

**DECISION 97-389 DC OF 22 APRIL 1997**  
**Act making various provisions in respect of immigration**

On 27 March 1997 the Constitutional Council received a referral from Mr Laurent FABIUS, Mr Léo ANDY, Mr Gilbert ANNETTE, Mr Jean-Marc AYRAULT, Mr Jean-Pierre BALLIGAND, Mr Claude BARTOLONE, Mr Christian BATAILLE, Mr Jean-Claude BATEUX, Mr Jean-Claude BEAUCHAUD, Mr Michel BERSON, Mr Jean-Claude BOIS, Mr Augustin BONREPAUX, Mr Jean-Michel BOUCHERON, Mr Didier BOULAUD, Mr Jean-Pierre BRAINE, Ms Frédérique BREDIN, Mr Laurent CATHALA, Mr Henri d'ATTILIO, Mr Camille DARSIERES, Ms Martine DAVID, Mr Bernard DAVOINE, Mr Jean-Pierre DEFONTAINE, Mr Maurice DEPAIX, Mr Bernard DEROSIER, Mr Michel DESTOT, Mr Julien DRAY, Mr Pierre DUCOUT, Mr Dominique DUPILET, Mr Jean-Paul DURIEUX, Mr Henri EMMANUELLI, Mr Jean-Jacques FILLEUL, Mr Jacques FLOCH, Mr Pierre FORGUES, Mr Michel FROMET, Mr Kamilo GATA, Mr Pierre GARMENDIA, Mr Jean GLAVANY, Mr Jacques GUYARD, Mr Jean-Louis IDIART, Mr Maurice JANETTI, Mr Serge JANQUIN, Mr Charles JOSSELIN, Mr Jean-Pierre KUCHEIDA, Mr André LABARRERE, Mr Jean-Yves Le DEAUT, Mr Louis Le PENSEC, Mr Alain Le VERN, Mr Martin MALVY, Mr Marius MASSE, Mr Didier MATHUS, Mr Louis MEXANDEAU, Mr Didier MIGAUD, Ms Véronique NEIERTZ, Mr Michel PAJON, Mr Paul QUILES, Mr Alain RODET, Ms Ségolène ROYAL, Mr Jean-Marc SALINIER, Mr Roger-Gérard SCHWARTZENBERG, Mr Bernard SEUX, Mr Henri SICRE, Mr Patrice TIROLIEN and Mr Daniel VAILLANT, Deputies, and Mr Claude ESTIER, Mr Guy ALLOUCHE, Mr François AUTAIN, Mr Germain AUTHIE, Mr Robert BADINTER, Ms Monique BEN GUIGA, Ms Maryse BERGE-LAVIGNE, Mr Jean BESSON, Mr Pierre BIARNES, Mr Marcel BONY, Mr Jean-Louis CARRERE, Mr Robert CASTAING, Mr Gilbert CHABROUX, Mr Marcel CHARMANT, Mr Michel CHARZAT, Mr William CHERVY, Mr Raymond COURRIERE, Mr Roland COURTEAU, Mr Rodolphe DESIRE, Mr Marcel DEBARGE, Mr Bertrand DELANOE, Mr Gérard DELFAU, Mr Jean-Pierre DEMERLIAT, Ms Marie-Madeleine DIEULANGARD, Mr Michel DREYFUS-SCHMIDT, Ms Josette DURRIEU, Mr Bernard DUSSAUT, Mr Léon FATOUS, Mr Aubert GARCIA, Mr Claude HAUT, Mr Dominique LARIFLA, Mr Claude LISE, Mr Philippe MADRELLE, Mr Jacques MAHEAS, Mr Jean-Pierre MASSERET, Mr Marc MASSION, Mr Jean-Baptiste MOTRONI, Mr Pierre MAUROY, Mr Georges MAZARS, Mr Jean-Luc MELENCHON, Mr Gérard MIQUEL, Mr Michel MOREIGNE, Mr Jean-Marc PASTOR, Mr Daniel PERCHERON, Mr Jean PEYRAFITTE, Mr Jean-Claude PEYRONNET, Mr Bernard PIRAS, Ms Danièle POURTAUD, Ms Gisèle PRINTZ, Mr Paul RAOULT, Mr René REGNAULT, Mr Alain RICHARD, Mr Michel ROCARD, Mr René ROUQUET, Mr André ROUVIERE, Mr Michel SERGENT, Mr Franck SERUSCLAT, Mr René-Pierre SIGNE, Mr Fernand TARDY, Mr André VEZINHET, Mr Marcel VIDAL, Mr Henri WEBER, Ms Hélène LUC, Mr Ivan RENAR, Mr Robert PAGES, Mr Guy FISCHER, Ms Nicole BORVO, Mr Jean-Michel BAYLET, Mr André BOYER, Mr Yvon COLLIN and Ms Joëlle DUSSEAU, Senators, pursuant to Article 61(2) of the Constitution, for constitutional review of the Act making various provisions in respect of immigration;

