



RULING OF THE PLENARY SESSION OF THE SUPREME COURT OF THE RUSSIAN FEDERATION

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On Certain Issues of Judicial Practice in Cases on Crimes against Constitutional Human and Civil Rights and Freedoms (Articles 137, 138, 138.1, 139, 144.1, 145, 145.1 of the Criminal Code of the Russian Federation)

Everyone's right to inviolability of private life, personal and family privacy (Part 1 of Article 23 of the Constitution of the Russian Federation); privacy of correspondence, telephone communications, mail, cables and of other messages (Part 2 of Article 23); inviolability of one's home (Article 25); as well as the right to remuneration for labour, without any discrimination and at or above the minimum wage stipulated in federal law (Part 3 of Article 37); to state support for family, motherhood, fatherhood and childhood, for the disabled and elderly citizens (Part 2 of Article 7, Part 1 of Article 38), guaranteed by the Constitution of the Russian Federation, are in particular enforced by criminal liability for violation of those rights, stipulated in the norms of the Special Part of the Criminal Code of the Russian Federation.

In order to ensure the uniform court application of legislation on liability for the crimes stipulated in Articles 137, 138, 138.1, 139, 144.1, 145, 145.1 of the Criminal Code of the Russian Federation, the Plenary Session of the Supreme Court of the Russian Federation, guided by Article 126 of the Constitution of the Russian Federation, Articles 2 and 5 of Federal Constitutional Law No. 3 of 5

February 2014 “On the Supreme Court of the Russian Federation”, hereby rules to provide the following clarifications:

1. It is brought to the attention of the courts that in accordance with Parts 1 and 2 of Article 137 of the Criminal Code of the Russian Federation (hereinafter referred to as the CrC RF), criminal liability is entailed for collection or dissemination of information about the private life of a person that constitutes her/his personal or family privacy without the consent of such a person, unless there are grounds for receipt, use, provision of information about the private lives of citizens without their consent, stipulated in the Criminal Procedure Code of the Russian Federation and in other federal laws (in particular, Federal Law No. 144 of 12 August 1995 “On Operative-Investigative Activities”, Federal Law No. 3 of 7 February 2011 “On Police”, Federal Law No. 323 of 21 November 2011 “On Basics of Healthcare of Citizens in the Russian Federation”).

2. When resolving whether there are elements of a crime stipulated in Part 1 or 2 of Article 137 of the CrC RF in the actions of a person, the court should establish whether it was within that person’s scope of intent that the information about the private life of a citizen is kept secret by that citizen.

Taking into account the aforementioned norms of criminal law in their correlation with provisions of Item 1 of Article 152.2 of the Civil Code of the Russian Federation, criminal liability cannot be entailed by gathering or dissemination of such information for state purposes, for the public good or for other public purposes, as well as when the information about the private life of a citizen earlier became publicly available or was published by the citizen her-/himself or at that citizen’s discretion.

3. The gathering of information about the private life of a person is understood as any intended actions consisting in acquisition of such information through any means, e.g. through personal observation, eavesdropping, questioning of other persons, in particular with audio-, video-, photorecording, copying of documented information, as well as through theft or other procurement of such information.

The dissemination of information about the private life of a person is its transmission (divulgence) to one or several persons in oral, written or other form and using any means (in particular, through transfer of materials or publication of information with the use of information and telecommunication networks, including the Internet).

4. When considering cases on the crime stipulated in Article 138 of the CrC RF, the courts should take into account that the privacy of correspondence, telephone communications, mail, cables and of other messages is regarded as violated, when access to correspondence, communications, messages is gained without the consent of the person, whose private life they are a part of, unless there are lawful grounds for limiting the constitutional right of citizens to the privacy of correspondence, telephone communications, mail, cables and of other messages.

In particular, violation of the privacy of telephone communications is constituted through illegal access to information about the incoming and outgoing connection signals between subscribers or between subscriber equipment (date, time, duration of connections, subscribers' numbers, other data allowing to identify the subscribers).

Illegal access to the contents of correspondence, communications, messages may be constituted through inspection of the text and (or) materials of correspondence, messages, tapping of telephone conversations, audio messages, their copying, recording with the use of different technical devices, etc.

5. Other messages, referred to in Article 138 of the CrC RF, should be understood as messages of citizens transmitted via telecommunications networks, e.g. SMS and MMS messages, fax messages, instant messages, e-mails, video calls transferred via the Internet, as well as messages transmitted in other ways.

