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# ISSUES OF PROOF IN THE ADMINISTRATIVE PROCESS

The article examines the issues of the formation of the theory of evidence and evidence in administrative proceedings. Judicial proving is an activity to clarify the situation in which the judge can draw a conclusion and decide on the case.

The evidence of administrative proceedings is all the real data on which the judge determines the presence or absence of administrative offenses, the guilt of this person and other situations important for the correct resolution of the case.

Judicial proof is an intersectoral institution inherent in all branches of procedural law. Both the Civil Procedure Code of the Republic of Kazakhstan, the Criminal Procedure Code of the Republic of Kazakhstan, and the Administrative Procedural and Procedural Code of the Republic of Kazakhstan contain a chapter devoted to judicial proof and evidence, which corresponds to the intersectoral nature of this institution.

The article analyzes the provisions of administrative proceedings and procedural norms of the Republic of Kazakhstan and formulates proposals for improvement.

For the most part, proving in administrative proceedings is subject to the general rules of the Civil Procedure Code of the Republic of Kazakhstan, but there are features provided for in the Administrative Procedural and Procedural Code of the Republic of Kazakhstan.

**Key words:** evidence, evidence, administrative process, court, public law relations; active role of the court; burden of proof.

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## Әкімшілік процестегі дәлелдеу мәселелері

Мақалада әкімшілік сот ісін жүргізуде дәлелдемелер мен дәлелдемелер теориясын қалыптастыру мәселелері қарастырылады. Әкімшілік процестегі дәлелдемелер әкімшілік іс жүргізу құқығының нормаларымен реттелген, бәсекелестік принципіне негізделген, судьяның әкімшілік құқық бұзушылық туралы істі қарайтын лауазымды тұлғаның, органның және дәлелдемелерді жинау, тексеру және бағалау участников бойынша іс жүргізуге қатысушылардың танымдық және куәландырушылық логикалық-практикалық қызметі болып табылады. Сот дәлелдемесі-бұл судья қорытынды жасай алатын және іс бойынша шешім қабылдай алатын жағдайды нақтылау қызметі.

Әкімшілік іс жүргізудің дәлелі судья әкімшілік құқық бұзушылықтардың болуын немесе болмауын, осы адамның кінәсін және істі дұрыс шешу үшін маңызды басқа да жағдайларды анықтайтын барлық нақты деректер болып табылады.

Сот дәлелдемесі-іс жүргізу құқығының барлық салаларына тән салааралық институт. Қазақстан Республикасының Азаматтық іс жүргізу кодексі, Қазақстан Республикасының қылмыстық іс жүргізу кодексі де, Қазақстан Республикасының Әкімшілік рәсімдік-іс жүргізу кодексі де сот дәлелдемелері мен дәлелдемелерге арналған тарауды қамтиды, бұл осы институттың салааралық сипатына сәйкес келеді.

Мақалада Қазақстан Республикасының Әкімшілік сот ісін жүргізу ережелері мен іс жүргізу нормалары талданады және жетілдіру бойынша ұсыныстар тұжырымдалады.

Әкімшілік процестегі дәлелдеудің өзіндік ерекшеліктері бар, оны құқықтық процестің басқа түрлеріндегі дәлелдемелерден ерекшелендіреді.

Көбіне әкімшілік сот ісін жүргізудегі дәлелдемелер Қазақстан Республикасы Азаматтық іс жүргізу кодексінің жалпы нормаларымен реттеледі, бірақ Қазақстан Республикасының Әкімшілік рәсімдік-іс жүргізу кодексінде көзделген ерекшеліктер бар. Мақалада авторлар әкімшілік сот

 

ісін жүргізудегі дәлелдеу ауыртпалығына назар аударады. Әкімшілік сот ісін жүргізуде дауды қарау кезінде соттың белсенді рөліне көп көңіл бөлінеді.

**Түйін сөздер:** дәлелдемелер, дәлелдемелер, әкімшілік процесс, сот, қоғамдық-құқықтық қатынастар; соттың белсенді рөлі; дәлелдеу ауыртпалығы.

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**Вопросы доказывания в административном процессе**

В статье исследуются вопросы формирования теории доказывания и доказательств в административном судопроизводстве. Доказывание в административном процессе представляет собой урегулированную нормами административного процессуального права, основанную на принципе состязательности познавательную и удостоверительную логико-практическую деятельность должностного лица, органа, рассматривающего дело об административном правонарушении судьи, и участников производства по делу по собиранию, проверке и оценке доказательств. Судебное доказывание – это деятельность по прояснению ситуации, в которой судья может сделать вывод и принять решение по делу.

