

On practice for enforcement of the legislation establishing liability for human trafficking

Unofficial translation

Normative Decree of the Supreme Court of the Republic of Kazakhstan dated December 29, 2012 No. 7.

Unofficial translation

Footnote. Throughout the text: figures "133", "132-1", "270" shall be replaced with figures "135", "134", "308" according to the regulatory resolution of the Supreme Court of RK dated 31.03.2017 № 3 (shall be enforced from the date of its first official publication)

In order to ensure the correct and unified enforcement of the Laws of the Republic of Kazakhstan and international treaties ratified by the Republic of Kazakhstan related to human trafficking, the plenary session of the Supreme Court of the Republic of Kazakhstan

hereby RESOLVED as follows

1. To draw the attention of the authorities conducting criminal proceedings to the fact that the correct enforcement of legislation establishing liability for human trafficking shall ensure the adequate protection of human rights and freedoms.

Footnote. Paragraph 1 as amended by the regulatory resolution of the Supreme Court of the Republic of Kazakhstan dated 31.03.2017 № 3 (shall be enforced from the date of its first official publication); No. 3 of 08.12.2021 (shall become effective on the date of first official publication).

2. The objective aspect of the offences covered by Articles 128 and 135 of the Criminal Code of the Republic of Kazakhstan (hereinafter the CC) shall be the infringement of human rights and freedoms and shall be reflected in buying, selling or carrying out other transactions with regard to a person, their exploitation, recruitment, transportation, transfer, harbouring or other acts for the purpose of exploitation.

To qualify an act under part one of Article 128 of the Criminal Code and under part one of Article 135 of the Criminal Code, it shall be sufficient to establish that at least one of the acts specified in the disposition of these articles has been committed.

No special purpose of exploitation shall be required to qualify, under Articles 128 and 135 of the Criminal Code, the sale or other transactions in respect of the victim, since the person is not the object of the transactions and such transactions shall be invalid from the moment of their conclusion.

The purpose of exploitation of a human being shall be a mandatory element in the recruitment, transportation, transfer, harbouring, receipt of a victim, as well as in other acts

stipulated by Articles 128, 135 of the Criminal Code. The corpus delicti of human trafficking shall be formal and shall be deemed completed from the moment of actual purchase and sale, other transactions in respect of a human being.

The object of the crime of human trafficking shall be the freedom of the person, his/her personal safety, rights and legitimate interests, honour and dignity, the right to free choice of residence, occupation and profession.

The subjective side of buying and selling a human being or committing other transactions with regard to the human being shall be characterized by the direct intent. Therefore, the purpose of such transactions shall be irrelevant for qualification of the deed under part one of Article 128 of the Criminal Code and under part one of Article 135 of the Criminal Code.

When committing the recruitment, transportation, transfer, harbouring, receipt of a person and other actions under Articles 128, 135 of the Criminal Code, the subjective side of the crime shall be characterised by the direct intent, and the purpose of the crime shall be exploitation of a person.

The means of committing crimes may include the use of violence, the threat of violence, kidnapping, the threat to spread defamatory information, photos or videos, blackmail, bribery, deception, abuse of power, use of material or other dependence, deliberate creation of difficult personal or family circumstances, and the like.

Footnote. Paragraph 2 as amended by Regulatory Resolutions of the Supreme Court of the Republic of Kazakhstan No. 3 of 31.03.2017 (shall be promulgated from the date of first official publication); No. 3 of 08.12.2021 (shall enter into force from the date of first official publication).

3. By purchase and sale should be meant an illegal reimbursable transaction in which one party (seller) transfers a person to the other party (buyer) for a certain reward.

Other transactions that incur criminal liability under Article 128 of the Criminal Code or under Article 135 of the Criminal Code should include giving (transfer of a person to another person free of charge), man (exchange of a person for something), exchange (replacement of one person with another), lease (transfer of a person for temporary possession and use) the abandonment of the person as a security for the performance of the obligation under the transaction concluded between the parties, the use of the person as the object of payment, the transfer of the person for the purpose of obtaining any benefits of a non-material nature and others.