6. Illegal actions violating the privacy of correspondence, telephone communications, mail, cables, or other messages of concrete persons or of the general public should be qualified under Article 138 of the CrC RF, if such actions are committed with direct intent. Herewith, liability under this Article is entailed independent of whether the information transferred through correspondence, communications, messages constitutes personal or family privacy of a citizen.

7. Under Article 138.1 of the CrC RF, criminal liability for illegal production, procurement and (or) dealing in special technical means intended for covert information gathering is entailed, where such acts are committed in violation of requirements of legislation of the Russian Federation (e.g. Federal Law No. 144 of 12 August 1995 "On Operative-Investigative Activities", Federal Law No. 99 of 4 May 2011 "On Licensing of Certain Types of Activities", decrees of the Government of the Russian Federation No. 770 of 1 July 1996, No. 214 of

10 March 2000, No. 287 of 12 April 2012), without the corresponding license and not for the purposes of activities of bodies vested with the powers to engage in operative-investigative activities.

8. By implication of law, technical devices (smartphones, voice recorders, video recorders, etc.) may only be recognised as special technical means, if through engineering modifications, programming or other actions, performed with direct intent, they were given new qualities and features, making it possible to gather information covertly with their use.

Where special knowledge is required to establish whether a technical device pertains to the means intended (engineered, fitted, programmed) for covert information gathering, the court must have the corresponding statements of an expert or specialist at its disposal.

9. It is clarified to the courts that participation in the illegal turnover of special technical means cannot itself serve as evidence of the person's guilt in the perpetration of the crime stipulated in Article 138.1 of the CrC RF, unless that person's intent was directed at the procurement and (or) dealing in exactly such means (for example, a person used a publicly accessible Internet resource to acquire special technical means advertised as a consumer device, making an honest mistake regarding their actual purpose).

Likewise, if a person acquired a covert information gathering device with the intent of using it, for example, in order to ensure her/his personal safety, the safety of her/his family members, including children, the safety of her/his property or for the purpose of tracking animals and had no intent of using it as an instrument of infringement of constitutional rights of citizens, such actions cannot be qualified under Article 138.1 of the CrC RF.

10. It is brought to the attention of the courts that Article 139 of the CrC RF stipulates criminal liability for entering one's home, where this is done against the will of the person residing therein, unless there are grounds for limiting the constitutional right to inviolability of home, stipulated in the Criminal Procedure Code of the Russian Federation and in other federal laws (in particular, Article 15 of Federal Law No. 3 of 7 February 2011 "On Police", Part 3 of Article 3 of the Housing Code of the Russian Federation, Items 5, 6 of Part 1 of Article 64 of Federal Law No. 229 of 2 October 2007 "On Enforcement Procedure").

11. In accordance with the provisions of Article 139 of the CrC RF, criminal liability under that Article is entailed for illegal entry into an individual residential house, including the residential and non-residential premises comprising it (e.g. veranda, attic, built-in garage); entry into one's residential premises, independent of the form of property, which are part of the housing fund and fit for constant or temporary dwelling (apartment, room, service residential premises, residential premises in a dormitory, etc.); entry into other premises or building that are not part of the housing fund, but are designated for temporary dwelling (apartment unit, garden house, etc.).

Herewith, if a person illegally enters another's premises, buildings that are structurally separate from the individual residential house (a tool shed, bath-house, garage, etc.), these actions cannot be qualified under the aforementioned Article, unless such premises were specially accommodated, equipped for dwelling; the same applies to entry into premises designated only for temporary stay, but not dwelling (a train compartment, ship cabin, etc.).

12. By implication of Article 139 of the CrC RF, illegal entry into one's home may take place without physical entry, but through the use of technical or other means, when such means are used for violating the inviolability of home (e.g. for illegal instalment of an eavesdropping or video surveillance device).

13. With regard to the fact that criminal liability for violating the inviolability of home is entailed where the guilty person illegally enters one's home, knowing that he/she is acting against the will of the person dwelling therein, if a person enters one's home through deceit or abuse of trust, this is qualified under Article 139 of the CrC RF.

If a person stays in another's home with the consent of the person dwelling therein, but refuses to leave the premises when requested to do so, this does not constitute the elements of said crime.

14. The courts should take into account that during illegal entry of another's home, the intent of the guilty person must be directed at violating the right of persons dwelling therein to its inviolability. When resolving whether the person had such intent, the court should proceed from the totality of facts of the case, in particular whether that person had relationships with the persons dwelling in the premises, building and the nature of those relationships, the way in which the person entered said premises, and other facts.

15. If the guilty person used violence or threatened to use violence at the moment of entering the premises or directly afterwards in order to realise the intent of illegal entry of another's home, her/his actions may be qualified under Part 2 of Article 139 of the CrC RF.