**THE CONSTITUTIONAL COUNCIL,**

Having regard to the Constitution;

Having regard to Ordinance 45-2658 of 2 November 1945 on the conditions for entry and residence of aliens in France, as amended;

Having regard to Ordinance 58-1067 of 7 November 1958, as amended, laying down the Institutional Act on the Constitutional Council, and in particular Chapter II of Title II thereof;  
Having regard to Ordinance 58-1270 of 22 December 1958 laying down the Institutional Act on the statute of the judiciary, as amended;  
Having regard to Act 52-893 of 25 July 1952, as amended, creating a French Office for the protection of refugees and stateless persons;  
Having regard to Act 78-17 of 6 January 1978, as amended, on computer technology, files and freedoms;  
Having regard to the Civil Code;  
Having regard to the Criminal Code;  
Having regard to the Code of Criminal Procedure;  
Having regard to the Labour Code;  
Having regard to the observations of the Government, registered at the Secretariat-General of the Constitutional Council on 7 April 1997;  
Having regard to the counter-observations presented by the Deputies listed above, registered on 14 April 1997;  
Having regard to the counter-observations presented by the Senators listed above, registered on 14 April 1997;  
Having heard the rapporteur;

On the following grounds:

1. The Deputies and Senators, authors of the first and second referrals, refer to the Constitutional Council the Act making various provisions in respect of immigration, disputing the constitutionality of sections 1, 3, 4, 5, 6, 7, 8, 13, 17, 18 and 19;

#### **ON SECTION 1 OF THE ACT:**

2. This section changes the conditions for approval of an accommodation certificate required of an alien making a private visit by virtue of section 5-3 of the Ordinance of 2 November 1945; paragraph II provides among other things that the representative of the State in the department, who now has the power to approve accommodation certificates, may refuse to do so where “applications from the supplier of the accommodation reveal that the procedure is being abused for the purposes of inquiries which the representative of the State in the department asks the police or *gendarmerie* to conduct”;

3. The Deputies, authors of the first referral, submit that this last provision is seriously in breach of the principle of individual freedom and that the Act referred does not contain provisions necessary to secure that liberty; that the expression “abuse of the procedure” is “dangerously imprecise” and confers on the Prefect a discretionary power that is so wide that arbitrary decisions cannot be excluded; that a simple investigation by the police or the *gendarmerie* will not suffice to ground a conclusion that “the procedure is being abused”; that the Government itself acknowledged during the parliamentary debate that computer files would be required; that such files would inevitably cover both suppliers and recipients of accommodation since the Prefect would not be able to assess the possibility of “abuse of the procedure” without considering earlier applications from them for accommodation certificates; that there is no limit as to the time for which personal data will be kept in these files and no provision as to what is to be done with the accommodation certificate which the alien is to hand in upon leaving France pursuant to paragraph V of the section contested; that by reason of, among other things, the abolition of checks in the “Schengen area”, which removes all certainty as to the manner of handing in the certificate, the inevitable result is that

suppliers of accommodation will be suspected of fraud without any statutory basis; that the provisions contested are accordingly vitiated by the legislature's failure to exercise its powers to the full, as paragraph VI merely reserves for a Decree of the Council of State the determination of the conditions for application of the section; that the "variability of prefectural practice" means that the provision contested also violates the principle of "territorial equality"; that by conferring on the administrative authorities extensive powers in relation to the enjoyment of a home, which is so important for individual freedom, the legislature has encroached on the jurisdiction of the judicial branch under Article 66 of the Constitution and violated rights of the defence;

4. The provision contested provides for new circumstances in which approval of the accommodation certificate may be withheld in the event of "abuse of the procedure"; the administration is always at leisure, even in the absence of a statutory authorisation, to reject an application that is made fraudulently; the reference to "abuse of the procedure" must be understood as a reference to fraud against the law; fraud can be established with certainty, subject to review by the administrative courts, only on the basis of objective and rational criteria; inquiries that the Prefect asks the police or *gendarmerie* (to conduct in order to ascertain whether earlier applications made by the supplier of accommodation do not reveal cases of fraud against the law are in the nature of administrative inquiries); they will be confined to seeking the information needed to establish such fraud;

