

Communication to the Compliance Committee of the Aarhus Convention

I. Information on correspondent submitting the communication

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II. State concerned

Republic of Kazakhstan

III. Facts of the communication

On August 6, 2000, the signers to this communication appealed to a court of Medeuski region of Almaty city with regard to inaction of the City Sanitary-Epidemiological Department and the Almaty City Territorial Department on Environmental Protection. The case concerns a large industrial enterprise engaged in storing cement (6 immovable containers by height of 25 meters, and 4000 tons in volume), coal (a warehouse with the annual cargo turnover – 48400 tons), and production of construction materials that require the use of cement. The containers for unloading and storing of cement are located in close vicinity to the living houses (at a distance of 13 meters to the closest houses). Unloading the cement into the worn-out containers, made of railcars, results in major discharge of cement dust into the air, - cement is swept down from railcars, or blown out by compressed air.

Since 1990 this enterprise has been idle for a quite long period of time due to the wear and tear of industrial equipment, however since 1998 it resumed its activity. The enterprise does not have the sanitary-hygienic zone, the establishment of which is envisaged by law, therefore it carries out industrial activity harmful to people's health and the environment. It systematically violates the legislation requirements on discharges of pollutants into the air and allowed levels of noise. Thus, we repeatedly revealed facts of discharging pollutants without obtaining the license, and exceeding the set discharging standards.

Starting from May 1998, as a result of fact that the enterprise resumed its activity and use of very old life-expired equipment, we have sent a large number of appeals to the City Sanitary-epidemiological Department and the Almaty City Territorial Department on Environmental Protection demanding to take measures with regard to this industrial enterprise, which violates the requirements of laws on environmental protection and protection of citizens' health. For instance, Article 49 of Law "On Environmental Protection" of July 15, 1997, contains

requirements to sanitary-hygienic zones of enterprises, and according to SN* 245-71 “Sanitary Norms of Planning Industrial Enterprises” the aforementioned enterprise is required to have a sanitary-hygienic zone of no less than 300 meters (see the conclusion of state ecological expertise as of February 21, 2003). However, these state bodies have not taken effective measures in order to make the industrial enterprise eliminate violations of legislation concerning the creation of sanitary-hygienic zone, stop discharging pollutants into the air without obtaining the license and exceeding the allowed levels, stop carrying out industrial work, which exceeds the allowed level of noise, and so on. The sanitary-epidemiological department and the department on environmental protection only forfeited the enterprise on several facts of violations, but have not taken necessary measures in order to ensure that the activity of the enterprise was carried out in compliance with legislative requirements.

On August 6, 2000 we filed a lawsuit to court with regard to inaction and violation of the acting legislation by the Almaty city department on environmental protection and the Sanitary-epidemiological department of Almaty city, and compensation of moral harm inflicted thereof. Also, in our statement of claim we asked to recall from the enterprise the permission for special nature management and the conclusion of state ecological expertise as not meeting requirements of legislation on environmental protection, as well as sanitary and construction standards. On June 20, 2001 the court of first instance – the court of Medeuski region of Almaty city fully rejected the lawsuit of A. G. Gatin, L. A. Gatina, L. G. Konyshkova, N. A. Cherepova, V. I. Cherepov, P. A. Gmerintsev, and M. V. Gmerintsev. The judge N. K. Sharipova grounded her decision on that we did not provide the proof of sending our appeals, which were left unconsidered by state bodies. As far as the rest 17 written appeals, which were responded, the court admitted the presence of the formal answer from state bodies as sufficient proof of taking all “possible and appropriate measures for considering appeals and complaints of plaintiffs” by them.

On September 7, 2001 basing on our complaint, the decision of the court of first instance was reversed by panel of judges dealing with civil cases of Almaty city court (judge Ivanova – chair, Kozhagulov and Esbergenov). The decision of the court of Medeuski region of Almaty city as of June 20, 2001 was repealed, and the case was sent back for reconsideration to the court of first instance. At that the decision of the court of appeal noted that the court of first instance did not satisfy our requirements made to state bodies-defendants with regard to inaction to take necessary measures to eliminate violations of environmental and sanitary-epidemiological norms. Particularly it was pointed on groundlessness of actions of the judge of Medeuski regional court confining the case by compensation of moral harm only, and not taking into consideration of the issue concerning the securing the environmental safety of living conditions of citizens living near the industrial enterprise.

