purpose of effective protection and restoration of violated or disputed rights, freedoms and legitimate interests of individuals, rights and legitimate interests of legal entities in public law relations. This norm corresponds to the norm of paragraph 1 of Article 76 of the Constitution that the purpose of the judiciary is to protect the rights, freedoms and legitimate interests of citizens and organizations, to ensure the implementation of the Constitution, laws, other normative legal acts, international treaties of the Republic of Kazakhstan.

An important feature of the APPC is the implementation of administrative proceedings on the basis of the active role of the court. The court, not limited to the explanations, statements, petitions of the participants in the administrative process, the arguments, evidence and other materials of the administrative case presented by them, comprehensively, fully and objectively examines all the factual circumstances that are important for the correct resolution of the administrative case, and on its own initiative or at the motivated request of the participants in the administrative process, collects additional materials and

evidence, as well as performs other actions aimed at solving the tasks of administrative proceedings (Article 16 of the APPC).

The redistribution of the burden of proof and the procedural activity of the court are among the main features of judicial proceedings according to the rules of administrative procedure, are a common practice reflected in the administrative procedure codes and laws of a number of countries, aimed at ensuring parity in the inequality of parties, one of which has powers.

2. Measures of procedural coercion are one of the forms of implementation of the constitutional principle of binding court decisions. Ensuring the authority of the judiciary, they simultaneously serve as a means of guaranteeing judicial protection of the rights and freedoms not only of the plaintiff, but also of the defendant.

A distinctive feature of measures of procedural coercion is their application by the court for violation of exclusively procedural norms intended and applied only for the purpose of implementing and observing the principles of the APPC, excluding abuse of rights and ensuring the execution of judicial acts, not related to the violation of any sectoral legislation. The purpose of procedural coercion measures is the immediate removal of obstacles to the exercise of the right to judicial protection and the restoration of violated rights and freedoms. From this point of view, the obligation of a person to execute a measure of procedural coercion immediately or within a short period of time established by law is necessary and proportionate, corresponding to the tasks and principles of the administrative process.

Supporting its position that the right to judicial protection means the right of a person to apply to the court for the protection and restoration of violated rights and freedoms (Regulatory Resolution of February 22, 2023 № 3), the Constitutional Court at the same time believes that this right should be exercised in an inextricable relationship and in conjunction with other norms of the Constitution, such as:

the exercise of State power in the Republic of Kazakhstan on the basis of the Constitution and laws in accordance with the principle of its separation into legislative, executive and judicial branches (paragraph 4 of Article 3);

determination of the content and application of laws and other normative legal acts by human rights (paragraph 2 of Article 12);

equality of all before the law and the courts and the exclusion of any discrimination (Article 14);

the administration of justice in the Republic of Kazakhstan only by the courts (paragraph 1 of Article 75);

protection by the judiciary of the rights, freedoms and legitimate interests of citizens and organizations, ensuring the implementation of the Constitution, laws,

other normative legal acts, international treaties of the Republic of Kazakhstan (paragraph 1 of Article 76);

binding force throughout the territory of the Republic of Kazakhstan of decisions, sentences and other court rulings (paragraph 3 of Article 76);

the independence of the judge and his subordination only to the Constitution and the law (paragraph 1 of Article 77);

the obligation of everyone to observe the Constitution and legislation of the Republic of Kazakhstan, to respect the rights, freedoms, honor and dignity of other persons (paragraph 1 of Article 34);

The exercise of human and civil rights and freedoms must not violate the rights and freedoms of other persons or encroach on the constitutional order and public morality (paragraph 5 of Article 12).

This means that judicial protection of rights cannot violate the rights and freedoms of other persons, must be carried out in strict accordance with the Constitution and laws of the Republic of Kazakhstan, on the basis of the principle of equality of all before the law, an independent court, the acts of which are generally binding. At the same time, the laws regulating the judicial protection of the rights and freedoms of individuals and legal entities are designed to ensure a balance in the implementation of constitutional norms.

The provisions of the current laws regulating the procedure for administrative proceedings (the Code of Administrative Procedure and the relevant provisions of the Code of Civil Procedure) provide for the possibility of appealing against a ruling on the application of a measure of procedural coercion in the form of a pecuniary penalty (Part 2 of Article 124 of the Code of Civil Procedure) and determine the procedure for consideration of a private complaint against such a ruling (Article 429 of the Code of Civil Procedure). Along with this law, a mechanism is established for exempting a person from paying a pecuniary penalty, reducing its amount or applying a deferral or installment plan for the execution of a pecuniary penalty (Parts 7 and 8 of Article 127 of the APPC). The application of these protective measures is possible both before and after the appeal of the ruling on the imposition of a pecuniary penalty.

It should be noted that there are two independent legal provisions in the second paragraph of Part 2 of Article 124 of the APPC. In accordance with the first sentence, it is provided that 'the appeal of this ruling does not suspend the execution of measures of procedural coercion', while according to the second sentence, 'the filing of a private complaint against the application of a monetary penalty is allowed after the execution of the imposed penalty'.