5. While it is clear from the parliamentary debates that computer processing of accommodation certificates may be necessary, the Act referred makes no provision in that respect; it follows that the arguments put forward are inoperative; in any event, the computer records would be subject to the statutory restrictions on computer technology, files and freedoms;

6. The provision complained of does not therefore excessively violate individual freedom and is not vitiated by failure to exercise legislative powers to the full or by violation of the principle of equality; not does it encroach on the jurisdiction enjoyed by the judicial branch under Article 66 of the Constitution;

### **ON SECTION 3 OF THE ACT:**

7. Section 3 inserts sections 8-1, 8-2 and 8-3 after section 8 of the Ordinance of 2 November 1945, all three contested by the applicants;

### ***Regarding section 8-1 of the Ordinance of 2 November 1945:***

8. The new section empowers the police and *gendarmerie* to withhold the passport or other travel document of foreign nationals in an irregular situation; in exchange, a receipt constituting evidence of identity must be given, specifying their identity, the date of the withholding order and the procedure for returning the document;

9. The Deputies and Senators, authors of the referral, submit that this provision limits the freedom to come and go enjoyed by any person in the territory of the Republic; that this freedom implies the right of aliens to leave the territory freely and to choose the place at which they do so and the country of destination; that the legislature, by conferring on the relevant authorities the discretionary power to determine the procedure for returning the passport or other travel document has acted unconstitutionally; and that the resultant violation of freedom is all the more serious as the Act referred provides for no limit as to time; they further submit that Article 55 of the Constitution is violated since confiscation of a passport, which is the property of the State of which the alien is a national, is contrary to France's international obligations to which the Preamble to the Constitution of 27 October 1946 refers;

the Senators add that the receipt constituting evidence of identity is not of sufficient force to enable the holder to exercise his rights and fundamental freedoms since the legislature has not fully defined its status;

10. Although the legislature has power to enact measures affecting the entry and residence of aliens, notably for the preservation of public order, it must reconcile the constitutional objective of public order with respect for the fundamental rights and liberties enjoyed by all those who reside in the territory of the Republic; these rights and liberties include the freedom to come and go, which is not confined within national territory but includes the right to leave it, and freedom to marry;

11. The provision contested has the sole purpose of ensuring that the alien in an irregular situation will be in possession of the document so that he can be made to leave the country; he may under no circumstances be prevented from exercising his right to leave the country or his other freedoms and fundamental rights;

12. For one thing, if the alien applies for return of his document in order to leave the country, the document must be returned to him without delay at the point of departure; for another, the substitution of the receipt for the passport or other travel document withheld in no way precludes the alien from exercising such freedoms and rights as do not depend on the regularity of his residence; and the passport or other travel document may be withheld solely for such time as is strictly necessary for the administrative authority, subject to review by the administrative courts, which in certain circumstances may order a stay of execution;

13. The unsupported argument based on failure to comply with international agreements entered into by France is inoperative;

14. It follows that section 8-1 is contrary to no principles or rules of constitutional status; the submissions must accordingly be rejected;

***Regarding section 8-2 of the Ordinance of 2 November 1945:***

15. Within an area delimited by France's land border and a line drawn twenty kilometres from it, section 8-2 authorises criminal investigation police officers by virtue of the Code of Criminal Procedure, with the driver's consent or, without this consent, on instructions from the State Counsel, to undertake summary inspections of certain vehicles on the public highway, excluding private cars, in order to seek offenders in relation to the entry and residence of aliens; by the final paragraph of section 8-2 the same arrangements are applicable in the department of Guyana, in an area delimited by France's land border and a line drawn twenty kilometres from it;

16. The Deputies and Senators, authors of the referral, submit first that the intervention of State Counsel does not suffice to protect individual freedom, as only the intervention of a judge provides the guarantee required by the Constitution; second, they submit that the provision is vitiated by the legislature's to exercise its powers to the full, since the Act referred defines neither "instructions" nor "summary inspections", nor the criteria for inspections of the vehicle by officers of the criminal investigation police; third, they submit that the constitutional principle of rights of the defence is deprived of its statutory protection as the driver of a vehicle may neither protest to the judicial authorities against measures affecting him nor notify a person of his choice; finally, they submit that by extending the applicability of the first three paragraphs of section 8-2 to the department of Guyana, the legislature has violated the principle of equality before the law as the land borders of that department are not concerned by the application of the Schengen Agreement and the conditions for exercising individual freedom cannot be restricted to the same degree as where new checks are established to offset the open-borders measures pursuant to the Agreement;

