

ACTUAL PROBLEMS OF SETTLEMENT AND IMPLEMENTATION OF CRIMINAL LIABILITY FOR CRIMES RELATED TO ILLEGAL MIGRATION

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ABSTRACT

The problems addressed in the present research are related to the shortcomings of criminal law prohibitions in the field of combating illegal migration, which make it difficult for law enforcement activity to interpret and resolve the competition of articles 322.1, 322.2 and 322.3 of the Criminal Code of the Russian Federation (hereinafter - CCRF) and legal norms on liability for similar offenses. General scientific and privately-based methods among which the sociological methods of studying the materials of criminal cases and opinions of experts prevailed were used in the research. The statistical data of the Judicial Department under the Supreme Court of the Russian Federation, the results of a survey of 87 judges, of 260 servants of law enforcement bodies and 125 scientific and pedagogical employees working in Moscow, Moscow region, Tambov region, Tver region, Tula region and Yaroslavl region were analyzed. The materials which were provided by the Supreme Court of the Russian Federation (hereinafter – SCRF) containing a summary of judicial practice in criminal cases on such crimes have been studied. It is concluded that articles 322.1, 322.2 and 322.3 of the CCRF of the current edition do not meet the requirements of systemic and legal certainty and do not allow to form a unified practice of delineating the crimes they envisage from similar administrative offenses, they need to improve and clarify the interpretation of Plenum of the SCRF. It is proposed to supplement the dispositions of articles 322.1, 322.2 and 322.3 of the CCRF with new constitutive elements of the relevant body of offenses (committing an act by a person subjected to administrative punishment for the corresponding offense, its implementation against two or more Russian or foreign citizens, as well as stateless persons, malversation). Issues that need interpretation from the Plenum of the SCRF are also indicated.

Keywords: illegal migration, criminal liability, fictitious recording, fictitious registration

INTRODUCTION

In addition, a significant example of competition of rules of criminal and administrative law is the ratio of articles 322.2, 322.3 of the CCRF and Art. 19.27 of the CAORF "Provision of knowingly false information in the course of migration recording" the dispositions of which includes almost complete coincidence of the elements of the objective side of the body of crimes and offenses under consideration, since fictitious registration or recording presupposes the provision of false information expressed in that other form to the migration authorities.

We believe that the establishment and application of administrative-legal measures of response would be sufficient to effectively counteract the majority of offenses in the field of migration recording. The introduction of criminal liability for fictitious registration (recording) would be justified only when new articles 322.2, 322.3 of the CCRF include such criminological elements that would unequivocally point out the public danger of the actions which are prohibited by them and would allow the delimitation from similar administrative offenses. In particular, such elements could be the commission of an act by a person previously subjected to administrative punishment for the corresponding offense, its implementation against two or more Russian or foreign citizens, as well as stateless persons, malversation. 90.8% of the respondents among the number of judges, 76.54% of the polled employees of internal affairs agencies and 87.2% of scientific and pedagogical workers agreed with the need to introduce such alternative additional criminological elements in the dispositions of articles 322.2, 322.3 of the CCRF.

With regard to the organization of illegal migration which is prohibited by the Art. 322¹ of the CCRF, we should note that the study of the practice of application of this criminal law rule showed that it is not uncommon for the bodies of preliminary investigation to bring to responsibility, and the courts to convict for specific actions of employment and ensuring the residence of illegal migrants who do not have a public danger. At the same time, it is not taken into account that such administrative responsibility are provided for such violations of the migration legislation (Part 3, Article 18.9, Article 18.15 of the CAORF).

While a significant part of the respondents (34.48% of the judges, 48.08% of the Department of Internal Affairs' employees and 87.2% of the scientific and pedagogical employees) expressed the opinion that the criminal liability under Art. 322.1 of the CCRF, according to its literal interpretation should be applied precisely for the organizational activity, which consists in finding partners, planning these illegal actions, directing their commission, etc. We agree with the expressed opinion about the fact that within the meaning of this norm the organization of illegal migration should be expressed in a complex of actions carried out "... not with respect to one foreign citizen or stateless person, but with respect to an indefinitely large number of persons, therefore this act must be of an ongoing nature or be committed one-time, but in relation to a large number of people". At the same time, in order to give for greater certainty of the content of

dispositions of Part 1 of Art. 322.1 of the CCRF, we consider it expedient to include in it of such a crime-forming element as the commission of organizational actions systematically and (or) against two or more foreign citizens or stateless persons. About 51.72% of the respondents from among the judges, 58.46% of the interviewed Department of Internal Affairs' employees and 80.8% of the scientific and pedagogical workers agreed with this proposal.

The consolidation of the practice of the application of articles 322.1, 322.2 and 322.3 of the CCRF showed that the courts had no uniform approach to the legal assessment of the commission by the same person of several actions to organize illegal migration or fictitious registration at the place of residence or registration at the place of stay: in some cases, such actions are qualified as one continued crime, and in others - as a combination of two or more crimes.

