

On the procedure of criminal proceedings in cassation instance

Invalidated Unofficial translation

Normative Resolution of the Supreme Court of the Republic of Kazakhstan dated June 29, 2017 No. 5. Abolished by the regulatory decree of the Supreme Court of the Republic of Kazakhstan dated 03/10/2022 No. 2

Unofficial translation

Footnote. Abolished by the regulatory decree of the Supreme Court of the Republic of Kazakhstan dated 03/10/2022 No. 2 (effective from 07/01/2022)

In connection with the amendment of the criminal procedure legislation on the review of judicial acts that have come into legal force in cassation procedure and for the purpose of its uniform application, the plenary session of the Supreme Court of the Republic of Kazakhstan

hereby decrees:

1. To clarify that in the cassation procedure in accordance with the norms of chapter 52 of the Criminal Procedure Code of the Republic of Kazakhstan (hereinafter referred to as the CPC), verdicts and decisions of courts of first instance that have entered into legal force after consideration by the court of appeal, as well as sentences and decisions of appellate courts may be reviewed.

In the case of withdrawal of appeals in accordance with the procedure, established by the law, judicial acts of the court of first instance shall not be subject to review by the cassation instance, as they have not been considered in the court of appeal.

If the consideration of the case at the appellate court took place on the basis of complaints from other participants in the proceedings or against the protest of the prosecutor, this does not mean that the author of the petition complied with the requirements of article 484 of the CPC for a personal appeal to the court of appeal. In cases where the court of appeal considers appeals of the defense counsel, representative or legal representative in the interests of the convicted (acquitted), or representative or legal representative in the interests of the injured, the petitions filed by the convicted (acquitted) or victims shall be reviewed in cassation procedure, notwithstanding their personal appeal to the court of appeal.

2. According to part three of article 484 of the CPC, judicial acts in case of non-observance of the appeal procedure for appealing them, as well as judicial acts in cases of criminal misconduct and crimes of minor gravity, can be reviewed in cassation only upon the protest of the General Prosecutor of the Republic of Kazakhstan (

hereinafter referred to as the General Prosecutor) or on the proposal of the President of the Supreme Court of the Republic of Kazakhstan (hereinafter referred to as the President of the Supreme Court), subject to the grounds provided for by the relevant parts of article 485 of the CPC.

3. Consideration of a case in the cassation instance shall be carried out upon receipt of a judge's decision to transfer the petition with the case for consideration at the hearing of the cassation instance if there are grounds for reviewing judicial acts, as well as the representation of the Chairman of the Supreme Court, the protest of the Prosecutor General, made by them both on their own initiative and at the request of the persons referred to in the first part of article 486 of the CPC, on the grounds provided for by article 485 of the CPC.

Persons listed in part one of article 414 of the CPC, the right to file a motion for judicial acts that have entered into legal force and in those cases when they did not participate in the consideration of the case in previous judicial instances, but subject to the requirement that the sentence be reviewed, the decision on appeal.

Clarify that other persons, who have the right to petition for the review of judicial acts in so far as they affect their rights and legitimate interests, shall include persons who are not recognized in the established manner by certain participants in the process, but based on their actual provisions requiring judicial protection (mortgagor, person whose property has been seized, and others). The right to appeal to the court of cassation with a request to verify the legality of the issued private decision has a person with respect to whom measures may be applied that affect his rights and legitimate interests in connection with the circumstances specified in the private decision.

The petitions of persons who are not participants in the process should indicate to what extent the judicial act affects their rights and legitimate interests, what norms of the law are violated during the consideration of the case, as well as the essence of the request indicating specific grounds that entail, in their opinion, the review of judicial acts.

The legal representative of a convicted minor has the right to file a motion for judicial acts that have entered into legal force only until the convicted person reaches the age of majority, unless there are other grounds provided for by law for the person to participate in the case as the legal representative of the convicted.

4. Upon receipt of a petition, protest, submission to the court of cassation, it is necessary to verify that the author complies with the procedural time limits provided for by article 487 of the CPC. Failure to comply with the time limit indicated in part two of article 487 of the CPC should be the grounds for making a decision on the return of the petition, protest, plea without consideration.