17. It is necessary to seek out offenders in order to safeguard principles and rights of

constitutional status; it is for the legislature to reconcile this constitutional objective with the exercise of constitutionally guaranteed liberties, including individual freedom, in particular the inviolability of the home, and to allow the judicial authority, in accordance with Article 66 of the Constitution, to exercise proper review of the form and substance of the conditions imposed by the legislature for that purpose;

18. The inspections provided for by the first three paragraphs of section 8-2 are conducted in order to detect and establish offences in relation to the entry and residence of aliens in France in areas that are precisely defined and are particularly vulnerable in terms of the international movement of persons; private cars are excluded from these summary inspections;

19. The procedure established by section 8-2, being a criminal investigation police operation, is conducted under the decision of the State Counsel and is subject to his control by virtue of the Code of Criminal Procedure; if the driver does not consent, the vehicle may be immobilised for no more than four hours pending instructions from the State Counsel, giving a specific and personalised authorisation to inspect summarily the vehicle, which, unlike authorisation to search in it, is intended solely to determine that there are no concealed passengers; moreover, according to the provisions complained of, “the inspection, which shall last no longer than is strictly necessary, shall be made in the driver’s presence, and a report recording the date and time of the beginning and end of the inspection shall be made”, one copy being handed to the driver and one transmitted without delay to the State Counsel; none of the foregoing provisions of this section precludes the driver from notifying a person of his choice;

20. In these conditions and subject to the foregoing reservation, there is no violation of the guarantees attaching to individual freedom or rights of the defence; nor did the legislature fail to exercise to the full the powers conferred on it by Article 34 of the Constitution;

21. It was legitimate for the legislature to take account of the specific situation of French Guyana in terms of the international movement of persons by making the first two paragraphs of section 8-2 applicable to the department in an area delimited by its land borders and a line drawn 20 kilometres beyond them without departing from the balance struck by the Constitution between the need to safeguard public order and the need to safeguard individual freedom; nor, given the situation in direct relation with its avowed objective of boosting the fight against illegal immigration, has it violated the constitutional principle of equality;

***Regarding section 8-3 of the Ordinance of 2 November 1945:***

22. By the first paragraph of section 8-3, the fingerprints of aliens, not being nationals of a Member State of the European Union, who apply for the issuance of a residence permit as provided by section 6 of the Ordinance, being in an irregular situation in France or against whom an order for removal from the territory has been made, may be taken, memorised and processed by computer in accordance with the Act of 6 January 1978; by the second paragraph of section 8-3, data held in the computerised fingerprint files managed by the Ministry of the Interior and those held in the computerised fingerprint files on applicants for refugee status may be consulted by duly authorised agents of the Ministry of the Interior and the *gendarmerie nationale* in order to identify an alien who cannot show documents authorising entry and residence in France, has not presented travel documents permitting execution of a measure refusing entry into France, an expulsion order or a measure for removal from French territory, or who, in the absence of such documents, has failed to furnish information allowing such execution, or who, having been expelled from or debarred from entry to the territory, has re-entered the territory without authorisation;

23. The authors of the referral argue that the first paragraph of section 8-3 is framed in such general terms as to constitute a violation of individual freedom, since the persons to whom it

applies need not have been the subject of a prosecution or a removal order; they consider that the violation of individual freedom through the memorisation of fingerprint files is manifestly disproportionate “to what might be justified by pursuit of the constitutional objective of maintaining public order”; they further consider that the effect of the authorisation given by the second paragraph to duly authorised agents of the Ministry of the Interior and the *gendarmerie nationale* to consult the computerised fingerprint files on applicants for refugee status will be to violate “the principle of the inviolability of all documents held by the French Office for the protection of refugees and stateless persons”, provided for by section 3 of the Act of 25 July 1952; section 8-3 accordingly removes the statutory protection of the right of asylum conferred by paragraph 4 of the Preamble to the Constitution of 27 October 1946;

24. Firstly, it is for the legislature to determine, in full compliance with constitutional principles and having regard to the public interest, the measures applicable to the entry and residence of aliens in France; by providing for a register and a memory of fingerprints of aliens who apply for a residence permit after three months have elapsed since their arrival in France, or who are in an irregular situation, or who are ordered to be expelled from France, and the possibility of computer processing of this information in accordance with the guarantees provided for by the Act of 6 January 1978, the legislature by these measures of administrative police has not excessively violated individual freedom in an unconstitutional manner;

