



On judicial protection of the rights and freedoms of a person and a citizen in criminal proceedings

Unofficial translation

Normative Decree of the Supreme Court of the Republic of Kazakhstan dated June 25, 2010
No. 4.

Unofficial translation

Footnote. Throughout the text, the figures "109" as amended by the figures "106" respectively in accordance with the regulatory resolution of the Supreme Court of the Republic of Kazakhstan dated 20.04.2018 № 8 (shall be enforced from the day of its first official publication).

In order to ensure the correct and unified implementation by the courts in criminal proceedings of constitutional standards and laws ensuring personal liberty, privacy, personal and family secrets, confidentiality of correspondence, telephone conversations, postal, telegraph and other communications, as well as to improve the effectiveness of their judicial protection, plenary session of the Supreme Court of the Republic of Kazakhstan

hereby RESOLVED as follows:

1. To draw the attention of the courts to the fact that, in addition to the direct resolution of court cases, it shall be necessary to implement the functions of the judiciary to protect against unlawful, unjustified restrictions on the rights and freedoms of persons participating in criminal proceedings, to take timely measures provided for by law aimed at their restoration, as well as compensation for the harm caused.

At the pre-trial stage of criminal proceedings, judicial protection shall be implemented with the authorization of preventive measures in the form of detention, house arrest, bail, measures of procedural coercion in the form of suspension from the position and prohibition of approach, as well as in the consideration of complaints of actions (omissions) and the decisions of the criminal prosecution bodies provided for in Article 106, part 2 of Article 109 of the Criminal Procedure Code (hereinafter referred to as the Criminal Procedure Code).

In the preparation of the case for litigation and the main litigation of the case, judicial protection shall be carried out by verifying the legality of the proceedings conducted by the criminal prosecution authorities and their compliance with the requirements of the law guaranteeing the procedural rights of the persons involved in the case.

At the stage of execution of the sentences and court resolutions, judicial control shall be carried out in accordance with Article 27 of the Criminal Executive Code of the Republic of Kazakhstan.

Footnote. Paragraph 1 as amended by the regulatory resolution of the Supreme Court of the Republic of Kazakhstan dated 20.04.2018 № 8 (shall be enforced from the day of its first official publication).

2. The courts should bear in mind that under part 1 of Article 106 of the Criminal Procedure Code, actions (omissions) and decisions of the public prosecutor, investigation and inquiry bodies shall be subject to judicial review: denial to accept an application for a criminal offence, as well as violation of the law at the beginning of a pre-trial investigation, interruption of the investigation period, termination of the criminal case, forced placement in a medical organization for forensic examination, search and (or) seizure, commission of other actions (omissions) and decision-making.

To other actions (omissions) and decisions, the delay of verification, the legality of which before the stage of preparation of the case for litigation or the main litigation shall make the restoration of the violated rights and freedoms of a person and a citizen difficult or impossible, reference should be made, for example, to the decision of the criminal prosecution bodies to deny to appoint a counsel, denial to allow a legal representative, election and application of measures of procedural coercion to the suspect, the accused (except as authorized by the investigating judge), denial of recognition of a person as a victim, omission to verify reports of a criminal offence and others.

Footnote. Paragraph 2 as amended by the regulatory resolution of the Supreme Court of the Republic of Kazakhstan dated 30.12.2011 № 4 (shall be enforced from the day of its first official publication); dated 20.04.2018 № 8 (shall be enforced from the day of its first official publication).

3. Actions and decisions relating to investigative activities may be appealed directly to the courts under Article 106 of the Criminal Procedure Code and paragraph 2 of Article 5 of the Law of the Republic of Kazakhstan dated September 15, 1994 No. 154-XIII “On operational investigative activities” (hereinafter referred to as the Law “On operational investigative activities”), if they relate to criminal proceedings.

Footnote. Paragraph 3 as amended by the regulatory resolution of the Supreme Court of the Republic of Kazakhstan dated 20.04.2018 № 8 (shall be enforced from the day of its first official publication).

4. The complaint against procedural decisions and actions (omissions) of the person conducting the initial inquiry, the body conducting the initial inquiry, the head of the body conducting the initial inquiry, the investigator, the head of the investigation department and the prosecutor, in accordance with Articles 100 and 106 of the Criminal Procedure Code, the parties to criminal proceedings or other persons or organizations in that part shall be entitled to file, in which the proceedings and decisions taken affect their legitimate interests, and defense counsel, legal representative or representative acting for the applicant.

