

On the judicial practice of parole from serving of sentence, replacing the unserved part of sentence with more lenient punishment and reducing the term of the inflicted penalty

Unofficial translation

Normative decision of the Supreme Court of the Republic of Kazakhstan dated October 2, 2015 No. 6.

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For purposes of ensuring correct and uniform application of the norms of the Criminal, Criminal Procedure and Penal Execution Codes of the Republic of Kazakhstan on issues of parole from serving of sentence, replacing the unserved part of sentence with more lenient punishment and reducing the term of the inflicted penalty, the plenary session of the Supreme Court of the Republic of Kazakhstan resolves:

1. The parole from serving of sentence, replacing the unserved part of sentence with more lenient punishment or reducing the term of the inflicted penalty shall be the complex legal institutions. The issues of their application shall be resolved in accordance with the procedure established by Articles 72, 73, 86 and 87 of the Criminal Code of the Republic of Kazakhstan (hereinafter referred to as the CC), by Articles 476, 477, 478 and 480 of the Criminal Procedure Code of the Republic of Kazakhstan (hereinafter referred to as the CPC) and by Articles 161, 162 and 169 of the Penal Execution Code of the Republic of Kazakhstan (hereinafter referred to as the PEC).

2. To draw the attention of the courts to the fact that the first paragraph of the first part of Article 72 of the Criminal Code establishes the possibility for the court to apply the parole of a convicted person who has served the legally prescribed part of the sentence imposed by the court verdict and does not need its full serving.

Paragraphs two and three of the first part of Article 72 of the Criminal Code provide for special conditions for the application of parole.

If the court establishes that, along with the actual serving of the legally provided sentence, the convicted person did not have gross violations of the serving sentence regime and fully compensated for the damage caused by the crime, then in accordance with the second paragraph of the first part of Article 72 of the Criminal Code he shall be the subject to parole without any additional conditions.

In the absence of at least one of these two conditions, the issue of parole of the convicted person shall be decided by the court in accordance with the rules enshrined in the first paragraph of the first part of Article 72 of the Criminal Code.

For the purposes of Articles 72 and 73 of the Criminal Code, the damage caused by a crime and subject to compensation shall include both the damage directly caused by a crime and other amounts recovered from a convicted person by a sentence or a court decision.

The amount of damage caused by a crime, subject to compensation to convicted persons, shall be established both by a court verdict and by a decision that has entered into legal force, adopted in the procedure of civil proceedings arising from a criminal case.

Footnote. Paragraph 2 as amended by the Regulatory Decree of the Supreme Court of the Republic of Kazakhstan dated 11.12.2020 № 6 (shall be enforced from the date of first official publication); dated 22.12.2022 № 10 (shall be enforced from the date of first official publication).

2-1. The convicted person can be released on parole on the basis of paragraph 5) of part three of Article 72 of the Criminal Code only if he fulfills all the conditions of the procedural agreement on cooperation and the occurrence of the results specified in part two of Article 621 of the Criminal Procedure Code.

Footnote. The regulatory decree is amended with paragraph 2-1 in accordance with the Regulatory Decree of the Supreme Court of the Republic of Kazakhstan dated 11.12.2020 No. 6 (shall be enforced from the date of first official publication).

3. When taking the decision of accepting the application of convicted person for release on parole or to replace the unserved part of the sentence with more lenient punishment, the court shall check whether it meets the requirements of the law (by the first, third, ninth parts of Article 162 of PEC and part two of Article 480 of the CPC), and whether the submitted materials contain data characterizing the convict's behavior, his/her attitude to work and training for the whole time of serving the sentence, are there copies of documents on the basis of which the convict person is serving his/her sentence, as well as information about the serving of the part of the sentence established by law.

If the submitted materials do not contain sufficient data for the consideration of the application and it is impossible to replenish it at court hearing, the judge, during the preparation for consideration of the application shall return these materials for the appropriate drawing up.

4. When considering the issue of parole from serving of sentence, replacing the unserved part of sentence with more lenient punishment, the participation of the convicted person, defense counsel, representative of the institution or the body executing the punishment, the prosecutor is mandatory, as well as the complainant or his representative is entitled to participate. Non-attendance of complainant, the civil plaintiff and their representatives shall not preclude the consideration of the application.

The court is obliged to notify them of the date, time and place of consideration of the application in an appropriate manner.

The official of the institution or body executing the punishment may be a representative in court if there is a power of attorney from the head of this institution or the body that executing

the punishment. This official shall not be entitled to appeal the court ruling. The convicted person, the complainant and their legal representatives, defense counsel shall have the right to appeal the court ruling, and the prosecutor shall have the right of lodging a protest.