25. Secondly, by the fourth paragraph of the Preamble to the Constitution of 27 October 1946, “Any man persecuted in virtue of his actions in favour of liberty may claim the right of asylum upon the territories of the Republic”; the legislature must at all times secure the legal guarantees for this constitutional requirement;

26. The confidential treatment of information held by the Office for the protection of refugees and stateless persons on applicants for refugee status in France is a vital guarantee of the right of asylum, a principle of constitutional status which implies inter alia that applicants for refugee status must enjoy special protection; it follows that only such officers as are empowered to apply asylum law, notably in decisions granting refugee status, may have access to such information, and in particular to applicants’ fingerprints; the possibility given to officers of the *gendarmerie* and of the Interior Ministry to have access to the Office’s file of fingerprints of applicants for refugee status thus removes the legal guarantee of the constitutional requirement flowing from the Preamble to the 1946 Constitution;

27. The words “and to the file of fingerprints of applicants for refugee status” in the second paragraph of section 8-3 are accordingly unconstitutional;

#### **ON SECTIONS 4 AND 5 OF THE ACT:**

28. Section 4 of the Act referred adds a paragraph to section 12 of the Ordinance of 2 November 1945; section 5 inserts a new section 15ter in the Ordinance; by these provisions the temporary residence card or the residence card may be withdrawn from any employer if he is “in breach of section L 341-6 of the Labour Code” or “has employed a foreign worker contrary to that section”; by section L 341-6, “It shall be unlawful for any person, either directly or through an intermediary, to engage, retain or employ for whatever period an alien not holding an authorisation in his own name to exercise a salaried occupation in France. It shall also be unlawful for any person to engage or retain an alien in an occupational category, an occupation or a geographical location other those mentioned, if any, on the authorisation referred to in the foregoing paragraph”;

29. The Deputies and Senators, authors of the referral, consider that these provisions organise “the substitution, pure and simple, of the administrative authority for the judicial authority in ascertaining whether an offence has been committed or not” and accordingly violate Article

66 of the Constitution; the Senators further submit that Article 16 of the Declaration of Human and Civic Rights is violated by the possibility for the administrative authority to order a penalty that is greater than the penalty available to the criminal courts, although the circumstances justifying the penalty and the nature of the criminal and administrative penalties are the same; the applicants add that the provisions contested establish penalties which “are neither necessary nor proportionate to the conduct to be penalised”, in particular as section 25 of the Ordinance of 2 November 1945 already allows a measure of expulsion or removal to the frontier to be taken against an alien sentenced to an unsuspended term of imprisonment, and where “the penalty that the criminal court has not seen fit to order although he had jurisdiction to do so is clearly not necessary”; the Deputies further consider that neither the principle of equality nor the rights of the defence are respected since the statute makes no provision for adversary proceedings before an independent body; the Senators add that the legislature has failed to exercise its powers to the full since it has not stated that the withdrawal of authorisations may be ordered only after the employer has been finally sentenced and has not set a period within which the withdrawal must take place;

30. Neither the principle of the separation of powers nor any other principle or rule of constitutional status precludes an administrative authority, acting in the exercise of its public prerogatives, from exercising a power to impose penalties, provided the penalty entails no deprivation of liberty and the exercise of the power to punish is by statute accompanied by measures to secure the rights and liberties guaranteed by the Constitution; particular respect is due to the principles that penalties must be necessary and authorised by statute and to the rights of the defence, these principles being applicable to all punitive penalties even if their imposition is reserved by statute for nonjudicial bodies;

31. On the one hand the administrative penalties provided for by the Act referred, which are not automatic and are ordered subject to review by the administrative courts, which may order a stay of execution, are not manifestly disproportionate, even given the criminal penalties that may also be ordered; absent disproportion, it is not for the Constitutional Council to substitute its judgement for that of the legislature as to the need for penalties attaching to the conduct to be suppressed;

32. On the other hand the constitutional principle of rights of the defence must be respected by administrative authorities even if the legislature does not remind them; measures for the withdrawal of residence permits or residence cards provided for by sections 4 and 5 of the Act referred are in the nature of penalties, and the administrative authorities, subject to judicial review, must respect rights of the defence;