Доказательствами административного производства являются все реальные данные, по которым судья определяет наличие или отсутствие административных правонарушений, виновность данного лица и другие ситуации, важные для правильного разрешения дела.

Судебное доказывание – межотраслевой институт, присущий всем отраслям процессуального права. Как ГПК РК, УПК РК, так и АППК РК содержит главу, посвященную судебному доказыванию и доказательствам, что соответствует о межотраслевом характере данного института.

В статье анализируются положения административного судопроизводства и процессуальные нормы Республики Казахстан и формулируются предложения по совершенствованию.

Доказывание в административном процессе обладает своими особенностями, отличающими его от доказывания в других видах юридического процесса.

По большей части доказывание в административном судопроизводстве регулируется общими нормами ГПК РК, но есть особенности, предусмотренные АППК РК. В статье авторы акцентируют свое внимание на вопросах бремени доказывания в административном судопроизводстве. Уделяется большое внимание активной роли суда при рассмотрении спора в административном судопроизводстве.

**Ключевые слова:** доказательства, доказывания, административный процесс, суд, публично-правовые отношения; активная роль суда; бремя доказывания.

## Introduction

Since July 1, 2021, in accordance with the rules of administrative procedures of the Republic of Kazakhstan under the CPC of the Republic of Kazakhstan, a new specialized administrative court has been operating in the Republic of Kazakhstan, which considers public court proceedings between citizens, legal entities and state bodies. The powers of the administrative court include claims for challenging decisions and actions (inaction) of public officials in cases of private bailiffs, taxes, land, housing, procurement, labor disputes and others.

When considering a case in administrative proceedings, special attention is paid to the issues of evidence and proof, to which Chapter 19 of the APPC of the Republic of Kazakhstan is devoted.

Evidence and proof, as A.V. Averin points out, are both the procedural foundation and the procedural core (Averin 2007). And as P.E. Spiridonov notes, this is due to the performance by the subjects of proving the cognitive function in the administrative process, which is characterized by the laws underlying any process of cognition (Spiridonov 2019).

Evidence in administrative proceedings is considered simultaneously in the form of procedural activity and procedural recognition, forming the content of procedural activity, which is one of the legal means of determining the circumstances of a particular case on an individual basis. Proving in administrative proceedings, in contrast to civil proceedings, has its own characteristics.

Thus, the purpose of this study is to analyze.

## Materials and methods

To achieve the goals and objectives of this study and to solve research issues related to issues of evidence and evidence in the administrative process, the main method – analysis consisted in conducting a thorough documentary study, including a literature review and analysis of the current legislation of the Republic of Kazakhstan.

A comparative method was applied, directly when comparing the features of evidence in both administrative and civil proceedings.

In addition, Internet research from various secondary sources, such as textbooks, relevant journal articles, etc., was largely used to search for information.

The article is based on the methods of synthesis, induction, deduction, with the help of which the results of the study are formulated.

## Literature review

The issues of judicial evidence in both administrative and criminal and civil proceedings are the cornerstone. These issues are the basis of all legal proceedings. Thus, the issues of proof do not lose their relevance. Unfortunately, it must be stated that with the adoption in Kazakhstan of the CPC of the Republic of Kazakhstan on issues of evidence in the administrative process, very few scientific articles have been written yet.

Regulation of evidentiary issues in the administrative process is analyzed by A. Kenzhebayeva, D. Toigonbaev in the article "Burden of proof and standards of proof for the APPC" https://online.zakon.kz/Document/?doc_id=39189436.

Evidence and proof in the APPC is disclosed in the "Legal Gazette" of October 4, 2022, No. 79 by Uldai Shurenova. The textbook "General Administrative Law of the Republic of Kazakhstan" was published under the authorship of R.S. Melnik. Under the authorship of R.S. Melnik and R.A. Podoprigora, the manual "APPK is Just about complicated" was published //https://drive.google.com/file/d/1d7v_RVEM1XsDtXHj5rVNKMhXLWszLw3N/view.

Accordingly, in the modern science of administrative procedural law of the Republic of Kazakhstan, the issues of proof have not yet received proper coverage.

## Results and discussions

Modern Kazakh legislation is subject to significant changes. This is especially true of administrative law. In this regard, there are a huge number of scientific publications, especially about administrative processes (Pudelka, Plog, Oleynik, Baimoldina, 2022). It should be noted that the discussion about the legal nature of administrative procedures has been going on for a long time and still does not subside.

The legal basis of proof in the administrative process is fixed in the APPC RK. Proving in the administrative process has its own characteristics that distinguish it from proving in other types of legal process.