The Constitutional Court believes that, proceeding from the interrelated goals of ensuring the effective implementation of the right of everyone to judicial protection and achieving the objectives of administrative proceedings, this paragraph of Part 2 of Article 124 of the APPC enshrines the right of a person to

appeal against a court ruling from the date of its delivery, as well as the obligation of such a person to execute the imposed penalty within the period established by law.

3. Article 14 of the Basic Law enshrines the principle of equality of all before the law and the court, which implies the unity of requirements and legal responsibility for all subjects of the relevant legal relations (Regulatory Resolution of the Constitutional Court of October 3, 2023 № 31-RR).

Analyzing the provisions of Article 127 of the APPC from the point of view of the presence of discriminatory norms in them, the Constitutional Court notes that a pecuniary penalty as one of the measures of procedural coercion can be applied both to an individual and to an official or legal entity or his/her representative, regardless of his/her procedural status, gender, place of residence, official position, etc (inaction) provided for by parts three, four, five and nine of Article 127 of the APPC. The imposition of a pecuniary penalty is carried out at a court session, of which the person against whom this coercive measure is applied must be notified.

The right of the court to apply measures of procedural coercion, including the imposition of a pecuniary penalty, stems from the constitutional principles of the autonomy and independence of the judiciary, the binding nature of judges' requirements and is one of the manifestations of the discretionary powers of the court necessary for the administration of justice in the context of administrative justice.

Thus, Article 127 of the APPC establishes equal consequences for all participants in the administrative process for violation of the norms on the binding nature of court requirements and judicial acts and does not have provisions of a discriminatory nature.

4. In accordance with subparagraph 2) of paragraph 3 of Article 77 of the Constitution, no one may be subjected to repeated criminal or administrative liability for the same offense.

The Constitutional Court recognizes that legal responsibility is established in laws of various sectoral content and takes into account the nature of the action or inaction of a person.

Thus, for example, Article 9 of the Civil Code of the Republic of Kazakhstan of 27 December 1994 (hereinafter – the Civil Code) establishes the procedure and methods of protection of civil rights and imposition of civil liability, including in the form of compensation for losses, compensation for moral damage, imposition of fines and other methods established by law. The Civil Code also establishes the liability of subjects of civil legal relations for violation of the rights and legitimate interests of other persons.

The Criminal Code of the Republic of Kazakhstan dated July 3, 2014 (Part 2 of Article 2) introduces the grounds for criminal liability, determines which acts

dangerous to the individual, society or the state are criminal offenses, that is, crimes or criminal misdemeanors, establishes penalties and other measures of criminal law influence for their commission.

According to Part 2 of Article 6 of the Code of Administrative Offenses, the legislation on administrative offenses establishes the grounds and principles of administrative responsibility, determines what acts are administrative offenses, the types of penalties imposed for their commission.

In accordance with the existing legal approaches, the basis for the application of legal liability measures is an unlawful act.

Article 653 of the Code of Administrative Offenses provides for administrative liability for contempt of court. At the same time, the legislator in a note to the said article established that the liability provided for in Article 653 of the Code of Administrative Offenses for contempt of court does not apply to an action (inaction) in respect of which measures of procedural coercion may be applied in accordance with the APPC.

In accordance with paragraph 3 of Article 61 of the Constitution, the Parliament of the Republic of Kazakhstan has the right to issue laws that regulate the most important social relations, establish fundamental principles and norms relating to the legal personality of individuals and legal entities, civil rights and freedoms, obligations and responsibilities of individuals and legal entities.

The Constitutional Court also notes that in administrative proceedings, measures of procedural coercion are applied not only for contempt of court, but also for abuse of procedural rights or failure to fulfill procedural obligations, including in cases of submission of evidence, execution of instructions in violation of the deadline established by the court without valid reasons, if this led to a delay in the consideration of an administrative case. For failure to comply with a court decision, court rulings approving the agreement of the parties on conciliation, mediation or settlement of the dispute in a participatory procedure, the court has the right to impose a pecuniary penalty on the defendant. Consequently, the list of grounds for the application of measures of procedural coercion includes acts that are not covered by Article 653 of the Code of Administrative Offenses, but reflect the features of administrative proceedings and the principles of their implementation.

The acts listed in Article 127 of the APPC, for the commission of which a measure of procedural coercion in the form of a pecuniary penalty may be applied, have been excluded by the legislator from the list of unlawful acts entailing administrative liability. Measures of procedural coercion are a type of legal liability in the field of judicial proceedings and can be considered as procedural liability in the event of violation by a participant of the judicial process of the rules of conduct in court and failure to perform his procedural duties, including evasion of the execution of a court decision. They are used to ensure

the observance of the law during the judicial process, include actions aimed at collecting evidence, maintaining order and ensuring fairness in judicial procedures, and are legal instruments used in the process of administrative proceedings.