33. It follows that the applicants’ arguments must be rejected;

#### **ON SECTION 6 OF THE ACT:**

34. This section amends the conditions provided for by section 12 bis of the Ordinance of 2 November 1945 for the automatic issuance of a temporary residence card; it provides that in all cases the presence of the applicant on the territory must not constitute a threat to public order; paragraphs 3, 4 and 5 preclude the benefit of that card for aliens living in a polygamous marriage; paragraph 4 especially confers the right to a card on aliens whose spouse has French nationality, provided they have been married for at least one year and living together continuously during that period; the issuance of a temporary residence card to an alien who is father or mother of a child enjoying French nationality is, pursuant to paragraph 5, subject to the three conditions that the child be aged at least sixteen, that he reside in France, and that the applicant actually meet his subsistence needs;

35. The Deputies, authors of the first referral, submit that the condition that there be no threat to public order contradicts the general objective of regularising the situation of certain

categories of alien, pursued by the legislature, and is thus vitiated by a manifest error of judgement; the Senators, authors of the second referral, submit that polygamy cannot be held up against women since it is often imposed on them and are often unaware of the situation; it is complained that paragraph 4 of section 12 bis, by subjecting the issuance of a temporary residence card to the foreign spouse of a French national to one-year duration of the marriage, violates freedom of marriage and the right to a normal family life; they also submit that the legislature had no power, in paragraph 5, to subject the issuance of a temporary residence card to the father or mother of a child aged less than sixteen to the condition that he or she actually meet the child's subsistence needs without violating the alien's right to lead a normal family life; this provision, moreover, violates the principle of equality between parents of French children depending whether they acquired French nationality before the age of sixteen or between sixteen and eighteen, there being no difference in situation and no general interest in relation to the purpose of the Act to justifies such difference of treatment;

36. Firstly no constitutional principle or rule provides aliens with a general, absolute right to enter and reside in France; it is for the legislature to reconcile the constitutional objective of the preservation of public order with the constraints of individual freedom and the right to family life ; it was accordingly legitimate for the legislature, without violating any right or principle of constitutional status, to subject the automatic issuance of a temporary residence card to the absence of a threat to public order;

37. Secondly subsections 3 to 5 of section 12 bis exclude aliens married polygamously from entitlement to a temporary residence permit; this must be understood to apply solely to aliens residing in that state in France; subject to that interpretation, the legislature, by imposing that condition as a matter of public interest, has not violated any principle or right of constitutional status; in particular, in the determination of an objective situation, no distinction may be made between women and men;

38. Thirdly given the public interest objectives pursued, the legislature was entitled, without restricting freedom to marry or violating the right to a normal family life, to make the automatic issue of a temporary residence card to the spouse of a French national subject to the condition that the marriage have been contracted at least one year earlier and that the couple have lived together continuously;

39. Fourthly for the purposes of section 12 bis (5), a father or mother must be regarded as actually maintaining the child if he or she takes the necessary measures, having regard to his or her resources, to maintain him; any other interpretation would be contrary to the right to a normal family life; subject to that reservation, this provision is not unconstitutional;

40. Finally, given the intention of the legislature to allow parents of French children to remain in the country to provide for their maintenance and education, the circumstance that children aged over 16 enjoy considerable autonomy, being released among other things from obligation to attend school, create a difference in situation between parents of children aged more than 16 and parents of younger children; moreover, children aged 16 may, of their own initiative, in certain circumstances obtain French nationality by mere declaration, whatever attitude their parents may take; the difference in treatment generated by the Act is not unconstitutional;

#### **ON SECTION 7 OF THE ACT:**

41. This section amends the conditions set by section 16 of the Ordinance of 2 November 1945 for renewal of the residence card; it now notably excludes automatic renewal where “the presence of the alien constitutes a threat to public order”;

42. The Deputies, authors of the first referral, submit that this condition, “which is vague and open to interpretation”, confers on the administrative authority a “virtually discretionary

power” which removes the statutory protection of individual freedom as the permanence of regular residence for at least ten years in French territory has been abandoned to “arbitrary administrative decision”; the Senators, authors of the second referral, also criticise this provision, arguing that it deprives the holder of a residence card of an acquired right to renewal and is liable to destabilise the situation of all aliens living lawfully in France; in any event such a decision, which seriously violates individual freedom, must be reserved for the judicial authority; moreover, it imposes a penalty without providing full constitutional protection, notably of rights of the defence;

43. Although the legislature has the power to enact provisions governing the entry and residence of aliens in order to safeguard the constitutional objective of public order, it must reconcile that objective with respect for the fundamental rights and liberties enjoyed by all those who reside in the territory of the Republic;