The purpose of the introduction of the administrative court was the need to ensure equality of the parties occupying an unequal position in civil and criminal proceedings, as well as proper adversarial and public relations, in connection with which there are no equal opportunities to demonstrate the situation in administrative cases. This approach is based on the nature of administrative procedures, which in some cases means that the court must take proactive measures regardless of the will of the person concerned (Hoxhaj 2014).

It is known that the subject of administrative relations is in an unequal position – one party (a civil servant or a state body), unlike the other, has legally authoritarian powers in accordance with the law (Dobjani).

It is individuals and legal entities that are the weak side in this confrontation (Tukiev).

It is impossible to imagine a court hearing without evidence. The role of evidentiary procedures is very difficult to underestimate (Ivanenko 2011).

We cannot agree with the opinion of A.A. Vetrova, who believes that the administrative procedure has not yet become an independent method of judicial protection (Vetrova).

The activity of proof is complex, multifaceted and represents a kind of practical cognitive activity.

The activity of proving has a complex, multilayered nature, it is a kind of practical cognitive activity. It is necessary to agree with the opinion of V.A. Novitsky, who notes that it is precisely the problems of proof during the period of legal reforms that acquire enormous importance, since they provide a real opportunity to protect the violated right (Novitsky 2002).

In turn, I.M. Luzgin points out that it is the procedure of proof provided for in the Procedural Code that is the most effective and expedient for solving the tasks of law enforcement. These rules of procedure promote the acquisition of true and reliable knowledge, ensure the accuracy of decisions, public

recognition, and proper educational effectiveness (Luzgin 1969).

At the same time, I would like to note that the principle of the active role of the court in administrative proceedings was introduced in accordance with the norms of the APPC of the Republic of Kazakhstan.

Thus, article 16 of the APPC of the Republic of Kazakhstan provides for administrative proceedings based on the active role of the court. In this case, considering the active role of the court in accordance with paragraph 2 of Article 130 of the APPC of the Republic of Kazakhstan, the court, at its discretion, collects evidence if the evidence provided by the participants in the administrative procedure is insufficient. In addition, participants in administrative proceedings are required to provide the documents and necessary information requested by the court. Participants in administrative proceedings are required to attach extracts from electronic documents, certificates, or related documents.

In administrative proceedings, unlike civil proceedings, the court is not limited to statements, descriptions, claims, evidence, and other materials of administrative cases submitted by the participants, comprehensively, fully, and objectively considering all the facts and circumstances important for the proper resolution of administrative cases.

Another significant difference between the administrative process and the civil process is the fact that when considering an administrative case, the judge has the right to express to the parties his preliminary legal opinion on legal grounds relating to the actual and (or) legal sides of the case.

To properly resolve administrative cases, the court has the right to demand evidence both at the request of the participants in the process and on its own initiative.

When determining the subject of proof, the court is not bound by the grounds and arguments of the stated claims of the participants in the process and, accordingly, in the administrative process, the court has the right to correct it, which is not provided for by the norms of the CPC RK.

Thus, in the administrative process, in contrast to the civil process, the principle of the active role of the court is implemented. We believe that the introduction of the principle of the active role of the court in the administrative process arose due to the need for procedural alignment of the parties. This principle is currently applied only in the resolution of cases arising from public relations.

The legislative consolidation of the principle of competition and equality of the parties with an emphasis on the active role of the court in administrative proceedings is due to the need to equalize the parties with different legal status. At the same time, allowing the parties to balance their procedural rights and obligations, the principle in question does not bind the court with the arguments of these parties.

In our opinion, the provision on the active role of the court serves as a ballast in ensuring a fair trial.

The practical application of this principle is also expressed in the fact that the court, having established that the claim was brought against the wrong person who should answer the claim, has the right to summon the plaintiff and explain to him the consequences of filing such a claim and, with his consent of the plaintiff, replace the improper defendant with the proper one. However, if the plaintiff does not give his consent to the replacement of the defendants, the court has the right, without the consent of the plaintiff, to involve the proper defendant as a second defendant.

The exercise of this right by the court allows for a more efficient and rapid resolution of the administrative case under consideration without the emergence of new requirements for other defendants.

In accordance with the provisions of Article 169 of the Civil Procedure Code of the Republic of Kazakhstan, when the subject and the basis of the claim are changed, the proceedings on the previously filed claim are terminated, since a new statement of claim has been filed. The provisions of the APPC RK allow changing the basis and subject of the claim before the court decides.

We believe that when such a right is exercised by a party, a new claim has arisen before the court and, accordingly, the previously collected evidence may no longer relate to the new subject and the basis of the claim.