5. The grounds for the review of judicial acts that have entered into legal force should be considered violations of the constitutional rights and freedoms of citizens

committed during pre-trial or judicial review of the case, or such improper application of the criminal and criminal procedural laws that entailed the onset of at least one of the consequences specified in part one of article 485 of the CPC. The list of the indicated grounds for the review of the entered into force judgments and decisions is exhaustive. For the reasons specified in part two of article 485 of the CPC, verdicts and decisions may be reconsidered upon a plea, protest, and in the absence of consequences , specified in part one of article 485 of the CPC.

6. Improper application of the law as the grounds for reviewing a verdict or decision in cassation procedure may consist of a court's erroneous interpretation of the criminal or criminal procedural norm of the law when it is applied, or in non-compliance with the requirements set forth in it, as well as in other violations committed by the court during consideration cases if these violations entail the onset of the consequences referred to in part one of article 485 of the CPC.

7. In accordance with paragraph 1) of part one of article 485 of the CPC an innocent convicted person should be understood as a person against whom a guilty verdict has been passed in the absence of the event of criminal infraction, a criminal offense or in the absence of evidence of a person's participation in a criminal infraction .

8. Unjustified verdict or decision on termination of a case should be regarded as unreasonable if the evidence in the case was given an improper evaluation, the court's conclusions contradict the actual circumstances of the case, the material or procedural laws are improperly applied, or other circumstances are established that exclude the legality and validity of the decision to acquit the defendant or dismissal. Other violations of the criminal procedure law alone may not be the grounds for reviewing an acquittal that has entered into legal force, a decision to terminate a criminal case or other decision made in favor of the defendant if these court decisions are not actually challenged in a petition, protest.

9. The imposition of a sentence by a court without observing the requirements of the law on its individualization, although within the limits of the sanction of the article of the criminal law, according to which the act is qualified, does not correspond to the gravity of the deed and the personality of the convicted person due to its excessive severity or excessive leniency, is an independent basis for reviewing the sentence in cassation proceedings.

Punishment shall be recognized inconsistent with the gravity of the criminal infraction and personality of the convicted also in cases when it exceeds the limits of sanction of article of the Special Part of the Criminal Code of the Republic of Kazakhstan, or when a lesser sentence is assigned than it is provided by a relevant article of the Criminal Code of the Republic of Kazakhstan (hereinafter referred to as the CC), without application of article 55 of the CC. The inconsistency of the

punishment with the gravity of the criminal infraction and the personality of the convicted person may also occur with its correct choice, but with an incorrect determination of its size or term.

The inconsistency of the punishment with the gravity of the criminal infraction and personality of the convicted due to its excessive leniency may also be evidenced by assignment of punishment without consideration of circumstances stipulated by article 54 of the CC, assignment of a lesser sentence than it is stipulated by the law, in case of the absence of exceptional circumstances, stipulated by article 55 of the CC, assignment of a punishment without consideration of the recidivism of crimes, unreasonable use of conditional conviction, etc.

As an excessively severe punishment should be recognized the punishment, which clearly does not correspond to the nature and degree of public danger of the criminal offense, the identity of the perpetrator and the specific circumstances of the case, mitigating responsibility, as well as in cases where the court did not use the possibilities provided for by law for applying punishment not related to deprivation of liberty, assigned a punishment without regard to requirements of articles 52, 53 of the CC.

10. On the grounds provided for in paragraph 4) of the first part of article 485 of the Code of Criminal Procedure, sentences and decisions on applications for persons that are recognized as established by the victim, his representative or legal representative may be revised.

The deprivation of the victim's right to judicial protection may be evidenced by the unjustified non-recognition of the person as a victim, significant violations of his rights stipulated by articles 71, 72, 73 and 76 of the CPC, in particular, the non-recognition of the victim by the private prosecutor in case the prosecutor refuses the charge, the deprivation of his right to participate in court proceedings, appearing in judicial debates, incorrect resolution of a civil lawsuit filed by a victim (civil plaintiff) and others that influenced on the appropriateness of the criminal case in a substantial manner. Inappropriate application of the law, as well as explanations, provided in the Regulatory Resolution of the Supreme Court of the Republic of Kazakhstan dated June 20, 2005 no. 1 "On consideration of a civil claim in the criminal proceeding", entailed inappropriate resolving of the civil claim, except for cases of leaving the claim without consideration, are grounds for reviewing the entered into force of sentences and decisions in this part.

11. Retrial in the cassation instance of enforced verdicts and decisions, issued by the court в кассационной инстанции вступивших в законную силу приговоров и постановлений, вынесенных судом with the participation of jurors, carried out on the grounds stipulated by articles 665, 666 of the CPC.