According to Part 3 of Article 127 of the APPC, the court has the right to impose a pecuniary penalty on a person who abuses procedural rights or fails to perform procedural duties, including in cases of submission of evidence, execution of instructions in violation of the deadline established by the court without valid reasons, if this led to a delay in the consideration of an administrative case, for each action (inaction) in the amount of ten monthly calculation indices. Part 9 of Article 127 and Part 4 of Article 171 of the APPC provide for provisions that allow taking into account certain qualifying features (repetition), with an increase in the amount of a monetary penalty. In these articles of the APPC, a repeated pecuniary penalty is imposed for the commission of new procedural violations.

In this regard, the Constitutional Court considers that the right of the court, established by Part 9 of Article 127 and Part 4 of Article 171 of the APPC, to re-apply a measure of procedural coercion to a person in the form of a pecuniary penalty for a new procedural violation does not contradict Subparagraph 2) of Paragraph 3 of Article 77 of the Constitution.

5. The provisions of the APPC and the relevant provisions of the Civil Procedure Code regulate the process of administrative proceedings with a sufficient degree of certainty. However, certain provisions of the APPC require improvement in terms of determining the specific terms for the performance of procedural actions, for example, the time limit for serving a person with a copy of the ruling on the imposition of a pecuniary penalty or the period within which an appeal may be filed against such a ruling, if the court applies a delay or installment plan for the execution of a judicial act on the imposition of a pecuniary penalty. In addition, the use of the concept of 'repeatedly' in the APPC allows for an ambiguous understanding of it in relation to the powers of the administrative court.

The Constitutional Court also notes that civil, criminal and other forms of legal proceedings established by law provide for different measures of legal sanction for breach of order in the courtroom, failure to fulfil procedural obligations and other actions (inaction) clearly indicating disrespect towards the court and (or) the judge. Similar unlawful acts when courts consider cases in civil proceedings and proceedings on administrative offences constitute administrative offences for which administrative penalties are imposed (Article 653 of the CAP). In turn, in the APPC and the CPC, the same acts entail measures of procedural coercion, which do not have similar legal consequences as those arising from the application of administrative responsibility. The

procedural possibilities of persons on whom the court imposed a monetary penalty for such violations differ: under the CPC, such a person has the right to appeal against the court's ruling regardless of the payment of the monetary penalty, while under the APPC provision appealed by the applicant, the filing of a private complaint does not suspend the execution of procedural coercive measures. Failure to execute a judicial act issued due to a person's manifestation of contempt of court and (or) judge in proceedings under the CPC, CPC and APC shall constitute an administrative offence, but this procedure does not apply to cases of failure to execute a judicial act by which measures of procedural coercion have been applied for similar acts under the APPC. In this regard, in the opinion of the Constitutional Court, there is an objective need to eliminate the imbalance and unify the measures of legal liability for similar unlawful acts and the means of defence of persons brought to such liability in different forms of legal proceedings.

Based on the above, guided by paragraph 3 of Article 72 and paragraph 3 of article 74 of the Constitution of the Republic of Kazakhstan, subparagraph 3) of paragraph 4 of Article 23, Articles 55 - 58, 62, paragraphs 3 and 4 of Article 63, paragraph 4 of Article 64 and subparagraph 2) of paragraph 1 of Article 65 of the Constitutional Law of the Republic of Kazakhstan dated 5 November 2022 'On the Constitutional Court of the Republic of Kazakhstan', the Constitutional Court of the Republic of Kazakhstan

DECIDES:

1. To recognize the second part of Article 124 of the Administrative Procedural Code of the Republic of Kazakhstan as corresponding to the Constitution of the Republic of Kazakhstan as interpreted by the Constitutional Court of the Republic of Kazakhstan:

'Proceeding from the interrelated goals of ensuring the effective implementation of the right of everyone to judicial protection and achieving the objectives of administrative proceedings, the legal provisions of the second paragraph of part two of Article 124 of this Code should be understood as granting to a person to whom a measure of procedural coercion in the form of a pecuniary penalty has been applied, the right to appeal the relevant ruling to a higher court from the date of its delivery, as well as the imposition on such a person obligations to execute the imposed penalty within the period established by law.'

2. To recognize part nine of Article 127 and part four of Article 171 of the Administrative Procedural Code of the Republic of Kazakhstan as corresponding to the Constitution of the Republic of Kazakhstan.

3. Court decisions based on a different interpretation of the provision of paragraph two of part two of Article 124 of the Administrative Procedural Code of the Republic of Kazakhstan shall not be enforced and shall be reviewed in accordance with the established procedure.

4. The Government of the Republic of Kazakhstan within six months to submit to the Mazhilis of the Parliament of the Republic of Kazakhstan a draft law aimed at improving the legislation in terms of the application of measures of procedural coercion in administrative proceedings in accordance with the legal positions of the Constitutional Court of the Republic of Kazakhstan contained in this normative resolution.

5. This regulatory decision shall come into force from the date of its adoption, shall be generally binding throughout the territory of the Republic of Kazakhstan, final and not subject to appeal.

6. To publish this regulatory decision in the Kazakh and Russian languages in periodical printed editions, which have received the right to official publication of legislative acts, in the unified system of legal information and on the Internet resource of the Constitutional Court of the Republic of Kazakhstan.

**Constitutional Court
of the Republic of Kazakhstan**