44. The tenth paragraph of the Preamble to the Constitution of 27 October 1946 states that “the Nation shall provide the individual and the family with the conditions necessary to their development”; aliens who have a stable and regular residence in France are entitled, in the same way as nationals, to lead a normal family life; serious interferences with their private life are a violation of their individual freedom, as would be the case if they were nationals;

45. When they apply for renewal of their residence card, aliens may show evidence of regular residence in France for at least ten years; in the event of such a stable situation, which is likely to have generated manifold links between the alien and the host country, a mere threat to public order is not enough to justify refusal to renew; this would be an excessive encroachment on the applicant’s right to respect for his private and family life whereas at any time the authorities can, in the event of a serious threat, order his expulsion in accordance with the conditions and procedures of sections 23 to 26 of the Ordinance of 2 November 1945; the words “unless the presence of the alien constitutes a threat to public order” are accordingly unconstitutional;

#### **ON SECTION 8 OF THE ACT:**

46. Section 8 of the Act referred repeals section 18 bis of the Ordinance of 2 November 1945 establishing the departmental commission for residence of aliens, consultation of which was hitherto compulsory where the Prefect was minded to refuse to issue either a residence card, where issuance was automatic, or a residence card to an alien against whom no expulsion order could be made by virtue of section 25(1) to (6), and specifying the commission’s composition and operation;

47. The Deputies, authors of the first referral, and the Senators, authors of the second referral, submit that abolishing and not replacing this commission, where the alien had access to adversary proceedings before an independent body with the assistance of counsel, removes the statutory protection of the individual’s freedom and his right to a normal family life and violates rights of the defence;

48. It is within the legislature’s powers to repeal provisions enacted earlier; in the exercise of this power it must merely ensure that constitutional principles are not deprived of their legal guarantees; section 8 merely modifies an administrative procedure without jeopardising the redress available from the ordinary courts to the aliens concerned; it is accordingly not unconstitutional;

#### **ON SECTION 13 OF THE ACT:**

49. Section 13 makes several amendments to section 35 bis of the Ordinance of 2 November 1945;

**Regarding paragraph 1:**

50. Section 13(1) of the Act inserts, after the fourth paragraph of section 35 bis, a subsection 4 whereby a written reasoned decision of the representative of the State in the department may order the detention in premises not belonging to the prisons administration, for such time as is strictly necessary to arrange for his departure, of an alien who is the subject of a detention order in one of the circumstances specified in subsections 1 to 3 and “has not obeyed a departure order within seven days following the end of the previous detention period”; the circumstances are handing over to the authorities of a Member State of the European Union, expulsion and removal to the border;

51. The Deputies, authors of the referral, submit that this provision, by allowing an alien to be placed in “administrative detention” a second time a few days after the first period of “detention”, is contrary to the principles developed by the Constitutional Council, notably in Decision 93-325 DC of 13 August 1993; as no “quantitative limit” is set “on the number of repeated detentions”, the total duration is subject to no particular conditions; this constitutes a violation of an existing Constitutional Council decision and places an excessive restriction on individual freedom; the Senators, authors of the second referral, add that by this procedure, which “effectively nullifies the *res judicata* status of Court of Cassation decisions to the effect that is impossible to proliferate detention orders on the basis of the same expulsion decision”, the legislature precludes consideration being given to events post-dating the initial expulsion measure and thus deprives the person concerned of the right of redress against the administrative decision underlying the detention; they submit that the period of seven days which must elapse between two periods of “detention” is not the kind of condition that will guarantee individual freedom;

52. The legislature must be regarded as having authorised only one repeat detention order, and only when the alien has refused to obey the departure order; subject to that interpretation, and bearing in mind that changes in situations of fact and law applying to the persons concerned must be taken into account by the authorities subject to judicial review, given public order constraints, there is no excessive violation of individual freedom;

**Regarding paragraph 2:**

53. Section 13(2) of the Act extends from twenty-four hours to forty-eight hours the time within which the judicial court must be seised in the event of a decision to detain a person in premises not belonging to the prisons administration and reduces from six to five days the supplementary detention period that its order may open;

54. The Deputies and Senators, authors of the referral, consider that by providing for the intervention of the courts only forty-eight hours after the decision of the administrative authority, the legislature has removed the statutory protection of individual freedom in relation to detention orders, since that period must be “as short as possible”, especially where the time-limit is not for appearance before the court but for reference to it; lastly, given that the time-limit for contesting orders for removal to the border is unchanged at twenty-four hours from notification, the Act also deprives the alien of the statutory protection of the right of redress against such orders, unless an advocate can be involved in good time;