5. Parole from serving a sentence, replacing the unserved part of the sentence with more lenient punishment may be applied to the convicted person after the actual serving of the terms specified, respectively, in parts three, four and five of Article 72, part two of Article 73, and for minors convicted person in part one of Article 86, part one of Article 87 of the Criminal Code.

6. When calculating the actually served term of punishment of the convicted person, the time shall be included of holding a person in custody until a sentence is passed and it comes into legal force. When calculating the actually served term of punishment of the convicted person, the time shall be included of holding a person in custody until a sentence is passed and it comes into legal force. If the decision to set off the indicated terms in the general term of punishment is not contained in the court verdict or in the court ruling issued in the course of the execution of the sentence, then the court, when applying the parole, shall decide on such set-off in its ruling in accordance with the requirements of parts three, four and five of Article 62 of the Criminal Code.

Parole shall not be applied to convicted persons referred to in part eight of Article 72 of the Criminal Code.

Footnote. Paragraph 6 as amended by the Regulatory Decree of the Supreme Court of the Republic of Kazakhstan dated 11.12.2020 No. 6 (shall be enforced from the date of first official publication).

7. In cases where the sentence of the convicted person was mitigated by an act of amnesty or pardon or by a decision of a higher court, the court shall calculate the actually served term of the sentence, when applying the parole from serving of sentence or replacing the unserved part of the sentence with more lenient punishment, on the basis of the sentence established by the act amnesty or pardon or a higher court ruling.

8. If a person has been convicted on several counts or cumulative sentences for committing offenses of various categories of gravity, then when deciding on the parole from serving a sentence or replacing an unserved part of a sentence with more lenient type of punishment, the court shall calculate the period after the actual serving of which it is possible to apply the parole from serving a sentence or replacing an unserved part of a sentence with more lenient type of punishment, according to the rules provided for by the third part of Article 72, part two of Article 73, part one of Article 86 of the Criminal Code, in relation to the most serious cumulative crime. At the same time, the arithmetic calculation of the term of punishment served by the convict and the term for which the convicted person was released on parole, or the term of punishment when it is replaced with a more lenient type, must be made based on the final punishment imposed on the totality of crimes or the totality of sentences.

Footnote. Paragraph 8 as amended by the regulatory resolution of the Supreme Court of the Republic of Kazakhstan dated 22.12.2022 No. 10 (shall be enforced from the date of first official publication).

9. Actual serving by the convicted person of a part of the sentence prescribed by the law, in accordance with parts three, four and six of Article 72, part two of Article 73, part one of Article 86 and part one of Article 87 of the Criminal Code, cannot serve as an unconditional basis for the parole or replacement of the unserved part of the sentence with more lenient type of punishment.

When deciding the issue on parole and replacement of the assigned punishment with more lenient type of punishment, the courts must ensure an individual approach and in each case establish whether the information contained in the application and in other materials is sufficient for parole from serving the sentence and replacement of the assigned punishment with more lenient type of punishment i.e., to assess the positive changes in the behavior of the convicted person.

When assessing the behavior of a convicted person, the courts must take into account: compliance with internal rules, compliance with the requirements of the administration of the institution of the penal system (hereinafter referred to as the Institution), participation in educational events and in the public life of the institution, promotion, recovery, keeping relations with relatives and prisoners, positive or negative attitude towards studies, compensation for damage, transfer to lighter conditions of detention and other circumstances that may indicate the correction of the convicted person.

The conclusion of court on the correction of the convicted person should be based on a comprehensive record of his behavior data not only for the time immediately preceding the consideration of the application, but for the entire period of stay in the institution, including the time of detention until the sentencing.

The credibility of the requirements provided for in Article 130 of the Penal Execution Code, shall be established on the basis of careful examination by the court of the materials of the personal file.

The penalties imposed on the convicted person for the entire period of serving the sentence, with the exception of those withdrawn and expunged, taking into account the nature of the violations committed, shall be assessed by the court in conjunction with other data characterizing it.

When examining the degree of correction of a convicted person, it is necessary to examine each fact of disciplining him on the subject of whether these violations are gross.

Footnote. Paragraph 9 as amended by the Regulatory Decree of the Supreme Court of the Republic of Kazakhstan dated 11.12.2020 No. 6 (shall be enforced from the date of first official publication).

10. In cases where the damage caused by the crime (material damage and non-pecuniary damage) was not compensated for in a civil lawsuit due to objective reasons such as the

convicted person's disability or the presence of diseases that impede employment, etc., the court shall not have the right to refuse in parole from serving a sentence or replacing an unserved part of a sentence with more lenient punishment only for this reason.