On November 27, 2001 a new consideration of our case took place in the court of first instance – the court of Medeuski region of Almaty city. Despite the decision of the court of appeal, the judge A. A. Altaeva again considered the case only with regard to compensation of moral harm. Basing on the fact that another court – the court of Zhetisujski region, considered our case on compensation of damage basing on the suit filed against “SUCCESS” LLP (at that time it was the owner of the enterprise on storage of cement and coal), the consideration of case on inaction of the Almaty City Department on Environmental Protection and Sanitary-epidemiological Department of Almaty City was suspended until the adoption of the decision on the case considered on the lawsuit against the enterprise-polluter. Thus, the court of Medeuski region again did not consider issues of inaction of state bodies-defendants. We again made an attempt to appeal the decision of the court of first instance, however, the penal of judges on civil cases of the Almaty city court (chair-judge S. A. Karakuzieva, and members L. P. Matveenkov and K. A. Kamalova) made a decision to leave our claim without consideration.

* SN – Sanitary Norms.

Further, on June 27, 2002 the judge Altaeva, not informing the plaintiffs and without the participation of both parties, and despite the fact that the court proceedings on the suit against “SUCCESS” LLP went on, made a decision to leave our case concerning the inaction of the Almaty City Department on Environmental Protection and the Sanitary-epidemiological Department of Almaty City without consideration. As the ground for making such a decision the judge pointed “default in appearance by parties without good reasons”, however the continuing court proceedings on the suit against the enterprise-pollutant was not even mentioned in the decision. Though, according to Article 246 of the Civil Procedural Code “the procedure on case is resumed after removing circumstances that caused its suspension basing on the application of persons participating in the case, or at the initiative of the court” and “when resuming the case procedure the court informs persons participating the in case in accordance with general rules of civil judicial proceeding”. Moreover, none of the plaintiffs received copies of decision of the Medeuski regional court made in June 27, 2002. The copy of this judicial document, which is attached to the communication, was received in May 2004 only, when we tried to resume the consideration of this case.

On May 14, 2004 A. G. Gatin and L. A. Gatina filed the application to the Medeuski regional court in order to resume the suspended case with regard to inaction of the Almaty city department on environmental protection and the Sanitary-epidemiological department of Almaty city. At the moment of preparing this communication, we have not received the response to this application.

In June 2004, L. A. Gatina sent the application to the Ministry of Environmental Protection concerning the fact that the City Department on Environmental Protection did not take necessary effective measures in order to stop the activity of enterprise, which pollutes the environment. Particularly, she mentioned about a document written by the Department on March 20, 2003 stating the absence of violations by enterprise, which was presented in court. Mrs. Gatina also attached copies of documents proving the fact of discharging pollutants into the air within the period from January 2001 to December 31 2002 without obtaining the appropriate license (a copy of the letter from the Almaty territorial department on environmental protection as of February 4, 2004, certificates from “Kazakhstan Temir Zholy” CJSC concerning the supply of cement to the enterprise, and other). On July 14, 2004 Gatina received the response from Mr. N. Iskakov, Vice-Minister. However, the letter did not contain the answer to the main question, to wit regarding the inaction of the City Department on Environmental Protection towards the enterprise carrying out discharges of pollutants into the air without obtaining the proper license during 2 years, and not creating the sanitary-hygienic zone, which is envisaged by the law.

Meanwhile the enterprise continues violating the requirements of legislation on environmental protection. Up to August 2004 it discharged pollutants without obtaining the license in bodies dealing with environmental protection issues.

IV. Nature of alleged non-compliance

This complaint concerns the non-compliance by the Republic of Kazakhstan of requirements of Article 9 of the Aarhus Convention on access to justice by the public. It includes issues of considering appeals of citizens in administrative and judicial procedure with regard to violations of legislation on environmental protection.

In the administrative procedure, despite our repeated appeals, the City Sanitary-epidemiological Department and the City Territorial Department on Environmental Protection mainly confined their actions by imposing small administrative fines to the enterprise. The abovementioned bodies did not take adequate and effective means of legal protection, which are necessary in order to eliminate the revealed breaches of environmental protection laws. As a result of their inaction in 2001-2002 the enterprise did not obtain the permission to discharges, and in 2004 up to August it continues to discharge pollutants into the air (the cement dust, acetic acid, sodium hydroxide, acetaldehyde and other substances) without a special permit, which is issued by bodies dealing with environmental protection issues. An issue of sanitary-hygienic

zone the creation of which is envisaged by both, the currently acting legislation as well as sanitary standards, which were valid in the period when the enterprise started to operate, still remains open.