The applicant's representative may also be a person who has not participated in the pre-trial proceedings, in connection with which the complaint was filed, but authorized by the applicant to file the complaint and/or participate in its consideration.

The restriction of the right to judicial appeal against decisions and actions (omissions) affecting the rights and legitimate interests of citizens only on the grounds that they have not been recognized in accordance with the procedure established by law as participants in the process shall be unacceptable. The rights and freedoms of a person and a citizen guaranteed by the Constitution of the Republic of Kazakhstan (hereinafter referred to as the Constitution) must be derived from the actual situation of the person in question as in need of ensuring the right in question (for example, a person who shall be denied registration of an application for a criminal offence; a person whose property shall have been seized or damaged during a search (seizure); victim of the crime committed, unduly unrecognized by the victim, etc.).

Footnote. Paragraph 4 as amended by the regulatory resolution of the Supreme Court of the Republic of Kazakhstan dated 20.04.2018 № 8 (shall be enforced from the day of its first official publication).

5. Within the meaning of Article 106 of the Criminal Procedure Code, when verifying the legality and validity of decisions and actions (omissions) of the prosecutor, the investigative bodies and the inquiry, the investigating judge must not prejudge matters that may subsequently be the subject of the main litigation. In particular, the investigating judge shall not be entitled to draw conclusions on the factual circumstances of the case, on the assessment of the evidence and on the qualification of the act.

Footnote. Paragraph 5 as amended by the regulatory resolution of the Supreme Court of the Republic of Kazakhstan dated 20.04.2018 № 8 (shall be enforced from the day of its first official publication).

6. Excluded by the regulatory resolution of the Supreme Court of the Republic of Kazakhstan dated 24.01.2020 No. 2 (effective from the date of the first official publication).

7. Excluded by the regulatory resolution of the Supreme Court of the Republic of Kazakhstan dated 24.01.2020 No. 2 (effective from the date of the first official publication).

8. Excluded by the regulatory resolution of the Supreme Court of the Republic of Kazakhstan dated 24.01.2020 No. 2 (effective from the date of the first official publication).

9. Excluded by the regulatory resolution of the Supreme Court of the Republic of Kazakhstan dated 24.01.2020 No. 2 (effective from the date of the first official publication).

10. Criminal procedure legislation shall establish a unified procedure for criminal proceedings, while courts must take into account that Constitutional Law of the Republic of Kazakhstan dated December 25, 2000 No. 132 “On judicial system and the status of judges of the Republic of Kazakhstan” Constitutional Law of the Republic of Kazakhstan dated October 16, 1995 No. 2529 “On Parliament of the Republic of Kazakhstan and the status of its deputies” Constitutional Law of the Republic of Kazakhstan dated December 29, 1995 No. 2737 "On Constitutional Council of the Republic of Kazakhstan", the Law of the Republic of

Kazakhstan dated June 30, 2017 No. 81-VI "On prosecutor's office" provisions shall provide some features which respect when conducting investigative, legal proceedings concerning judges, deputies of Parliament, candidates of Parliament, candidates for president, the Chairman and members of the Constitutional Council, the General Prosecutor surely.

In deciding whether to prosecute a person with privileges for crimes of minor or moderate gravity, if that person has not been detained at the scene of the crime, consent must be obtained in order to prosecute him.

Footnote. Paragraph 10 as amended by the regulatory resolution of the Supreme Court of the Republic of Kazakhstan dated 20.04.2018 № 8 (shall be enforced from the day of its first official publication).

11. Courts should pay attention to the fact that in accordance with the resolution of the Constitutional Council of the Republic of Kazakhstan dated January 30, 2003, No. 10 "On official interpretation of paragraph 4 of Article 52, paragraph 5 of Article 71, paragraph 2 of Article 79, paragraph 3 of Article 83 and paragraph 2 of Article 15 of the Constitution of the Republic of Kazakhstan" if the offence is changed from serious or particularly serious to a crime of lesser gravity committed by a person whose inviolability is enshrined in the Constitution and for whom the consent of the relevant state organizations has not previously been sought by the criminal prosecution bodies, compliance with the rules on the procedure for deprivation of immunity in case of arrest and criminal prosecution shall be mandatory.