16. It is brought to the attention of the courts that criminal liability stipulated in Articles 144.1, 145 of the CrC RF for refusing to hire or firing a person of preretirement age (indicated in Note to Article 144.1) or a pregnant woman (when the guilty person knows about the pregnancy), or a woman, who has children under the age of 3 (mother, adoptive mother, custodian mother or foster mother raising one or more children under the age of 3), without a good reason is entailed only when the employer was guided by the discriminatory motive, pertaining, accordingly, to the fact that the person has reached preretirement age, that the woman is pregnant, or that the woman has children under the age of 3.

If the employment contract with an employee was dissolved upon the employee's initiative, but there is evidence in the case that the employer forced the employee to file a letter of voluntary resignation particularly due to preretirement age, pregnancy or having children under the age of 3, such actions also form the elements of the crime stipulated in, correspondingly, Article 144.1 or 145 of the CrC RF.

17. Failure to pay salary, pensions, education allowance, grants and other payments stipulated in law, whether in part (where for a time exceeding three months such payments were being made in the amount less than a half of the payable sums) or in full (where for a time exceeding two months such payments were not made or the amount of the paid salary was below the minimum stipulated by a federal law for the whole territory of the Russian Federation), is qualified correspondingly under Part 1 or 2 of Article 145.1 only if such acts were committed with intent and motivated by profit or by other personal interests.

In this regard, the facts subject to proof and providing grounds for criminal liability of the head of an organisation or another person indicated in Article 145.1 of the CrC RF must include the fact that said person had a real financial capacity to pay the salary, make other payments or lacked that capacity due to her/his own unlawful actions.

18. The courts should take into account that in accordance with Article 145.1 of the CrC RF criminal liability is in particular entailed when salary and other payments are not paid to employees with whom a labour contract was not concluded or was not properly drawn up, but who began to work with the knowledge or upon instructions of the employer or of the employer's authorised representative (Article 16 of the Labour Code of the Russian Federation).

19. For the purposes of Article 145.1 of the CrC RF, the term during which indebtedness regarding the payments due to the employee formed should be calculated based on the payroll schedule stipulated in the internal rules of the organisation, a collective contract, a labour contract and also taking into account the time during which the salary was actually not paid in full or in part. Herewith, the two-month or three-month delay term is calculated from the day following the stipulated payment date. Periods of non-payment during separate months of the year cannot be summed up into terms exceeding two or three months, if they were interrupted by periods during which payments were performed.

20. The statute of limitation of criminal prosecution for the crime stipulated in Article 145.1 of the CrC RF is calculated from the moment on which it actually terminated, in particular from the day on which the debt was settled, the guilty person was fired or temporarily removed. If an employee who did not receive salary was fired, this has no impact upon the statute of limitations for criminal prosecution of the employer.

21. Failure to pay salary in part (for more than three months) and in full (for more than two months) to the same or to different employees, where such acts are within the scope of single intent of the guilty person, is qualified only under Part 2 of Article 145.1 of the CrC RF. Herewith, all the elements of the act must be listed in the descriptive part of the judgment of conviction.

Otherwise, failure to pay salary in full and in part forms a cumulation of crimes stipulated in Parts 1 and 2 of Article 145.1 of the CrC RF.

22. In every criminal case on crimes against the constitutional human and civil rights and freedoms, the court should check whether there are grounds for exempting the persons that committed them from criminal liability.

Criminal cases on crimes stipulated in Part 1 of Article 137, Part 1 of Article 138, Part 1 of Article 139, Article 145 of the CrC RF are cases of private-public

prosecution and in accordance with Part 3 of Article 20 of the Criminal Procedure Code of the Russian Federation are not subject to mandatory termination due to reconciliation of the victim and the defendant. Herewith, where Article 76 of the CrC RF applies, if the person committed such a crime for the first time (and the crime is of minor gravity), reconciled with the victim and restituted all the damages caused to the victim, the court may terminate the case in regard of that person, based on the victim's application.

23. When considering criminal cases on crimes stipulated in Chapter 19 of the CrC RF, the courts should react to the violations of rights and freedoms of citizens guaranteed by the Constitution of the Russian Federation, as well as to other violations of law, by issuing special court decrees and rulings in regard of the corresponding organisations and officials, so that they take the necessary measures (Part 4 of Article 29 of the Criminal Procedure Code of the Russian Federation).

Chief Justice of the Supreme Court of
the Russian Federation

V.M. Lebedev

Secretary of the Plenary Session, Judge of
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V.V. Momotov