At the same time, the established facts of evading a convicted person from compensation for harm caused by a crime (by hiding property, income, evading work, etc.) along with other circumstances can serve as an obstacle to parole or replacing the unserved part of the sentence with more lenient punishment.

11. In accordance with the requirements of part five of Article 480 of the Code of Criminal Procedure, the issue of parole shall be considered by the court with the mandatory participation of the convicted person, and the court, in case of refusal to satisfy the application for parole in accordance with paragraph 3) of part seven of Article 480 of the Code of Criminal Procedure, has the right before going to the consultative room at the same meeting to take a decision on replacing the unserved part of the sentence with more lenient punishment, if there is a corresponding application from the convict.

If there are objections from the convicted person, the court shall not have the right to replace the unserved part of the sentence with more lenient punishment.

12. There shall not be cases of both the improper use of parole and replacement of the unserved part of the sentence with more lenient punishment, and the unreasonable refusal to exempt from further serving the sentence of the convicted person and the replacement of the unserved part of the sentence with more lenient punishment, in relation to convicted persons who do not need to serve their sentence in full.

Courts shall not have the right to refuse parole for reasons not prescribed by the Law, such as: leniency of the sentence imposed, the short stay of the convicted person in the institution, denial of guilt by the convicted person, past conviction, serving the sentence for a serious or especially serious crime, etc.

13. If the court decides on parole from serving a sentence or replacing the unserved part with more lenient type of punishment, the convicted person shall be released from custody after the decision comes into effect. The term of the unserved part of the sentence shall be calculated from the moment of the actual release of the convict. The court must immediately send a copy of the decision to the institution or body that executes the punishment, as well as to the court that delivered the sentence.

14. If additional punishment was imposed along with the main punishment, when considering the issue of parole or replacing an unserved sentence with more lenient punishment, the courts should discuss the possibility of release the convicted person in whole or in part also from the additional punishment.

If the additional punishment was executed (a fine has been exacted, the person has been deprived of a special, military or honorary title, class rank, state awards), the issue of release of the convicted person from this additional punishment shall not be considered. In case of partial execution of the additional punishment (a part of the fine was recovered), the court has

the right to decide on the partial or full release of the person from serving the remaining part of the additional punishment. In cases where the additional punishment (for example, deprivation of the right to hold certain positions or be engaged in certain activities) was not executed, the court has the right to release the convicted person from serving it in whole or in part. The court decision on this issue must be stated in the operative part of the decision.

When applying the provisions of Articles 72 and 73 of the Criminal Code, persons shall not be exempted from additional punishment in the form of life deprivation of the right to hold certain positions or engage in certain activities.

Footnote. Paragraph 14 as amended by the regulatory resolution of the Supreme Court of the Republic of Kazakhstan dated 22.12.2022 No. 10 (shall be enforced from the date of first official publication).

15. If a decision was made on parole from serving a sentence, the court must explain to the convicted person the provisions of part seven of Article 72 of the Criminal Code.

The court decision shall be made in the form of a ruling, which should be reasoned and contain a detailed justification of the conclusions reached by the court as a result of consideration of the application.

16. Cancellation of parole on the grounds specified in paragraph 1) of part seven of Article 72 of the Criminal Code is possible only upon the recommendation of the authorized state body.

In accordance with paragraph 2) of part seven of Article 72 of the Criminal Code in cases of committing a crime through negligence, as well as committing a criminal offense, a deliberate crime of minor gravity by a pregnant woman, a woman with young children, a man raising single-handed young children, a woman aged fifty-eight years old and older, a man sixty-three years old or older, a disabled person of groups I and II, the issue of canceling or maintaining parole shall be decided by the court when sentencing for a new crime.

This norm gives the right, but does not oblige the court to cancel parole, even if there are circumstances specified in the Law.

Footnote. Paragraph 16 as amended by the regulatory resolution of the Supreme Court of the Republic of Kazakhstan dated 22.12.2022 No. 10 (shall be enforced from the date of first official publication).

17. Malicious evasion of the duties entrusted by the court to the convicted person provided for in part two of Article 44 of the Criminal Code and part eight of Article 169 of PEC should be understood as repeated failure to perform such duties after a written warning was sent out by the body controlling the behavior of the convicted person about the possibility of canceling parole. At the same time, the question of whether evasion of the duties assigned by the court is malicious should be decided in each specific case, taking into account its duration and the reasons for evasion, as well as other circumstances.

Failure to fulfill duties assigned to convicted on parole by the court due to objective reasons that impeded their performance, for example due to illness, shall not be the reason for canceling parole.

18. When canceling parole, the unserved part of not only the main and also of the additional punishment shall be executed if the person has been released on parole from its serving.