In this connection, the criminal prosecution body, having established that a person shall have been prosecuted for the commission of an offence of minor or moderate gravity without the consent of the state bodies as a result of the erroneous qualification of the act committed by him under the Articles of the Criminal Code of the Republic of Kazakhstan, which shall provide for liability for the commission of serious and (or) particularly serious crimes, or without taking into account the rules of competition of the standards of the criminal law, shall be obliged to make a corresponding submission to the General Prosecutor of the Republic of Kazakhstan on the need to obtain consent to bring him to criminal liability. If these circumstances are revealed during the preparation of the case for litigation or the main litigation, the court shall return the case to the prosecutor.

12. Searches of the residential and service premises of judges, personal and service vehicles used by them, their correspondence, bank accounts, baggage and other property, seizure of documents and items, seizure of property and postal and telegraph shipments, interception of communications, listening and recording of negotiations may be carried out only within the framework of a pre-trial investigation carried out with the consent of the General Prosecutor of the Republic of Kazakhstan.

Special operational investigative measures listed in paragraph 3 of Article 11 of the Law "On operational investigative activities" may be carried out only with the authorization of the regional prosecutor (city) and higher prosecutors. The implementation of the provisions of paragraph 7 of Article 12 of the Law "On operational investigative activities" on the

possibility of carrying out special operational investigative measures against judges without the authorization of the prosecutor shall be prohibited.

Footnote. Paragraph 12 as amended by the regulatory resolution of the Supreme Court of the Republic of Kazakhstan dated 21.04.2011 № 1 (shall be enforced from the day of its first official publication); dated 30.12.2011 № 4 (shall be enforced from the day of its first official publication); dated 20.04.2018 № 4 (shall be enforced from the day of its first official publication).

13. In deciding on the assignment of the main litigation to the courts, on the basis of the standards, contained in chapter 41 of the Criminal Procedure Code, it shall be necessary to verify whether during the pre-trial investigation, the accelerated pre-judicial investigation, the conclusion of the procedural agreement, the agreement on achievement of reconciliation as mediation significant violations of the criminal procedure law, preventing the appointment of the main litigation and, if found, in accordance with Article 323 of the Criminal Procedure Code and in accordance with the procedure, specified in Article 321 of the Criminal Procedure Code, to return the case for resolution to the prosecutor.

In preparation for the main litigation, the judge, when examining the case file, should determine whether there have been applications or motions by the parties for unlawful restriction of their rights during the pre-trial proceedings, whether they have been properly resolved, whether there have been relevant materials in the case, and, in their absence, whether the prosecutor should be obliged to submit them to the court.

Footnote. Paragraph 13 as amended by the regulatory resolution of the Supreme Court of the Republic of Kazakhstan dated 20.04.2018 № 8 (shall be enforced from the day of its first official publication).

14. The judge in the criminal case must verify whether the criminal prosecution body has taken measures to ensure the supervision, care and livelihood of minor children, other disabled persons who have been dependent on the defendant, as well as to ensure the supervision of property and animals belonging to him who have been left without care and supervision as a result of his detention.

If such measures are not taken, the court, if the defendant or defense counsel so requests, must, in accordance with Article 154 of the Criminal Procedure Code, order the persons or bodies concerned to take the necessary measures during the preliminary hearing.

Footnote. Paragraph 14 as amended by the regulatory resolution of the Supreme Court of the Republic of Kazakhstan dated 20.04.2018 № 8 (shall be enforced from the day of its first official publication).

15. The courts, when assessing evidence, should bear in mind that the rights of everyone to liberty and security of a person established in Articles 16 and 17 of the Constitution shall be affected by the examination and search, therefore, on a case-by-case basis, Articles 223

and 252 of the Criminal Procedure Code should be verified for the grounds for doing so, a reasoned order to carry out them, authorized where necessary by the investigating judge, compliance with the requirements of the law in their implementation.

The courts must separate the personal search, which may be carried out with the authorization of the investigating judge, except in the cases provided for in part 3 of Article 255 of the Criminal Procedure Code, from the examination of living persons, which may be carried out without the authorization of the investigating judge in the form of a visual examination.

At the same time, it should be borne in mind that, in accordance with subparagraph 2) of part 3 of Article 255, and Article 132 of the Criminal Procedure Code, when a person suspected of committing a criminal offence is detained in accordance with the procedure provided for in Articles 128 and 131 of the Criminal Procedure Code, the criminal prosecution bodies shall have the right to carry out a personal search of the person without the authorization of the investigating judge.

Also in accordance with sub-paragraph 16) part 2 of Article 11 of the Law of the Republic of Kazakhstan "On operational and investigative activities" within the framework of the general operational and investigative activities, the body carrying out operational and investigative activities within the limits of its competence, without the authorization of the investigating judge, but with the mandatory participation of the persons concerned, shall have the right to carry out an inspection of the detained person, an inspection and seizure of the items and documents under its control, as well as an inspection of residential premises, workplaces and other places, and an inspection of vehicles that may be considered.

