

Normative Resolution of the Supreme Court of the Republic of Kazakhstan dated 29 December 2012 #7 “On application of legislation determining liability for trafficking in human beings

In order to ensure proper and consistent application of laws of the Republic of Kazakhstan and international agreements ratified by the Republic of Kazakhstan in relation to trafficking in human beings, the plenary session of the Supreme Court of the Republic of Kazakhstan

has ruled:

1. To draw attention of authorities in charge of criminal proceedings to the fact that proper application of legislation determining liability for trafficking in human beings ensures proper protection of human rights and freedoms.

2. The objective side of crimes stipulated in articles 128 and 133 of the Criminal Code of the Republic of Kazakhstan (henceforth referred to as CC) lies in encroachment on human rights and freedoms and is expressed in trade or other transactions in relation to a person, their exploitation, recruitment, transportation, transfer, harboring as well as in commitment of other actions for the purpose of exploitation.

In order to qualify an act in accordance with clause one of article 128 of CC and clause one of article 133 of CC, it is sufficient to determine the fact of commitment of at least one of the acts stipulated in dispositions listed in these articles.

The object of crimes involving trafficking in human beings is freedom of a person, their personal safety, rights and legal interests, honor and dignity and right to a free choice of residence, occupation and profession.

The subjective side of trade in persons or other transactions involving a human being is characterized by direct intention. That is why the purpose of commitment of such transactions bears no significance for qualification of an act in accordance with clause one of article 128 of CC and clause one of article 133 of CC.

In case of recruitment, transportation, transfer and harboring of a human being, the subjective side of the committed crime is characterized by direct intention whereas the objective of the crime is exploitation of that human being.

3. Trade implies illegal for-profit transaction one party to which (the seller) transfers a human being to another party (buyer) for a certain payment.

Other transactions entailing criminal liability in accordance with article 128 of CC or article 133 of CC include gift (transfer of a person to another person free of charge), exchange (exchange of a person for something else), swap (replacement of one person for another), lease (transfer of a person for temporary ownership and use in exchange for payment), transfer of a person as security for fulfillment of a liability in a transaction between parties, use of a person as means of payment, transfer of a person with the purpose of receiving non-material benefits and others.

4. A trade or commitment of other transactions in relation to a human being with the purpose of exploitation shall be considered as crime completed from the moment of transfer of that human being to other people. In such a case, the time of receipt of payment for sale of a human being or for commitment of other transactions has no significance.

5. Recruitment shall be understood as obtaining consent of a victim for performance of some work or some activity, including illegal one, if it is done with the purpose of their exploitation. Recruitment methods may differ and include: a promise of payment, offer of a job, deception, persuasion, blackmail, bullying, use of threat and so on.

6. Transportation of a person implies intentional actions on their relocation from one place to another, including within the limits of one locality, committed with the purpose of exploitation

of that person. In this respect, the type of vehicle, time and method of transportation of a human being are of no significance for the purpose of qualifying an action. Transportation can express itself not only in delivery of a transported person in the company of another person but also in acquisition of travel documents to that person valid up until the destination point where the victim travels on their own. Transportation shall be considered as completed from the moment of its start.

7. Transfer shall be understood as direct transfer of a victim to another person with the purpose of their exploitation.

Actions of people who transferred and received a person with the purpose of their exploitation by themselves or by other people shall be qualified in accordance with the relevant clause of article 128 of CC while if the action involves a minor, it shall be qualified in accordance with the relevant clause of article 133 of CC. It shall also be qualified based on characteristic of its commitment by a group of people upon preliminary agreement.

8. Harboring a person with the purpose of their subsequent exploitation shall be understood as concealment of a victim from law enforcement authorities, relatives and other people (for example, concealment in special premises, ban on exiting this or that territory, suppression of physical or psychological activity by use of medication). Concealment may be expressed not only through physical concealment of a victim but also through other actions that make it difficult to find the victim (alteration of documents, appearance modification and so on).

9. When defining the concept of “exploitation of a human being” in accordance with articles 128, 133 of CC, one shall be guided by the explanatory note to article 125 of CC.

10. Forced exploitation of a victim for commitment of actions of sexual character (sexual abuse, making of pornographic photos and videos) is covered in disposition of articles 128, 133 of CC where additional qualification in accordance with article 132-1 or article 270 of CC is not required.

11. Victims shall be acknowledged as people in relation to whom at least one of actions stipulated in articles 128,133 of CC is committed directly. Courts have a right to involve people who have specific knowledge when it is required to determine the harm caused to the person in relation to whom the above-mentioned actions have been committed.

In order to ensure victims’ safety, authorities conducting criminal proceedings must take measures stipulated in articles 99-100 of the Criminal Procedural Code of the Republic of Kazakhstan (henceforth referred to as CPC), if at the stage of preliminary investigation, and in accordance with article 101 of CPC if at the stage of court trial.

In accordance with article 53 of CPC, they shall ensure confidentiality of information related to personal circumstances and personal life of the victim.

Victims shall not be liable for illegal migration, intentional illegal crossing of the state border of the Republic of Kazakhstan, non-observance of a decision on deportation, breach of rules of stay in the country, use of fake documents, illegal engagement in work if these actions have been committed by victims as a result of their submission into trafficking.