When canceling parole on the basis of Paragraph 1) of part seven of Article 72 of the Criminal Code, serving the unserved part of imprisonment shall be determined for the convicted person at the institution of penal system from which he/she has been released on parole.

Footnote. Paragraph 18 as amended by the Regulatory Decree of the Supreme Court of the Republic of Kazakhstan dated 11.12.2020 No. 6 (shall be enforced from the date of first official publication).

19. When the court considers the application for parole from serving a sentence or for replacing the unserved part of the sentence with a more lenient type of punishment in relation to a foreign citizen who does not have a permanent residence in the territory of the Republic of Kazakhstan, along with other information characterizing the convicted person, the subject to assessment shall be also the data which is the evidence of the presence or absence on the part of the convicted person or foreign state of the guarantees for the execution of the sentence regarding the civil lawsuit reached by the agreement on the transfer of the convicted person on the conditions provided for by international treaties of the Republic of Kazakhstan to monitor the behavior of the convicted person and the possibility of establishing probation control to be executed during the period of parole in the territory of a foreign state.

In accordance with part two of Article 72 of the Criminal Code, the probation control shall not be established in case of release on parole of a foreigner or a stateless person, who was sentenced by a court to deportation from the Republic of Kazakhstan as an additional punishment.

Footnote. Paragraph 19 as amended by the Regulatory Decree of the Supreme Court of the Republic of Kazakhstan dated 11.12.2020 No. 6 (shall be enforced from the date of first official publication).

20. Persons whose imprisonment have been commuted to a more lenient type of punishment may be released on parole from serving a new more lenient type of punishment on the grounds of Article 72 of the Criminal Code.

In the context of part two of Article 72 of the Criminal Code, when a person is released on parole from punishment in the form of restriction of liberty, probation control shall not be established.

Footnote. Paragraph 20 as amended by the Regulatory Decree of the Supreme Court of the Republic of Kazakhstan dated 11.12.2020 No. 6 (shall be enforced from the date of first official publication).

21. In accordance with article 73 of the Criminal Code, the unserved part of the prescribed term of imprisonment for crimes of minor, medium gravity and grave crimes, taking into account the behavior of the convicted person, may be replaced by more lenient type of punishment specified in Article 40 of the Criminal Code: by fine, restriction of liberty.

A convicted juvenile serving a sentence of imprisonment, the unserved part of the punishment in accordance with Article 87 of the Criminal Code, shall be replaced by the court only with a restriction of liberty.

For foreigners and stateless persons, the unserved part of the sentence can be replaced only with a penalty with deportation beyond the Republic of Kazakhstan or without thereof.

Footnote. Paragraph 21 as amended by the Regulatory Decree of the Supreme Court of the Republic of Kazakhstan dated 11.12.2020 No. 6 (shall be enforced from the date of first official publication).

22. The court, having established that the convicted person who was denied parole by the court for serving a sentence or replacing the unserved part of the sentence with more lenient type of punishment, filed a second parole application earlier than the deadline established by part ten of Article 162 of the PEC, shall give a ruling to refuse to accept the application and shall return it to the convicted person. At the same time, the six-month period specified in the Law shall be calculated from the date of the ruling on the refusal of parole from serving a sentence or replacing the unserved part of the sentence with more lenient type of punishment.

23. The cancellation of parole for a convicted person in accordance with part seven of Article 72 of the Criminal Code may not serve as a ground for refusing to reapply parole from serving a sentence to him. In such cases, the court should proceed not only from the fact that the convicted person was canceled parole, but also take into account all the data on his personality, time spent in the correctional institution after returning there, his behavior, attitude to work, etc.

24. When considering the application of the General Prosecutor of the Republic of Kazakhstan or his deputy, made in accordance with the third part of Article 621 of the Code of Criminal Procedure, to reduce the unserved part of the punishment, the courts should ascertain compliance with the second part of Article 618 of the Code of Criminal Procedure when concluding a procedural agreement with the convicted person, whether the convicted person assisted in the disclosure of crimes related to subject of the procedural agreement on cooperation, the exposure of persons who have committed especially grave crime, crimes in the part of a criminal group, as well as extremist and terrorist crimes, and whether the guilty verdict came into legal effect in relation to the perpetrators. Therewith the unserved part of the sentence may be reduced by the court by no more than half.

25. To recognize as invalid the normative resolution of the Supreme Court of the Republic of Kazakhstan No. 10 “On parole and replacing the unserved part of the sentence with more lenient type of punishment” dated December 25, 2007.

26. In accordance with 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 enter into effect from the day of its official publication.

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Supreme Court
of the Republic of Kazakhstan
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