4. The purchase or sale of other transactions in relation to a person should be considered a final offence from the moment of transfer of the person to other persons. At the same time, the time of receipt of remuneration for sale of a person or for performance of other transactions shall not matter.

In addition to buying, selling or entering into other transactions with respect to the victim, either involving the victim in prostitution or in procurement for a profit or in organizing or maintaining the house for prostitution without the purpose of exploiting the same victim in

other forms (e.g. forced labour, begging, etc.), each act recognized by the court as proven shall be independently qualified under a set of relevant articles: for carrying out a transaction - under Articles 128, 135 of the Criminal Code, for involvement in prostitution - under Articles 134, 308 of the Criminal Code, for procurement or organization and maintenance of a house for prostitution- under Article 309 of the Criminal Code.

Footnote. Paragraph 4 as amended by the regulatory resolution of the Supreme Court of the Republic of Kazakhstan dated 31.03.2017 № 3 (shall be enforced from the date of its first official publication)

5. Recruitment shall refer to obtaining the victim's consent to perform any work or activity, including unlawful work, if it is related to the purpose of its exploitation. The ways of recruitment can be different: promise of remuneration, offer of employment, deception, persuasion, blackmail, intimidation, threat and others.

Recruitment in human trafficking shall be distinguished from involvement in prostitution by the moment of its termination: recruitment shall be deemed completed when the person being recruited consents to be exploited, whereas involvement in prostitution shall be deemed completed when one of the described actions aimed at involvement in prostitution has been committed, regardless of whether or not the person induced to the said activity has succeeded in doing so.

If the intent of a person to recruit only for prostitution is directed, the act shall be subject to criminal law assessment under the relevant Article 308 or 134 of the Criminal Code, since the criminal law standards providing for the liability for recruitment for the purpose of sexual exploitation and involvement in prostitution shall be in the state of competition provided for in part 3 of Article 12 of the Criminal Code. Involvement in prostitution and procurement for profit shall be a form of exploitation, which, with regards to Articles 128, 135 of the Criminal Code, shall be special standards.

Footnote. Paragraph 5 as amended by the regulatory resolution of the Supreme Court of the Republic of Kazakhstan dated 31.03.2017 № 3 (shall be enforced from the date of its first official publication); No. 3 of 08.12.2021 (shall be put into force as of the date of first official publication).

6. Transportation of a person shall mean intentional acts carried out for the purpose of exploitation of a person to move him from one place to another, including within the same settlement. At the same time, the mode of transport, the time and the method of transportation of a person shall not be important for the qualification of the act. Transportation may be expressed not only in the delivery of the person being transported accompanied by someone, but also in the purchase of travel documents to the place of travel to the person being transported, where the victim shall go on his own. Transportation shall be deemed to be completed from the beginning of its operation.

7. "Transfer" means the direct transfer of an injured person for exploitation.

The actions of persons who have transferred and received a person for the purpose of exploitation by themselves or other persons are subject to qualification under the relevant part of Article 128 of the Criminal Code, and in relation to a minor - under the relevant part of Article 135 of the Criminal Code.

Footnote. Paragraph 7 as amended by the regulatory resolution of the Supreme Court of the Republic of Kazakhstan dated 11.12.2020 № 6 (shall be enforced after the day of its first official publication).

8. Concealing a person for the purpose of exploitation shall mean concealing the victim from law enforcement authorities, relatives and other persons until an opportune moment for transportation, transfer, sale or other transactions (e.g. concealment in special premises, obstruction of free movement, drug-induced suppression of physical or mental activity). Concealment may take the form not only of physical concealment of the victim, but also of other actions that make it difficult to locate the victim (changing documents, appearance, etc.)

Footnote. Paragraph 8 - as reworded by Regulatory Resolution of the Supreme Court of the Republic of Kazakhstan No. 3 of 08.12.2021 (shall take effect from the date of its first official publication).