12. In accordance with article 493 of the CPC the execution of the judicial act, on the revision of which the petition has been filed, the protest has been brought, may be suspended for a period not exceeding three months in whole or in part, as if there is such a request in the petition, the protest, and in the absence of such a request. A protest has been filed on the suspension of the execution of the sentence, the decision on the review of which the petition has been submitted, a reasoned decision must be made by the Chairman of the Supreme Court or the General Prosecutor indicating the term of the suspension, which should immediately be sent to the relevant bodies for execution.

Suspension of execution of the enforced verdict or decision of the court according to the grounds indicated in article 493 of the CPC, shall be allowed simultaneously with the certiorari, and may extent until consideration of the cassation petition, protest, plea, but not longer than three months, after which the decision to suspend the execution of court decisions in respect of which the petition was filed, a protest was brought, loses its effect.

The verdict of acquittal, the decision on termination of the case may not be suspended.

The grounds for the suspension of the execution of the sentence, the decision on the review of which the petition was filed, the protest was brought, may be related both to the convicted persons themselves, for example, to the execution of the sentence of life imprisonment or the death penalty, to the execution of the sentence if the convicted person has a serious illness, or with close relatives of the convicted, when the execution of the sentence may have a negative impact on them. The grounds for the suspension of the execution of the sentence, the decision on the review of which the petition has been filed, a protest has been brought, must be confirmed by duly executed documents.

When suspending the execution of the verdict, the application of punishment, assigned by the court, shall be postponed.

13. The structure and content of petitions, protests, pleas on review of a final judgment, court decisions, should meet the requirements of article 488 of the CPC.

If these requirements are not met, they will be returned to the authors within three days by a letter from the cassation judge to eliminate the deficiencies. In these cases, after removing the obstacles that served as the basis for the return of the petition, protest, plea, these persons shall be entitled to appeal again to the court of cassation on a common basis.

In cases provided for in paragraphs 3) and 4) of part one article 489 of the CPC, by results of preliminary consideration of the petition, the judge shall bring the decision.

14. The judge's decision based on the preliminary consideration of the petition must indicate the circumstances of the case, confirming the presence or absence of the grounds for reviewing judicial acts stipulated by article 485 of the CPC.

The decision to transfer the petition with the case for consideration at the court of cassation, if there are grounds for reviewing the judicial acts, should contain as an indication of what exactly the violations of the constitutional rights and freedoms of citizens committed during the investigation or judicial review of the case, as well as violations of the criminal or criminal procedure laws (their incorrect application), and the motives for which they should be considered significant, affecting the outcome of the case, and entailing the ensuing of consequences described in paragraphs 1) to 8) of the first part of article 485 of the CPC.

In the decision on refusal to submit the petition for consideration by the court of cassation due to the lack of grounds for reviewing the judicial acts to the judge, within the meaning of paragraph 6) of part two of article 491 of the CPC, it is necessary to indicate the conclusions of the petitions, the reasons for the procedural decision, substantiated responses to the arguments of the application, which disputes the legality of the verdict, court decision.

15. To clarify that the concept of considering a case on the same grounds that have already been considered should include cases where the previous decision of a cassation judge assessed the legality, objectivity, reliability and fairness of a judicial act, concluded that the convicted person was proved guilty or absent evidence guilty justified, on qualification of the offense, proportionality of punishment and the same arguments in one interpretation or another are given in a new petition. In this case, the application must be regarded as repeated, and the decision provided for in paragraph 6) of part one of article 489 of the CPC.

The repeated petitions should also be considered cases of appeal by different defense counsels in the interests of one and the same person, in the same case, for the same reasons and with the same justification as had previously been considered, with the judge deciding to refuse to transfer the motion with the case for consideration by the cassation instance.

The petition, protest, entailing a repeated review in court of cassation of judicial acts, for which there is already a decision of the court of cassation, shall be subject to transfer and consideration at the court of cassation, but on other grounds.

16. When assigning a court proceeding of the cassation instance, it should be guided by the requirements of article 492 of the CPC.

Right for defense in the court of cassation shall be provided in accordance with requirements of articles 26, 27 of the CPC, as well as clarifications, contained in the

Regulatory Resolution of the Supreme Court of the Republic of Kazakhstan dated December 6, 2002 no. 26 "On the practice of application the criminal procedure laws regulating the right for defense".