The peculiarity of the implementation of the principle of competition and equality of the parties in administrative proceedings consists in its combination with the active role of the court, a different distribution of the burden of proof. Thus, the court, without violating the requirements of independence, objectivity, and impartiality, directs the judicial process. He explains to the parties to the process their rights and obligations, warns against the possible consequences of committing or not performing procedural actions. In addition, the court assists the parties in exercising their rights, forms the conditions and takes measures provided for by the APPC of the Republic of Kazakhstan for a comprehensive and

complete establishment of all the circumstances in the case under consideration.

The fairness of the process in administrative cases between the State and private individuals implies a clear distribution of the burden of proof of the circumstances referred to by the parties in support of their arguments.

In accordance with paragraph 1 of Article 129 of the APPC of the Republic of Kazakhstan, the plaintiff is obliged to participate in the collection of evidence in accordance with his capabilities. Therefore, plaintiffs should understand that depending on how the court assesses the plaintiff's abilities, the plaintiff may be held liable for collecting certain evidence in the case.

The provisions of this article provide that the plaintiff must prove when he became aware of the violation of his rights, freedoms and legitimate interests, and the number of damages. Take place. Given that such an approach to losing seems objective, there is not enough time to go to court, the plaintiff must prove circumstances that contradict his interests.

According to paragraph 2 of Article 129 of the APPC of the Republic of Kazakhstan, the burden of proof is distributed between the parties to the dispute depending on the claim, which should be the basis for choosing a strategy for participation in the administrative process. For example, in a claim for challenging an onerous administrative act, the burden of proof is borne by the defendant, and for other types of claims there are peculiarities depending on whose interests a particular circumstance will be established.

At the same time, according to paragraph 4 of Article 130 of the APPC RK, the court could shift the burden of proof regardless of the rules established by paragraph 2 of Article 129 of the APPC RK, if the persons involved in the administrative case destroy or conceal any evidence or otherwise hinder its investigation and evaluation, making it impossible or difficult to obtain evidence.

At the same time, for not properly fulfilling the court's request, the court's request, including other obstruction of its activities, late submission of a review, the APPC RK provided for measures of procedural coercion (remark, removal from the courtroom, monetary penalty).

In accordance with paragraph 3 of Article 129 of the APPC of the Republic of Kazakhstan, the defendant may refer only to the justifications specified in the administrative act. Practice will show how widely the courts will interpret the concept of "justification", but this rule should be a powerful tool in matters of proof in the administrative process.

In accordance with paragraph 2 of Article 130 of the APPC of the Republic of Kazakhstan, "The court is not bound by a party's statement on the admissibility of evidence, which is resolved when making a final decision." The admissibility of evidence at the request of a party is established only when a final decision is made, and not after a person submits a statement on the inadmissibility of evidence and hearing the opinions of persons participating in the case, as provided for in the CPC RK. At the same time, I would like to note that in the administrative process, proof is regulated by the norms of the APPC of the Republic of Kazakhstan, unless another procedure is provided for by the APPC of the Republic of Kazakhstan.

Special attention in the administrative process is paid to the issues of prejudice. The provisions of Article 76 of the CPC of the Republic of Kazakhstan, Article 119 of the APPC of the Republic of Kazakhstan provide that the circumstances established by a court decision that entered into force do not need to be proved when considering another case in which the same persons participate. It can be assumed that almost every lawyer could face questions about the application of the rules on prejudice.

E. Semikina notes that "an analysis of the explanations and practice of higher courts allows us to conclude that prejudice today is a refutable evidentiary presumption" (Semikina https://www.advgazeta.ru/mneniya/muchitelnaya-agoniya-preyuditsii-v-grazhdanskom-protsesse).

When referring to judicial practice, many questions arise, especially about the objective limits of the prejudice of judicial acts. Is prejudice a factual and legal assessment established by the court or just a fact? What will the higher courts understand by "fact" when reviewing a case?

Paragraph 2 of Article 76 of the CPC RK contains an indication that it is not allowed to prove and verify only the circumstances established by a court decision. Therefore, according to the APPC of the Republic of Kazakhstan, only factual circumstances can be recognized as prejudicial, their legal assessment is impossible. It turns out that if the courts are not bound by a legal assessment of the facts and the legal relations of the parties are not prejudiced, in each new process, based on the same facts, the court may interpret the legal relations of the parties differently. For example, in one dispute, the court may conclude that the contract is concluded, and in another it may come to the opposite conclusion. This introduces a significant amount

of uncertainty into civil circulation and leads to a conflict of judicial acts – after all, the party to the dispute, dissatisfied with the outcome of the case, will always seek ways to challenge the decision by presenting a different, formally not identical claim.