In particular, when deciding on the qualification of actions to organize the illegal entry into the RF of several migrants which are committed simultaneously or for a short period of time, the courts mainly consider this committed act as one single complex crime if the relevant unlawful actions were covered by the common intent of the guilty persons. We believe that in most cases, the commission of two or more actions related to illegal migration is initially covered by the intent of the guilty persons, who usually deal with the relevant illegal activity on a regular, systematic basis, but the preliminary investigation bodies and then in some cases the courts qualify the deed not as one, but as a set of crimes.

The legal assessment of the considered violations of the migration legislation that have been committed in relation to two or more persons as a set of crimes is due to the approach which was developed in administrative practice, based on a note to Art. 18.9 of the CAORF, which stated that in case of violation of the established procedure for registration of documents for the right of stay of foreign citizens and stateless persons in Russia, their residence, movement, change of place of stay or residence in the Russian Federation and departure for two and more invited foreign citizens and (or) stateless persons, the administrative responsibility established by this norm applies with respect to each foreign citizen or stateless person separately.

We believe that in order to give uniformity to relevant judicial practice and to eliminate the prerequisites for render unfair law enforcement decisions on cases of crimes related to illegal migration, it is expedient for the Plenum of the SCRF to explain in which cases the commission of actions which are prohibited by articles 322.1, 322.2 and 322.3 of the CCRF, should be recognized as one, and in which – as complex of the relevant crimes.

Also very important and lacking in practice is the Interpretation of the Plenum of the SCRF on the issue of determining the timing of the end of such crimes, primarily those provided for in articles 322.2 and 322.3 of the CCRF. Regarding this issue, the judges drew attention to the problem that in practice, when determining the moment of the end of these crimes, it is customary to proceed from the fact of a fictitious registration (recording) take place, but it may be difficult to prove the person's lack of intention to stay (live) in a in a living

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premise. Particularly the lack of proof of the fact that the person registering (recording) someone at the place of residence (the place of stay) was aware of the fictitiousness of this legal fact, in practice can serve as the basis for the termination of the criminal case or the acquittal of this person.

With reference to articles 322.2 and 322.3 of the CCRF, we also point out the problem of exempting the perpetrators of criminal acts from criminal liability, taking into account the special conditions provided for in the notes to these criminal law norms, or more precisely, such an obligatory condition as facilitating the disclosure of a committed crime, which practice is extensively interpreted.

Facilitation of disclosure assumes that certain circumstances of a committed crime become known to law enforcement agencies through the efforts of that person. At the same time, courts recognize not only a turnout or truthful explanation given by a person in the course of an inspection under Art. 144 of the Code of Criminal Procedure RF as such assistance, but also consent to inspect the home in the absence of a judicial decision, consistent and truthful testimony during the investigation; a petition for an inquiry into the shortened form and / or the consideration of the case in a special order, that is, in most cases circumstances that cannot be regarded as facilitating the disclosure of a crime are taken into account.

In order to eliminate the highlighted problem, it seems advisable to abandon such notes, since the acts which are provided for in articles 322.2 and 322.3 of the CCRF in cases on which exemption from criminal liability on general grounds is possible, for example, due to active repentance (Art. 75 of the CCRF), one of the manifestations of which can be recognized the assistance not only in the disclosure, but also in the investigation of the crime fall into the category of minor crimes. Our proposal was supported by 62.22% of the surveyed judges, 76.54% of the employees of internal affairs agencies and 84% of the scientific and pedagogical employees.

In conclusion, we would like to notice that in the decisions of January 26, 2017 № 29-O and of September 27, 2017, № 2175-O, passed on complaints against Art. 322.3 of the CCRF as an insufficiently defined criminal-legal prohibition with unnecessarily strict sanction, the Constitutional Court of the RF, in particular, indicated that the disputed norm valid in the system of legal regulation does not contain uncertainty, and the resolution of the question of the scope of sanctions for the Articles of the Special Part of the CCRF is the prerogative of the federal legislator, who must take into account the need to ensure the proportionality of criminal penalties for the committed act and the balance of the individual's fundamental rights and the general interest in protecting the person, society and the state against crimes. At the same time, the very fact of such complaints together with the identified problems indicates the need to improve the legal regulation of legal liability for various violations of migration legislation.

CONCLUSION

Certainly, relations related to migration processes and ensuring proper order for the implementation of migration recording need criminal law protection, but this should be provided and implemented only with respect to those acts that have a public danger and on the basis of such provisions of the Special Part of the CCRF which exclude ambiguity and uncertainty in the regulation of the elements of the body of these crimes, as well as the conditions for the release from criminal liability of persons who committed the latter. The specifics of the body of crimes envisaged in articles 322.1, 322.2 and 322.3 of the CCRF and modern problems of regulating and realizing of responsibility for such crimes are considered in this paper. Currently, articles 322.1, 322.2 and 322.3 of the CCRF do not fully meet the requirements of systemic and legal certainty, they need to be improved, as well as implemented by the Plenum of the SCRF on the problematic issues of their application. We have identified these issues in the present paper, as well as areas for improving these criminal law norms, including the introduction of new constitutional and qualifying features in the body of relevant crimes. We believe that these proposals, when implemented, will help to eliminate the identified problems.

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