According to part one of article 495 of the CPC, participation of a defense counsel in the judicial proceedings of the cassation instance shall be mandatory in cases provided for by part one of article 67 of the CPC. In these cases participation of the defense counsel shall be provided for by the court.

At the same time, it is necessary to keep in mind that in accordance with paragraph 9) of part one of article 67 of the CPC, the mandatory participation of a defense counsel shall be determined by the participation in the court session of the prosecutor supporting the public prosecution (public prosecutor). Since the prosecutor does not perform the functions of the public prosecutor in the court of cassation, but expresses an opinion on the cassation petitions under consideration, lays out the arguments indicated in the protest, gives an opinion on the legality of the judicial acts held in the case, his participation in the cassation court shall not entail the mandatory participation of the defense counsel.

17. The date of the consideration of the case by the cassation instance should be determined subject to the possibility of proper notification of persons with the right to participate in the meeting, as well as of persons in respect of whom the petition for review of the court decision has been filed, a protest, a plea have been brought, in connection with which they must be notified of the consideration of the case with the date, time, place of the hearing, or notified of the possibility of familiarizing themselves with their electronic copies through the Internet resource of the Supreme Court of the Republic of Kazakhstan. The indicated persons should be sent copies of the judge's order on the transfer of the petition with the case for consideration at the court of cassation, as well as copies of the protest, plea.

18. Under scientific conclusion of the specialists, which in accordance with part three of article 490 and part two of article 492 of the CPC the court is entitled to demand from the relevant specialists, it should be understood an analysis of norms of the law and conclusions of certain specialists on problematic (disputable) issues, arisen during application of the norms of the law on the case in hand.

At the same time, the expert opinions should not contain conclusions regarding the evidence or unproven guilt of a person in committing an offense, qualification of the offense and sentencing. If necessary, these specialists can be summoned to a court of cassation for clarification.

Participants of the process, presenting at the meeting of the cassation board should be subject to familiarization with the scientific conclusion of the specialists.

19. The court hearing on the consideration of petitions, protests, pleas shall be carried out in the manner provided for in article 494 of the CPC. Based on the results

of the consideration of the case in cassation, the court makes one of the decisions specified in part seven of this article.

The conclusions of the court of cassation on the legality and validity of verdicts and decisions that entered into legal force should be based on the materials of the case and should not be based on materials not contained in the case. A court examining a case in accordance with the cassation procedure shall not have the right to consider facts, data on which, although available in the case file, were not investigated by the courts of the first and appeal instances and were not established by them in a verdict, decision, or rejected by the court.

When considering a case with a submitted application, the cassation court verifies all the arguments of the application in full.

20. The court of cassation was not entitled to establish the presence or absence of evidence necessary for the proper resolution of the case. Circumstances that appeared after the enforcement of the verdict may not be considered by the court of cassation, since they were not and could not be considered in the courts of first instance or appeal. Additional materials attached to the petition, protest, plea, relevant to the case and testifying to the erroneousness of the application by the courts of the first or appeal instance of the material or procedural law, the reliability and admissibility of the evidence used by the court to establish the evidence (lack of evidentiary support) of the charge, the role and degree of guilt of the convicted person, lack of justified guilt and other circumstances affecting the correctness of the resolution of the case, can serve as the basis for the annulment of the sentence a systematic way the case for a new trial.

21. The concept of ensuring uniform judicial practice is provided for in paragraphs 4) and 5) Regulatory Resolution of the Supreme Court of the Republic of Kazakhstan dated January 15, 2016 no. 1 " On the right of access to justice and powers of the Supreme Court of the Republic of Kazakhstan in reviewing judicial acts".

At the same time, a violation of uniformity in the interpretation and application of the rules of law by the courts, entailing a review of judicial acts under cassation procedure, should be understood as an interpretation of the law that distorts the true meaning of the legal provision applied by the court and leading to an erroneous assessment of the conduct of the convicted (acquitted) person, his qualifications, sentencing, a significant violation of the criminal procedure law, resulting in the issuance of an illegal and unreasonable verdict, decision.

22. The limits of consideration of a case in the court of cassation, set out in article 494 of the CPC, are exhaustive and not subject to broad interpretation. At the same time, it should be borne in mind that the court is not connected with the arguments of the petition, protest, plea, and shall be entitled, going beyond them, to check the entire proceedings in full and make a decision that improves the situation of the convicted (acquitted).