12. Trafficking in human beings in relation to two or more people can be performed at one point in time or in various points in time. When qualifying actions of the suspect based on characteristics of repeated crimes or commitment of the act in relation to two or more people, one shall take into account the target of their intention, nature of specific acts, periods of time between crimes and other circumstances under which the crime was committed.

In case if actions in relation to several victims at different points in time were not performed with a common intention, they shall be qualified in accordance with sub-clause b) of clause two of article 128 of CC and clause б) of clause 2 of article 133 of CC.

Actions of the suspect committed against two or more people with common intention shall be qualified in accordance with sub-clause e) of clause two of article 128 of CC and clause д) of clause two of article 133 of CC.

Actions of a person who committed a completed crime involving trafficking in human beings, preparation to it and attempt at it constitute an aggregate of crimes.

13. In order to qualify actions of a suspect in accordance with sub-clause ж) of clause two of article 128 of CC and subclause e) of clause two of article 133 of CC, one shall determine whether the case of trafficking in human beings was committed with the purpose of extraction of organs or tissues of a victim for transplantation or other use.

Actions involving coercion to extract or illegally extract organs and tissues of a human being shall be subject to independent qualification in accordance with the relevant clause of article 113 of CC.

14. In accordance with sub-clause з) of clause two of article 128 of CC, and sub-clause ж) of clause two of article 133 of CC, liability for commitment of the crime involving trafficking in human beings is applied in cases of deception or abuse of trust of a victim. As a result of this, the victim, unaware that the suspect is acting with the intention of selling him / her and performing other transactions and actions directed at his / her exploitation, find herself / himself in a servile status.

15. Actions of an official who committed the crime in abuse of his / her office within state bodies or non-state organizations, shall be qualified in accordance with sub-clause и) of clause two of article 128 of CC and sub-clause з) of clause two of article 133 of CC. A case of trafficking in human beings committed by an official is a qualifying characteristic of this crime and no additional qualification in accordance with article 307 of CC is required.

16. Actions committed against a victim who found himself in material or another type of dependence on the suspect shall be qualified in accordance with sub-clause к) of clause two of article 128 of CC and sub-clause к) of clause two of article 133 of CC.

Material dependency of a victim can, for example, be expressed in his / her total or partial dependence on subsistence provided by the suspect and / or lodging in the premises provided by the suspect. Other types of dependence shall be understood as any non-material dependence of the victim on the suspect (for example, family relations, dependence of a subordinate on his / her supervisor, dependence of a student on his / her teacher).

17. Clauses three of articles 128 and 133 of CC stipulate liability for trafficking in human beings committed with the purpose of smuggling (dispatch) to outside of the territory of the Republic of Kazakhstan, smuggling into the territory of the Republic of Kazakhstan or transit of a person through the territory of the Republic of Kazakhstan from one foreign state to another with the purpose of commitment of such actions.

18. Trafficking in human beings committed by an organized group – a sustainable group of people who came together in advance with the purpose of commitment of one or several crimes – shall be qualified in accordance with sub-clause а) of clause four of article 128 of CC and sub-clause а) of clause four of article 133 of CC. An organized group shall be distinguished from a group of people united through preliminary agreement, based on characteristics of sustainability and organized nature.

Sustainability of a group can be identified as an association of two or more people for a comparably long period of time with the purpose of commitment of one or several crimes associated with long-term joint preparation for or complicated commitment of a criminal act. An organized group is characterized by submission of participants of a group to instructions of one or several people and determination to achieve criminal goals in an organized way.

Actions of each participant of an organized group who committed a crime of trafficking in human beings, independent of his / her role, shall be qualified in accordance with sub-clause a) of clause four of article 128 of CC without reference to article 31 of CC. Set up of an organized group as well as leadership over it or participation in it shall be subject to independent qualification in accordance with relevant clauses of article 235 of CC.

19. One shall take into account the fact that trafficking in human beings which, through inadvertence, resulted in death of a victim or other serious consequences, shall be assumed as commitment of a crime with two forms of guilt. Committed crimes stipulated in articles 128 of CC or 133 of CC which, through inadvertence, resulted in death of a victim or other serious consequences shall not require additional qualification.

Psychological disorder or other serious diseases may also be considered as other grave consequences. In case if other intentional crimes, for example, murder, rape, contamination with HIV/AIDS and / or sexually transmitted diseases, illegal abortion and so on) are committed against a victim in the course of his / her exploitation, the committed act shall be qualified as an aggregate of crimes.

20. Abduction or illegal deprivation of liberty of a human being with the purpose of his / her exploitation as well as subsequent criminal acts involving trafficking in human beings shall be qualified as an aggregate of crimes in accordance with sub-clause б) of clause three of article 125 of CC or sub-clause б) of clause three of article 126 of CC and relevant parts of articles 128 or 133 of CC.

21. In accordance with article 4 of the Constitution of the Republic of Kazakhstan, this regulatory statute shall be included in existing law, shall be generally binding and is enacted from the day of its official publication.

**Chairman of the Supreme Court of the
Republic of Kazakhstan**

B.Beknazarov

**Judge of the Supreme Court of the Republic
of Kazakhstan, plenary session secretary**

D.Nuralin