9. Paragraph 1 of Article 3 of the Criminal Code should guide the definition of “human exploitation” in relation to Articles 128, 135 of the Criminal Code.

In dealing with cases of trafficking in persons, it shall be noted that Law of the Republic of Kazakhstan No. 37-IV of June 4, 2008 ratified the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, adopted by the United Nations General Assembly on November 15, 2000.

The exploitation provided for in Article 128 of the Criminal Code shall take various forms (sexual exploitation, forced labour, begging, etc.). The Criminal Code shall not allocate to a separate special standard such forms of human exploitation as labour exploitation or begging. Therefore, in cases of purchase, sale or other transactions against the victim with further exploitation of the victim not only by involvement in prostitution and appropriation of the proceeds, but also in other forms of exploitation (forced labour, etc.), such acts shall indicate the commission by the perpetrator of acts united by a common intention to achieve a single purpose - the exploitation of the victim, and shall be classified as one offence provided for in Articles 128 or 135 of the Criminal Code without additional qualification under Articles 308, 134 of the Criminal Code.

The victim's consent to the planned operation shall not be taken into account if any of the means of action specified in part 2 of Article 128 of the Criminal Code have been used.

The consent of the minor victim to the planned exploitation for criminal prosecution shall not taken into account under Article 135 of the Criminal Code.

Footnote. Paragraph 9 as amended by the regulatory resolution of the Supreme Court of the Republic of Kazakhstan dated 31.03.2017 № 3 (shall be enforced from the date of its first official publication); No. 3 of 08.12.2021 (shall come into force on the date of first official publication).

9-1. Other acts for the purpose of exploitation of a person shall be deemed to include soliciting customers, organising tenders for sale, exchange and other transactions, including those involving the use of telecommunications networks, and so forth.

Footnote. Regulatory Resolution has been supplemented by paragraph 9-1 as per Regulatory Resolution of the Supreme Court of the Republic of Kazakhstan No. 3 of 08.12.2021 (shall be effective from the date of its first official publication).

9-2. In contrast to the criminal offences of trafficking in persons, criminal liability for acts under Articles 152, 153, 156, 395 of the Criminal Code may be incurred where there is an employment relationship between the employer and the employee and where there is no purpose of exploitation.

Footnote. Regulatory Resolution has been supplemented by paragraph 9-2, in line with the Regulatory Resolution of the Supreme Court of the Republic of Kazakhstan No. 3 of 08.12.2021 (shall be promulgated from the date of the first official publication).

10. Forced use of the victim for sexual acts (indecent acts, creation of pornographic pictures, video clips) shall be covered by the dispensation of Articles 128, 135 of the Criminal Code and additional qualifications under Article 134 or Article 308 of the Criminal Code shall not be required.

Since, under part three of Article 13 of the CC, when the general and special norms are competing, no offence entails cumulative offences and the act is subject to classification under the respective special norm, enticement into prostitution and procurement for profit, being special norms concerning acts of sexual exploitation in human trafficking envisaged under Articles 128 and 135 of the CC, shall be classified under the respective Article 134, 308 or 309 of the CC without additional classification under Articles 128 or 135 of the CC.

The courts should bear in mind that the organization of a house for prostitution, maintenance of a house for prostitution and self-serving procurement provided for in Article 309 of the Criminal Code shall be separate acts and they shall constitute an offence. It shall be possible to organize a house for prostitution to engage in prostitution without its maintenance, or only to maintain such a house for prostitution without engaging in procurement or procurement for a self-serving purpose without organizing and maintaining a house for prostitution.

Pandering shall be undertaken by facilitating prostitution based on an agreement reached with the person providing sexual services for profit.

Footnote. Paragraph 10 as amended by the regulatory resolution of the Supreme Court of the Republic of Kazakhstan dated 31.03.2017 № 3 (shall be enforced from the date of its first

official publication); No. 3 of 08.12.2021 (shall become effective on the date of first official publication).

11. Persons, in respect of whom at least one of the actions specified in Articles 128 and 135 of the CC has been directly committed, shall be recognised as victims. When it is required to clarify the harm caused to a person against whom the above actions have been committed, the bodies conducting the criminal proceedings shall be entitled to involve persons with special knowledge.

To ensure the safety of victims, the bodies conducting criminal proceedings shall, in the course of pre-trial proceedings, take the measures prescribed by Articles 96 and 97 of the Code of Criminal Procedure of the Republic of Kazakhstan (hereinafter the CCP) and, in court proceedings, by Article 98 of the CCP.

Pursuant to Article 47 of the Code of Criminal Procedure, the bodies in charge of criminal proceedings must ensure the confidentiality of data relating to the victim's intimate circumstances and private life.

Victims shall not be held liable for acts constituting criminal or administrative offences committed by them during or as a result of being trafficked, on the grounds envisaged in Articles 23, 32, 33, 34, 36, 37 of the Criminal Code and sub-paragraph 11) of paragraph one of Article 741 of the Code of Administrative Offences (e.g. for illegal migration, intentionally crossing the state border of the Republic of Kazakhstan, failure to comply with an expulsion decision, violation of residence rules, use of forged documents, illegal employment, etc.)

Footnote. Paragraph 11 as amended by Regulatory Resolutions of the Supreme Court of the Republic of Kazakhstan No. 3 of 31.03.2017 (shall be brought into force from the date of first official publication); No. 3 of 08.12.2021 (shall be put into force from the date of first official publication).

12. Two or more persons may be trafficked simultaneously or at different times. The identification of the guilty person's actions on the grounds of repeated crimes or the commission of an act against two or more persons should be based on the orientation of his intent, the nature of the specific actions, the length of time between the crimes and the other circumstances of the crime committed.

Acts not covered by a single intent against several victims at different times shall be subject to qualification under paragraph 2, part 2 of Article 128 of the Criminal Code and under paragraph b), and part 2 of Article 135 of the Criminal Code.

The actions of the perpetrator against two or more persons committed with a single intent shall be subject to qualification under paragraph 2, part 2 of Article 128 of the Criminal Code and under paragraph 5, part 2 of Article 135 of the Criminal Code.

The actions of the person who committed the completed crime of human trafficking, preparation for it and attempt on it shall form a set of crimes.

When classifying human trafficking on the basis of repetition, it is necessary to take into account the provisions of Article 12 of the Criminal Code that the repetition of criminal

offenses shall be recognized as the commission of two or more acts provided for by the same article or part of the article of the Special Part of the Criminal Code. In this regard, crimes committed against an adult and a minor shall constitute repetition and shall be subject to the classification of Articles 128 and 135 of the Criminal Code.

Human trafficking committed with the same intent against two victims, one of whom is a minor and the other an adult shall be subject to qualification under the second part of Article 128, paragraph 6) of the Criminal Code and the corresponding part of Article 135 of the Criminal Code.

Footnote. Paragraph 12 as amended by the regulatory resolution of the Supreme Court of the Republic of Kazakhstan dated 31.03.2017 № 3 (shall be enforced from the date of its first official publication); dated 11.12.2020 № 6 (shall be enforced after the day of its first official publication).

12-1. In the characterization of actions under the second part of Article 128, paragraph 3) and 4), of the Criminal Code and the second part of Article 135, paragraphs 3) and 4) of the Criminal Code should be guided by the explanations contained in paragraphs 21 and 23 of the Supreme Court decision No. 8 of 11 July 2003 on judicial practice in embezzlement cases and in the qualification under the second part of Article 128, paragraph 5) of the Criminal Code, and the second part of Article 135, paragraph 11) of the Criminal Code - explanations given in paragraph 9) of the regulatory resolution of the Supreme Court dated May 11, 2007 No. 1 “On qualification of some criminal offences against human life and health”.

Footnote. The regulatory resolution as added by the paragraph 12-1 in accordance with the regulatory resolution of the Supreme Court of the Republic of Kazakhstan dated 11.12.2020 № 6 (shall be enforced after the day of its first official publication).

13. In order to qualify the actions of the accused under the second part of Article 128, paragraph 7), of the Criminal Code and the second part of Article 135, paragraph 6) of the Criminal Code, it must be established that trafficking in persons committed for the purpose of removing the victim's organs or tissues for transplantation or other use, regardless of whether human organs and tissues have actually been removed and used.

Actions involving the forcing to seize or illegally seize organs and tissues of a living person, in the absence of signs of an actions provided for in Article 128 or 135 of the Criminal Code, shall be subject to independent qualification according to a special standard of criminal law - the corresponding part of Article 116 of the Criminal Code.

Murder committed for the purpose of using human organs and tissues shall be classified as a combination under the second part of Article 128, paragraph 7) of the Criminal Code or, respectively, under the second part of Article 135, paragraph 6) of the Criminal Code and under the second part of Article 99, paragraph 12) of the Criminal Code, regardless of whether its organs and tissues had been actually seized and used.

Footnote. Paragraph 13 –in the wording of the regulatory resolution of the Supreme Court of the Republic of Kazakhstan dated 11.12.2020 № 6 (shall be enforced after the day of its first official publication).

14. Under paragraph 8, part 2 of Article 135 of the Criminal Code, the commission of human trafficking shall be liable in cases of deception or abuse of the trust of the victim. As a result, the victim, without assuming that the perpetrator acts with intent to sell him, shall perform other transactions and actions aimed at his exploitation, shall be in servitude.

Footnote. Paragraph 14 as amended by the regulatory resolution of the Supreme Court of the Republic of Kazakhstan dated 31.03.2017 № 3 (shall be enforced from the date of its first official publication)

15. Under paragraph 9, part 2 of Article 128 of the Criminal Code and paragraph 8, part 2 of Article 135 of the Criminal Code, the actions of an official who shall have committed crimes should be classified using his or her official position as working in state or non-state organizations. Human trafficking committed by an official shall be a qualifying feature of the offence and no additional qualification shall be required under Article 361 of the Criminal Code.

Footnote. Paragraph 15 as amended by the regulatory resolution of the Supreme Court of the Republic of Kazakhstan dated 31.03.2017 № 3 (shall be enforced from the date of its first official publication)

15-1. Trafficking of a minor for the purpose of involving him in the commission of crimes or other antisocial actions shall be qualified under the second part of Article 135, paragraph 9) of the Criminal Code, regardless of the real achievement of this goal. If the goal is achieved and the minor is involved in the commission of criminal offenses, then the action shall be subject to qualification according to the totality of crimes provided for the second part of Article 135, paragraph 9) of the Criminal Code and the corresponding part of Article 132 of the Criminal Code.

Footnote. The regulatory resolution as added by the paragraph 15-1 in accordance with the regulatory resolution of the Supreme Court of the Republic of Kazakhstan dated 11.12.2020 № 6 (shall be enforced after the day of its first official publication).

16. Under paragraph 10, part 2 of Article 128 of the Criminal Code and paragraph 10, part 2 of Article 135 of the Criminal Code, acts committed against a victim who shall be materially or otherwise dependent on the guilty person.

The material dependence of the victim, for example, may be expressed by finding him fully or partially dependent on the guilty person, living in the housing of the guilty person. By other dependence it shall be necessary to mean any intangible dependence of the victim on the guilty person (for example, family relations, dependence of the subordinate on the head, the student on the teacher).

Footnote. Paragraph 16 as amended by the regulatory resolution of the Supreme Court of the Republic of Kazakhstan dated 31.03.2017 № 3 (shall be enforced from the date of its first official publication)

17. Parts 3 of Articles 128 and 135 of the Criminal Code shall provide for liability for human trafficking committed for the purpose of removal (shipment) outside the Republic of Kazakhstan, import into the Republic of Kazakhstan or transportation (transit) of a person through the territory of the Republic of Kazakhstan from one foreign state to another, as well as export outside the Republic of Kazakhstan, import into the Republic of Kazakhstan or transportation of a person through the territory of the Republic of Kazakhstan from one foreign State to another State for the purpose of committing such acts.

These actions shall not require additional qualification under Article 392 of the Criminal Code, if during the import or export, transit of a person, crossing the State border of the Republic of Kazakhstan has been carried out through checkpoints without violating the established procedure and without the use of forged documents or without fraudulent use of valid documents of third parties.

Footnote. Paragraph 17 as amended by the regulatory resolution of the Supreme Court of the Republic of Kazakhstan dated 11.12.2020 № 6 (shall be enforced after the day of its first official publication).

17-1. Trafficking in human beings shall be distinguished from organising illegal migration under Article 394 of the Criminal Code.

The purpose of organising illegal migration shall be the illegal movement of persons or a person, and the purpose of human trafficking shall be the exploitation of a person.

Trafficking may not necessarily involve crossing a state border. It can take place within a single state.

In the organisation of illegal migration, the transaction between the one who is smuggling others across the state border and the person being smuggled shall cease once his/her purpose has been achieved. Trafficking, on the other hand, shall involve the loss of personal freedom of the trafficked person, their subordination. Such a transaction shall not end when she arrives at her destination, where human trafficking begins.

Footnote. Regulatory Resolution has been supplemented by paragraph 17-1 in line with Regulatory Resolution of the Supreme Court of the Republic of Kazakhstan No. 3 of 08.12.2021 (shall be promulgated from the date of the first official publication).

18. On paragraph 1 part 4 of Article 128 of the Criminal Code and on paragraph 1, part 4 of Article 135 of the Criminal Code shall be qualified as the human trafficking made by criminal group which according to explanation of paragraph 24 of Article 3 of the Criminal Code shall be qualified as the organized group, the criminal organization, criminal community, transnational organized group, the transnational criminal organization, transnational criminal community, terrorist group, extremist group, gang, illegal paramilitary force treat.

Footnote. Paragraph 18 as amended by the regulatory resolution of the Supreme Court of the Republic of Kazakhstan dated 31.03.2017 № 3 (shall be enforced from the date of its first official publication)

19. It should be borne in mind that human trafficking, which by negligence resulted in the death of the victim or other serious consequences shall involve the commission of an offence with two forms of the guilty person. The acts committed referred to in Articles 128 of the Criminal Code or 135 of the Criminal Code, which by negligence resulted in the death of the victim or other serious consequences, shall not require additional qualification.

Other serious consequences may be recognized as mental disorder and other serious diseases. If other intentional crimes are committed against the victim during the exploitation (for example, murder, rape, HIV/AIDS infection, sexually transmitted diseases, illegal abortion, etc.) then the act shall be qualified for a combination of crimes.

Footnote. Paragraph 19 as amended by the regulatory resolution of the Supreme Court of the Republic of Kazakhstan dated 31.03.2017 № 3 (shall be enforced from the date of its first official publication)

20. Kidnapping or unlawful deprivation of freedom for the purpose of exploitation and subsequent criminal acts related to human trafficking shall be qualified for a combination of offences under paragraph 2, part 3 of Article 125 of the Criminal Code or under paragraph 2, part 3 of Article 126 of the Criminal Code and the relevant parts of Articles 128 or 135 of the Criminal Code.

Kidnapping of the victim for the purpose of exploitation by deception, further transportation without elements of seizure and forced displacement in space shall form the recruitment and transportation of a person for the purpose of exploitation in human trafficking, and the act in general should be qualified only under the relevant part of Article 128 of the Criminal Code without enforcing the criminal and legal standards provided for in paragraph 2, part 3 of Article 125 of the Criminal Code.

Footnote. Paragraph 20 as amended by the regulatory resolution of the Supreme Court of the Republic of Kazakhstan dated 31.03.2017 № 3 (shall be enforced from the date of its first official publication)

21. According to Article 4 of the Constitution of the Republic of Kazakhstan, this regulatory resolution shall be included in the existing law, as well as shall be generally binding and shall be enforced from the date of its official publication.

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