Petitions on application of provisions of article 6 of the CC on the retroactive effect of the criminal law, the amnesty act in cassation procedure shall not be considered, since the resolution of these issues is related to the jurisdiction of the courts operating at the place of execution of the sentence.

At the same time, in a context where a case is considered based on the grounds, stipulated by article 485 of the CPC, and simultaneously there are circumstances, allowing the applying provisions of article 6 of the CC, of the act on amnesty, the cassation instance shall take decision with application of the indicated norms of the law

23. The law does not require from the court of cassation when considering petitions, protests, pleas and judicial decisions regarding convicted persons in the case of which petitions, protests, pleas have not been submitted. At the same time, if their actions are inextricably linked with the actions of the persons in respect of whom the petition has been filed, a protest, a plea to a sentence, a court order have been brought, and a change in the qualification of a criminal offense committed by them in complicity entails a change in the qualification of the actions of other convicted persons, or termination of the case in with respect to them, the court has the right to review the verdict and court decision in respect of those convicted persons for whom petitions, protests, pleas have not been submitted, provided that their situation is not worsening. Under the same conditions, in order to improve the situation of the convicted persons, judicial acts may be reviewed in respect of persons for whom petitions, protests, pleas have not been filed, based on constitutional principles on the assigning the judicial power aimed at protecting the rights, freedoms and legitimate interests of citizens and organizations, on the application of the new law, if after the commission of the infraction, the responsibility for it by law is canceled or mitigated. In this case, the court should give reasons in the decision, in which connection the court decisions in relation to other persons were reviewed.

If the verdict and decision were reviewed only in relation to the person about whom the petition, protest, or plea was filed, and only on the arguments set forth in them, and in the other part or in relation to other convicted persons they were not reviewed, then the court must indicate this in the decision so as not to deprive the possibility of filing a petition to the same court by other convicted persons or by the same convicted persons, but with different claims or a new argumentation of the previous claims.

24. Grounds for cancellation or change in the verdict shall be circumstances, indicated in article 433 of the CPC. The court of cassation without the right to refer the case for a new trial shall be entitled, on the grounds set forth in the protest of the prosecutor or the petition of the victim, to change the verdict, the decision in the direction of worsening the situation of the convicted person, if this is connected with:

unlawful and unreasonable mitigation of punishment for the convicted court of appeal; with an increase in punishment, the term and amount of which was incorrectly determined by previous courts as a result of an arithmetic error or an error in offsetting the period of preliminary detention of a person in custody or in the addition of sentences on the totality of criminal offenses or on the totality of sentences; with an increase in the amount to be recovered from the convicted in a civil suit.

25. In case of establishing the violations of law resulting in the unlawful termination of the case or mitigation of punishment for the convicted person committed by the appellate, cassation instances, the Supreme Court shall have the right to cancel or change the decisions made by the indicated instances, and at the same time, without sending the case for a new judicial review, decide on the legality of the sentence (decision) of the trial court, changing or leaving it unchanged.

26. To recognize invalid:

1) decree of the Plenum of the Supreme Court of the Republic of Kazakhstan dated April 28, 2000 no. 2 "On the procedure of On proceedings in criminal cases in the supervisory instance";

2) Regulatory Resolution of the Supreme Court of the Republic of Kazakhstan dated June 25, 2010 no. 16 "On amendments and additions to the decree of the Plenum of the Supreme Court of the Republic of Kazakhstan dated April 28, 2000 no. 2 "On the procedure of On proceedings in criminal cases in the supervisory instance";

3) paragraph 1-1 of the Regulatory Resolution of the Supreme Court of the Republic of Kazakhstan dated April 4, 2013 no. 2 " On amendments and additions to certain normative decisions of the Supreme Court of the Republic of Kazakhstan";

4) decree of the Plenum of the Supreme Court of the Republic of Kazakhstan dated November 5, 1999 no. 18 "On certain issues arising in the judicial practice when applying the Law of the Republic of Kazakhstan dated July 13, 1999 "On amnesty in connection with the Year of unity and continuity of generations ".

27. According to article 4 of the Constitution, this Regulatory Resolution shall be included into the composition of the current law shall be compulsory and shall be enforced from the date of its first official publication.

Chairman

of the Supreme Court of the

Republic of Kazakhstan

Judge of the Supreme

Court of the Republic of Kazakhstan,

Secretary of the Plenary Session

K. MAMI

K. SHAUKHAROV