Footnote. Paragraph 15 as amended by the regulatory resolution of the Supreme Court of the Republic of Kazakhstan dated 21.04.2011 № 1 (shall be enforced from the day of its first official publication).

16. In assessing the legality of the entry into, inspection and search of the residence, the courts must be guided by the provisions of Articles 25 of the Constitution and 17 of the Criminal Procedure Code on the inviolability of the residence, so that the above-mentioned actions may be carried out only in cases and in accordance with the procedure established by law. The need for strict observance of the procedural procedure provided for in Articles 197, 198, 199, 219, 220, 224, 252, 254 and 256 of the Criminal Procedure Code should be considered not only as compliance with the requirements of the law, but also as a mechanism guaranteed by law for the protection of the inviolability of the residence and the protection of privacy, personal and family secrets.

In the absence of the consent of the persons residing in the home, the house shall be inspected and searched on the basis of a reasoned decision of the investigator authorized by the investigating judge.

In accordance with Articles 219 and 220 of the Criminal Procedure Code, the residence may be inspected with the consent of the adult residents.

In accordance with part 14 of Article 220 of the Criminal Procedure Code, if the residence is the scene of the incident and its inspection is not urgent, the inspection of the residence may be carried out by order of the person conducting the pre-trial investigation, but with subsequent submission of the materials to the investigating judge within a daily period.

A copy of the order shall be sent to the prosecutor at the same time.

The investigating judge shall verify the legality of the examination and shall make a decision on its legality or illegality, which shall be attached to the criminal case file.

In the event of a decision on the illegality of the inspection, the results cannot be admitted as evidence in the case.

Footnote. Paragraph 16 as amended by the regulatory resolution of the Supreme Court of the Republic of Kazakhstan dated 20.04.2018 № 8 (shall be enforced from the day of its first official publication).

17. Since restriction of a citizen's right to privacy, residence, correspondence, telephone conversations, postal, telegraph and other communications shall be permitted only in cases and in the manner expressly established by law (paragraph 1 and 2 of Article 18, paragraph 1 of Article 25, and Article 39 of the Constitution) courts should assume that operational investigative measures restricting the specified constitutional rights of citizens can be carried out only if the conditions specified in Article 12 of the Law "On operational investigative activities". The list of bodies authorized to carry out operational investigative activities shall be contained in Article 6 of the Law.

The results of these operational investigative measures can be used as evidence in cases in the procedure provided for in Chapter 30 of the Criminal Procedure Code "Covert investigative activities"

Carrying out investigative activities on covert listening and recording of negotiations and conversations shall be carried out on the basis of and in accordance with the procedure provided for in Chapter 30 of the Criminal Procedure Code.

If investigative activities have been carried out in violation of the rules established by law or by bodies not entitled to carry out them, all the materials obtained as a result shall be subject to recognition as invalid evidence.

Footnote. Paragraph 17 as amended by the regulatory resolution of the Supreme Court of the Republic of Kazakhstan dated 20.04.2018 № 8 (shall be enforced from the day of its first official publication).

18. The courts should verify whether measures have been taken at the pre-trial stage of criminal proceedings to ensure the confidentiality and non-disclosure of the circumstances of the private life of persons during inspection, search, seizure and other activities related to the proceedings. In case of detection of violations related to non-compliance with the requirements of the Constitution for the protection of the above-mentioned rights, the courts, together with the adoption of the measures provided for by law for their protection, must issue private resolution for the adoption of appropriate measures.

19. Higher courts, when considering complaints and motions for judicial acts, in addition to verifying the arguments contained therein, should pay due attention to compliance at the pre-trial and judicial stages of criminal proceedings with the requirements of the law prohibiting arbitrary restrictions on the rights and freedoms of citizens.

Footnote. Paragraph 19 as amended by the regulatory resolution of the Supreme Court of the Republic of Kazakhstan dated 20.04.2018 № 8 (shall be enforced from the day of its first official publication).

20. According to Article 4 of the Constitution, this regulatory resolution shall be incorporated into the law in force and shall be generally binding and shall be enforced from the date of its official publication.

Footnote. Paragraph 20 as amended by the regulatory resolution of the Supreme Court of the Republic of Kazakhstan dated 20.04.2018 № 8 (shall be enforced from the day of its first official publication).

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