At the same time, prejudice not only exempts from proof, but is also one of the properties of the validity of a court decision.

At the same time, Article 119 of the APPC of the Republic of Kazakhstan provides that a court decision on an administrative case that has entered into force is mandatory for all administrative bodies, officials, individuals, and legal entities with respect to both the established circumstances and their legal assessment in relation to the person about whom it was issued.

Accordingly, the circumstances established by a court decision that has entered into legal force are mandatory for the person in respect of whom they are established.

The active role of the court covers the most diverse powers of the court to consider administrative cases. According to paragraph 1 of Article 130 of the Administrative Code of the Republic of Kazakhstan, the court is obliged to assist in eliminating formal errors, clarifying unclear expressions, filing petitions on the merits of an administrative case, supplementing incomplete factual data, submitting all written explanations relevant to the full definition and objective assessment of the circumstances of an administrative case at all stages of the process.

The positive effect of this rule is to stop the practice of unjustified return of claims by courts due to the absence of any documents, or refusal of claims due to the lack of evidence of certain circumstances. Considering an administrative case, the judge first establishes the facts relevant to the resolution of the case. Then the parties independently, based on their free will, present evidence to the court, express their opinion about the claimed administrative claim. If the judge considers that a particular circumstance can be confirmed only by certain evidence, then he has the right to demand the presentation of this evidence from the party referring to this circumstance. To decide, the judge has the right to demand any evidence on his own initiative. This is the main manifestation of the court's activity. However, the law does not define the cases in which the court can exercise this right. The decision on the demand for evidence is left to the discretion of the court. The activity of the court in the implementation of the principle of competition and equality of the parties, proclaimed by the APPC RK, contains a significant element of independence.

The legislation on administrative proceedings does not establish the procedure for filing a petition for the reclamation of evidence. In civil proceedings, there is a rule according to which the court of claim proceedings assists the parties in collecting evidence if the applicant cannot obtain it independently without the help of the court (73 of the CPC RK). At the same time, the law clearly defines the issues that should be reflected in the content of the parties' petition for the reclamation of evidence. Considering that Part 5 of Article 7 of the APPC allows for the possibility of using the analogy of the law, you can use this to resolve the indicated problem.

However, it is most rational to supplement the APPC RK with a new norm, which will provide a list of circumstances in which the court may, on its own initiative, demand evidence, then in all other cases the activity of the court will be expressed in assisting in the collection of evidence. At the same time, the court must assist in the reclamation of evidence to any person involved in the case, including government entities (paragraph 3 of Article 16 of the APPC). Such an approach of the legislator is based on the principle of competitiveness and equality of the parties, as well as the objective impossibility for a person to obtain evidence significant for the case. In addition, it is important to legislatively determine the form of a petition for the reclamation of evidence. The lack of legal regulation of this issue in administrative proceedings may lead to problems in law enforcement practice, when the court will, only based on its own discretion, decide how to claim the necessary evidence: at the request of the persons participating in the case, or on their own initiative. In any case, for the court to be active in the form of reclaiming evidence on its own initiative, there must be circumstances in which it is impossible to reclaim evidence at the request of the parties, and such evidence is of a fundamental nature and an administrative case cannot be resolved without their establishment.

**Conclusion**

In conclusion, I would like to note that the specifics of the manifestation of the universal principle of competition in administrative proceedings is due to the unequal opportunities of the parties to protect their rights and legitimate interests. The material legal relations between the parties to a judicial dispute in administrative proceedings have the character of authority and subordination. Of course, the power subject can protect their rights, far surpassing the capabilities of the opposing party

in the dispute. To protect this "weak" party in the process, the court is endowed with appropriate power functions that allow it to act actively. Therefore, the position of the legislator, who defined the active role of the court in administrative proceedings to ensure the balance of the adversarial process, is quite fair.

As Kazakh lawyers A. Kenzhebayeva, D. Toygonbayev D. point out, the provisions of the CPC of the Republic of Kazakhstan, in contrast to the norms of the CPC of the Republic of Kazakhstan, contain other rules of the burden of proof, as well as issues of the active role of the court in proving (Kenzhebayeva, Toygonbayev https://online.zakon.kz/Document/?doc_id=39189436&pos=6;-106#pos=6;-1068).

We can fully agree with the opinion of the well-known Kazakh scientist – specialist in the field of administrative law R.A. Podoprigora, who notes that the rule provided for in civil proceedings on the provision of evidence by the parties cannot be applied in administrative proceedings (Podoprigora 2010).

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