When considering our case within the framework of judicial proceedings, we, as representatives of the public (a group of citizens of the Republic of Kazakhstan), were deprived the access to justice with regard to:

1) impugment of inaction of state bodies – the City sanitary-epidemiological department and the City territorial department on environmental protection, and violation by them of the legislation on sanitary-epidemiological well being of the population and environmental protection;

2) restricting in administrative procedure by competent state bodies of the activity of the enterprise, which exerts harmful impact on environment and health of citizens, and violates the requirements of the legislation of the Republic of Kazakhstan on environmental protection.

In the decision of the appealing body as of September 7, 2001 there was given a special attention to the necessity of consideration of our statement of claim not only with regard to compensation of moral harm, but also in part of ensuring by competent state bodies that the activity of the industrial enterprise is carried out in compliance with the set environmental requirements. Nevertheless on November 27, 2001 the court of first instance repeatedly reduced the consideration of the case to the issue of compensation of moral harm. As a result our case was not decided by court in terms of eliminating violations of law on environmental protection and protection of citizens' health. In addition, the court of first instance with no grounds delayed the consideration of the statement of claim with regard to bringing the activity of the enterprise in compliance with the set environmental requirements, even though this issue could have been considered separately from the issue of compensating the moral harm.

One should separately pay attention to the fact that the judge Altaeva of the Medeuski regional court of Almaty city on June 27, 2002 made a decision to leave the suit without consideration, at that not prior informing plaintiffs and without their participation in court session. The copy of this decision was given only in May 2004, when plaintiffs made an attempt to resume the consideration of the case, which was suspended by the same judge on November 27, 2001. We, as representatives of the public, were deprived the access to the text of the court decision on our case and, hence, the possibilities to appeal it in the procedure established by law.

V. Provisions of the Convention relevant for the communication

Article 9. Access to justice

3. In addition and without prejudice to the review procedures referred to in paragraphs 1 and 2 above, each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.

4. In addition and without prejudice to paragraph 1 above, the procedures referred to in paragraphs 1, 2 and 3 above shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive. Decisions under this article shall be given or recorded in writing. Decisions of courts, and whenever possible of other bodies, shall be publicly accessible.

VI. Use of domestic remedies or other international procedures

The signers to this communication repeatedly made numerous unsuccessful attempts to solve this issue in the administrative procedure by way of submitting complaints to higher state bodies – the Ministry of environmental protection, Administration of the President, Commission on Human Rights. The last attempt was taken in June 2004, which also became unsuccessful (a

copy of application of Ms. L. A. Gatin and the response to it from the Ministry of Environmental Protection as of July 14 are among supporting documents attached to communication).

The statement of claim applied to the Medeuski Regional Court of Almaty city concerning the compensation of moral harm due to the inaction of the City Sanitary-epidemiological Department and the Almaty City Territorial Department on Environmental Protection was submitted on August 6 2000. For this period of time we exhausted all available means of judicial protection. The case twice was in the court of first instance (Medeuski regional court), but it had not been considered in essence.

Moreover, the consideration of issue concerning the inaction of state bodies was groundlessly delayed by court for extremely long period, and then stopped without informing citizens about it. The application to resume the suspended case submitted to Medeuski regional court in May 14, 2004 remained unanswered.

We have not appealed to other international procedures.

VII. Confidentiality

Not required.

VIII. Supporting documents

1. The statement of claim as of August 6, 2000 to the court of Medeuski region of Almaty city
2. Addendum to the statement of claim as of August 6 2000
3. Decision of the first instance – court of Medeuski region of Almaty city as of June 20, 2001
4. Decision of the court of appeal – panel of judges on civil cases of Almaty city court of September 7, 2001
5. Decision of the court of Medeuski region of Almaty city of November 27, 2002 concerning the suspension of consideration of the case
6. Decision of the panel of judges on civil cases of Almaty city court as of February 8, 2002 concerning the decision of Medeuski regional court on suspension of consideration of the case
7. Decision of the court of Medeuski region of Almaty city as of June 27, 2002 concerning the rejection to consider the suit
8. Response of the Almaty city department on environmental protection as of February 4, 2004 to inquiry of Almaty city Bar
9. Application as of May 14, 2004 concerning the resumption of suspended case
10. Application of Mrs. Gatina to the Ministry of environmental protection as of June 14, 2004
11. The letter from the Ministry of environmental protection as of July 14, 2004
12. Conclusion of the state ecological expertise as of February 21, 2002

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Signatures: