

ADMINISTRATIVE COURT OF THE REPUBLIC OF ARMENIA

Administrative case number VD/1049/05/15

JUDGMENT

ON PARTLY DENYING ADMISSION OF THE CLAIM AND ON RETURNING OF OTHER PART

09 April 2015

City of Yerevan

The Administrative Court of the Republic of Armenia, Judge K. Zariqyan, having examined, as per claim, the issue admitting the claim filed by the Tehmine Yenokyan, Goharik Yenokyan, Derenik Yenokyan, Sevak Mkrtychyan, Armen Hambardzoumyan, Vanik Hovhannisyanyan, Aram Hovsepyan, Artur Mkrtychyan, Alexan Mnatsakanyan, Gagik Grigoryan, Nairi Nersisyan, Non-Governmental Organization "Ecodar", Non-Governmental Organization "Ecological Right",

FOUND THE FOLLOWING

On 2 April 2015, Tehmine Yenokyan, Goharik Yenokyan, Derenik Yenokyan, Sevak Mkrtychyan, Armen Hambardzoumyan, Vanik Hovhannisyanyan, Aram Hovsepyan, Artur Mkrtychyan, Alexan Mnatsakanyan, Gagik Grigoryan, Nairi Nersisyan, Non-Governmental Organization "Ecodar", Non-Governmental Organization "Ecological Right" filed a claim with the Administrative Court of the Republic of Armenia against the Republic of Armenia Ministry of Nature Protection, the Republic of Armenia Ministry of Energy and Natural Resources, the Republic of Armenia Sevan lake protection expert commission of the National Academy of Science. The plaintiffs are inhabitants of Gndevaz community and announced that respondents adopted a number of acts concerning the Amulsar gold-quartzite open-pit mine located in the Republic of Armenia Vayots Dzor Marz, in the immediate vicinity of Gndevaz community, and the community will be affected by the proposed activity. The plaintiffs claimed:

1. to declare unlawful the affirmation of positive conclusion of the Amulsar gold-quartzite open-pit mine exploitation project by the Sevan lake protection expert commission of the National Academy of Science, developed by the "Geoteam" CJSC and affirmed in the session of Sevan lake protection expert commission on 24 September 2014;
2. to invalidate the Environmental Impact Assessment Affirmative Conclusion number BF-76 approved by the RA Minister of Nature Protection on 17 October 2014;
3. as a consequence, to invalidate the Order 188-A of the RA Minister of Energy and Natural Resources issued on 11 November 2014; the license SHATV29/245 issued on 26 September 2012 and reformulated on 12 November 2014; the Modification of the Mining Act LV-245 issued on 26 September 2012 and modified in 12 November 2014; the Order 286-A of the RA Minister of Energy and Natural Resources on "Enlargement of mining area and extension of license" issued on 24 November 2014; based on the indicated

Order, the Modification of Mining Act LV-245 issued on 26 September 2012 and modified on 25 November 2014; as well as the Modification of SHATV29/245 by the same minister issued on 26 September 2012 and modified on 29 November 2014.

The Analysis of the Administrative Court

Taking into account the interrelationship of the first and the second demands the Court will discuss them jointly, and the third claim will be discussed separately.

1) The issue of admission of the first and the second demands:

Based on the strategy of efficient and just judicial protection of human rights guaranteed by the Articles 18 and 19 of the RA Constitution, the institute of administrative justice allows the physical and legal entities litigate the administrative decisions, acts or omissions of state government and local self-government bodies and their officials in an administrative procedure only in case when the rights or liberties of the latter were interfered. In particular, the Paragraph 1 Article 3 of the RA Administrative Procedure Code stipulates the condition for physical and legal entities for their legal standing to file a claim in the Administrative Court: if such entity believes that the administrative decision, act or omission of state government or local self-government bodies or their officials violated or may directly violate their rights and liberties envisaged by the RA Constitution, International Treaties, national laws or other legal acts. Thus, the entity has legal standing to sue in the Administrative Court only those administrative acts of state government or local self-government bodies or their officials, which caused negative consequence for him. Moreover, the indicated act shall be explicit, e.g., Administrative or Real (action, omission). That is to say, through an administrative proceeding can be litigated only those acts of administrative bodies which intervened into the rights or liberties of the plaintiff.

At the same time, the legislative body determined the legal activities of administrative bodies, which shall be done within the procedure of administrative oversight by certain procedural rules. Those activities are separated from the ones, which are under the liabilities of criminal prosecution or civil relations. In particular, by adopting the Law on Basics of Administration and Administrative Proceeding the legislative body clearly stated that the type of activities of administrative bodies, through which those bodies affect the rights and freedoms of physical and legal persons and which is not related to criminal and civil relations.

First of all, the Article 3 of the indicated Law counts the scope of bodies, which are considered to be the administrative bodies (institutionally it is the state and local administrative bodies). Following, the definition of "administration" is constituted in Article 53, Part 1, describes the term as follow: "The activity of administrative body, which has the external influence, which concludes by adopting a decision, order, command or another individual legal act, as well as the action or inactivity, which causes factual consequences for persons." Following, the Article 53, Part 1 of the Law on Administration and Administrative Proceeding envisages the definition of "administrative act" as follows: "The administrative act is the decision, order, command or another individual legal act, which has the external influence, and was adopted by the administrative body in the field of public law for the settlement of a specific case and is aimed to define, modify, nullify or recognize rights and responsibilities for individuals."

In fact, this Law ensures formal regulation of the relations of physical and legal persons from one side and the state and local administrative bodies from another side in the field, which is not regulated by the private law, and where special regulations apply for the protection of the public interest. In its turn, the relations of criminal legislation are regulated by the Criminal Proceeding Code.

In such conditions it is obvious, that the terms “administrative act”, “action”, “inactivity” envisaged by the Article 3 of the Administrative Proceeding Code are not autonomous, they are identical with the acts, which are adopted as a result of “administration” (administrative act, action or inactivity, in line with the Law on Administration and Administrative Proceeding).

Based on the foregoing, the results of actions of the administrative bodies not necessarily are being considered as the effect of administration activity (Administrative or Real act). Consequently, not all of those acts themselves directly cause legal effect for the persons. During their activity the administrative bodies can create number of documents or implement physical actions which are not considered as the results of administrative proceeding and do not independently intervene into the rights or liberties of persons. Although, those acts may later serve as basis for consequent legal effects on person’s rights and liberties but they are not considered to be legally affecting unless those acts are not put on the basis of an Administrative or Real act (e.g., a document created by the administrative body as an evidence for any administration proceeding or an action of administrative body directed to notify about some administrative proceeding). Therefore, similar documents or actions are not the subjects to be independently litigated. The issue of lawfulness of those documents or actions can be the subject of administrative oversight exclusively within the scope of verification of the final administrative act.

In the current case, the first and the second demands of the claim are being sued the action of Sevan Lake Protection Expert Commission of the National Academy of Science, which affirmed the positive conclusion of the Amulsar gold-quartzite open-pit mine exploitation project, developed by the “Geoteam” CJSC on 24 September 2014, and the Environmental Impact Assessment Affirmative Conclusion number BF-76 approved by the RA Minister of Environmental Protection on 17 October 2014. In such conditions the court finds it necessary to discuss legal characters of the litigated action and Expert Conclusion to reveal whether they directly interfere any right or liberty of the plaintiffs.

a/ Legal nature of the action of Sevan lake protection expert commission of the National Academy of Science in relation to issuing positive conclusion at the session of 24.09.2014 to the Amulsar gold-quartzite mining project, developed by the “Geoteam” CJSC

The legal and economic basis of state policy with regard to normal development, restoration, preservation, reproduction and use of natural recourses of the lake Sevan, as environmental, economic, social, scientific, historical, cultural, aesthetic, health, climate, recreational (restoration) and spiritual value is defined by the Law on Lake Sevan. Chapter 5 of the Law on Lake Sevan is

dedicated to the issues related to legal status of the Sevan lake protection expert commission. Hence, the Article 19 of the mentioned Law defines:

“1. For the purpose of independent professional expertise of the annual programs (reports) as well as the documents developed by the authorized bodies ensuring their implementation, a subdivision is established within the structure of the National Academy of Sciences of the Republic of Armenia (hereinafter referred to as NAS).

2. The commission consists of 9 members, who are appointed by the President of the National Academy of Sciences within one month after the entry into force of this law.

The authorized person of the Governor of Gegharkunik province may participate in the work of the commission with the right of consultative vote.

3. The chairman of the commission is elected from among the members of the Commission by secret ballot by the majority of votes of the total number of members of the Commission.

4. The President of the National Academy of Sciences may make changes in the composition of the commission.

5. The Commission acts in accordance with its charter, which, upon the submission of the Chairman of the Commission, approves the chairmanship of the National Academy of Sciences within one month after the establishment of the Commission.

6. The financing of the expenses of the Commission, including the remuneration of the members of the Commission, is carried out at the expense of the state budget and is reflected in the maintenance expenses of the National Academy of Sciences.

Article 20 of the same Law defines liabilities of the Commission, which are the following:

a) Carries out preliminary & final expertise of the Complex & Annual programs (reports), as well as the documents ensuring their implementation and issues conclusions;

b) Based on the results of the preliminary expertise, develops and submits relevant proposals to the authorized bodies;

c) can take part in events related to Lake Shana & discuss issues;

d) Carries out scientific-expert researches, compiles protocols;

e) may involve additional specialists;

f) Executes other authorities defined by the Charter of the Commission, which do not contradict the legislation.

The Article 21 defines the legal status of expert conclusions of the Commission in following way:

“1. The Commission shall issue an expert conclusion on the documents developed to ensure the implementation of the Complex & Annual Programs (reports) as well as their implementation within one month from the date of their receipt.

(...)

3. The conclusion of the Commission on annual programs (reports) includes:

a) The degree of substantiation of program issues and measures;

b) Assessment of resources safety of program issues and measures, including financial safety;

c) Assessment of compliance of programs (reports) with the requirements of this law;

d) The reference on the inclusion or rejection of the proposals submitted in the programs (reports) received during the elaboration of the programs (reports) as well as the proposals submitted as a result of the preliminary expertise;

- e) Summary assessment of program development and realism;
- f) Other information and analysis that the Commission deems necessary to provide a full expert conclusion on the projects (reports).
(...)"

Based on the above-mentioned, the legislative body, aiming to protect the Sevan Lake, as the strategic ecosystem of RA conservational, economic, social, scientific, historical, cultural, aesthetic, health, climatic, recreational and spiritual value, decided to establish an expert commission within the structure of the RA National Academy of Science, which shall declare its position about the planned activities, which may have some impact on Sevan Lake. Thus, the members of the commission, being the knowledgeable persons in that area, express their opinion related the factual aspects of impact on Sevan Lake during the discussion of any issue by the liable bodies.

b/ Legal nature of Environmental Impact Assessment Expert Conclusion BF-76 issued by the RA Ministry of Nature Protection at 17.10.2014

The RA Mining Code is the main document, which defines the principles and category of mining activities, as well as the protection of environment from negative influence during mining, labor safety, protection of rights and legal interests of the persons and the state. The Mining Code also regulates the issues concerning mining expertise. Hence, Article 7 Part 1 of the indicated Code lists the expertise implemented in the field of mining activities, among which is the type of expertise on Environmental Impact Assessment (point 2). Part 6 of same Article defines that the regime state environmental impact assessment expertise is defined by the Law on Environmental Impact Assessment and Expertise.

At the same time, in line with the Article 20 of the Mining Code "The mining license is issued by the authorized body on the general grounds or on a competitive basis defined by this Code or other legal acts, through the entrails use permit or agreement, mine-allocation act, as well as by signing contract with the mining company." However, according to the Article 50 Part 2 of the same Code, it is prohibited the extraction of mineral resources without properly implemented expertise. In its turn, Article 51 of the Mining Code defines the decision-making procedure, following the issuance of mining license. In particular:

- Within 10 days after the registration of the application for the right to extract minerals, the authorized body shall submit the environmental impact assessment report and the attached documents for implementation of Environmental Impact Assessment Expertise (Part 3);
- Within 100 days after receiving the environmental impact assessment report, the authorized body of the State Environmental Administration shall issue an appropriate expert conclusion on the environmental impact assessment report (Part 4);
- After receiving the positive expert conclusions, the authorized body shall make a decision on the application within 180 days after the day of registration of the application, about which it shall notify the applicant in writing (Part 8);
- Extraction of minerals without properly implemented state expertise is prohibited (Part 14).

Based the above-mentioned, the expertise of environmental impact is being conducted by the liable authority to test the justification of the mining project and to make the decision about it. Taking into consideration that environmental impact assessment demands specific professional knowledge, the liable authority issue the mining license based on the opinion of experts.

c) The Conclusion of the Administrative Court

Having reviewed the claim the Court records that both the opinion of Sevan Lake Protection Expert Commission related the impact on the lake by any activity and the expert conclusion of the environmental impact assessment are the expert conclusions in accordance with the Article 45 of the Law on Administration Baselines and Administrative Proceeding. In its turn, according the Article 42 of the same Law, expert conclusion is considered as evidence in the administrative proceeding. However, the evidence of the administrative proceeding does not itself cause any legal effect for the persons. In Accordance with Paragraph 1 Article 37 of the mentioned Law, the administrative body is committed to comprehensively examine all evidences of the proceeding and constitute the factual circumstances, which are affirmed by those evidences.

In such conditions it is obvious that persons rights were not been interfered by the litigated acts, as the decision to give license for mining activity was not conditioned by those acts. Therefore, the plaintiffs do not have legal standing to litigate those acts, as the issue of assessment of evidences in the administrative proceeding in Administrative Court is the subject for discussion within the scope of verification of the legality of administrative acts admitted during the administrative decision-making.

Followed by the whole above-mentioned, the indicated part of the filed claim is not the subject for litigation in the Administrative Court. In accordance with the Point 1 Paragraph 1 Article 80 of the RA Administrative Procedure Code, it is a ground to deny the admission of that part of the claim.

Based on the foregoing and guided by Points 2-3 Paragraph 1 Article 77, Articles 79-80 of the Administrative Procedure Code of the Republic of Armenia, and Articles 130-132 of the RA Administrative Procedure Code, and Article 144 of the Civil Procedure Code, the Administrative Court hereby

DECIDES

1. To deny admission of the claim filed in 02.04.2015 by the Tehmine Yenokyan, Goharik Yenokyan, Derenik Yenokyan, Sevak Mkrtychyan, Armen Hambardzoumyan, Vanik Hovhannisyan, Aram Hovsepyan, Artur Mkrtychyan, Alexan Mnatsakanyan, Gagik Grigoryan, Nairi Nersisyan, Non-Governmental Organization "Ecodar", Non-Governmental Organization "Ecological Right" demanding declare unlawful the affirmation of positive conclusion of the Amulsar gold-quartzite open-pit mine exploitation project, developed by the "Geoteam" CJSC, affirmed in the session of Sevan lake protection expert commission of the National Academy of

Science on 24 September 2014; and invalidate the Environmental Impact Assessment Affirmative Conclusion number BF-76 approved by the RA Minister of Environmental Protection on 17 October 2014.

2. To return the claim filed in 02.04.2015 by the Tehmine Yenokyan, Goharik Yenokyan, Derenik Yenokyan, Sevak Mkrtchyan, Armen Hambardzoumyan, Vanik Hovhannisyan, Aram Hovsepyan, Artur Mkrtchyan, Alexan Mnatsakanyan, Gagik Grigoryan, Nairi Nersisyan, Non-Governmental Organization “Ecodar”, Non-Governmental Organization “Ecological Right” demanding as a consequence, to invalidate the Order 188-A of the RA Minister of Energy and Natural Resources issued on 11 November 2014; the license SHATV29/245 issued on 26 September 2012 and reformulated on 12 November 2014; the Modification of the Mining Act LV-245 issued on 26 September 2012 and modified in 12 November 2014; the Order 286-A of the RA Minister of Energy and Natural Resources on “Enlargement of mining area and extension of license” issued on 24 November 2014; based on the indicated Order, the Modification of Mining Act LV-245 issued on 26 September 2012 and modified on 25 November 2014; as well as the Modification of SHATV29/245 by the same minister issued on 26 September 2012 and modified on 29 November 2014.

According the Paragraph 11 Article 127, and Points 1-2 Paragraph 1 Articles 131 of the Administrative Procedure Code, the current Decision enters into force 5 days after admitting it and may be appealed within a five-day period of receiving it.

According the Paragraph 5 Article 79 of the Administrative Procedure Code, in case of elimination of the mistakes made in the lawsuit and re-submission of the decision to the administrative court within 15 days after receiving the decision, the lawsuit is considered accepted on the day of initial submission.

JUDGE

KAREN ZARIKYAN