55. By Article 66 of the Constitution, the judicial authority is guardian of individual freedom; the provision contested satisfies this requirement by submitting to judicial review any extension beyond forty-eight hours of detention in premises not belonging to the prison administration of an alien who is on one of the situations referred to section 35 bis (1) to (3); moreover the change to this period does not in itself preclude the alien’s right to contest the

administrative decision requiring him to leave French territory (the right conferred and organised by section 22 bis of the Ordinance of 2 November 1945); the arguments must accordingly be rejected;

**Regarding paragraph 6:**

56. Section 13(6) of the Act referred inserts after the twelfth paragraph of section 35 bis of the Ordinance of 2 November 1945 a paragraph to empower the State Counsel, where he believes that a person does not have the means to ensure his representation, to apply to the First President of the Court of Appeal or his Delegate for a suspension order where there is an appeal by the Prefect or the State Counsel against an order of the *Tribunal de Grande Instance* or a Delegate judge of this court refusing to renew a judicial detention order, with or without a house arrest order; the First President or his Delegate, on the basis of the documents in the case, may then decide by Order giving no reasons, against which there is no appeal, whether the person concerned shall be remanded in custody until the Order is made and whether the appeal shall have suspensive effect pending a decision on the substance;

57. The Deputies, authors of the first referral, argue that the absence of an adversary proceeding before the First President of the Court of Appeal or his Delegate violates the constitutional principle of rights of the defence; the provision contested constitutes an “unconstitutional retrograde” step in relation to the statutory protection of aliens’ individual freedom, not justified by absolute urgency or by any specific threat to public order; they further submit that it is also a serious violation of aliens’ rights to judicial review; the principle of equality of litigants before the law is also violated by the variability of the suspensive effect of appeals, since suspensive effect can be given only to appeals brought by the State Counsel or the Prefect against a judicial decision terminating the detention of the alien;

58. The Senators, authors of the second referral, further submit that the provision contested is contrary to Article 66 of the Constitution since, where a court has decided that a person may no longer be deprived of his liberty, privation of liberty should cease forthwith; although the State Counsel is part of the judicial order, that does not mean that his functions are “interchangeable” with those of the *magistrat du siège*, whose independence is strictly protected by the Constitution, the State Counsel being in a hierarchically subordinate situation in the executive branch;

59. By Article 66 of the Constitution, “No one shall be arbitrarily detained. The judicial authority, guardian of individual freedom, shall ensure the observance of this principle as provided by statute”;

60. The effect of this provision is that where a *magistrat du siège*, in the exercise of the jurisdiction conferred on him by Article 66 of the Constitution as guardian of individual freedom, makes a judicial order in due form that a person must be released, there can be no opposition to such order, even pending an appeal;

61. However, the judicial authorities consist both of the *magistrats du siège* and of the State Counsel; and the legislature may provide for different procedures in different circumstances and for different categories of persons, provided the differences do not originate in unjustified forms of discrimination and provided litigants are assured of equal guarantees, notably as to respect for rights of the defence, which in turn entail the existence of a fair procedure;

62. On the one hand in the instant case the State Counsel was given jurisdiction by the legislation referred to act in specified circumstances which distinguish him from the parties to the action – the alien and the departmental representative of the State;

63. On the other hand the legislature provided that the State Counsel, on whom section 35 bis of the Ordinance of 2 November 1945 confers authority to appeal, may apply to the First

President of the Court of Appeal or his Delegate for a suspension order only where he believes that a person does not have the means to ensure his representation; the purpose of the legislation is to ensure that the person concerned remains at the disposal of the courts so that he can be present at the hearing of the appeal against the order of the President of the *Tribunal de Grande Instance* or his delegate; the application by the State Counsel must accompany the appeal which is made immediately after the order has been made and transmitted to the First President of the Court of Appeal or his Delegate; only this *magistrat du siège*, in the exercise of the jurisdiction conferred on him by Article 66 of the Constitution as guardian of individual freedom, may make an immediate order that the appeal shall have suspensory effect; the need for the First President to make his order without delay prompted the legislature to provide that he should act solely on the basis of the documents in the case; but these documents must include those needed to ascertain the person's ability to ensure that he is represented, in particular those supplied by the parties in the proceeding before the President of the *Tribunal de Grande Instance*; and the First President has only to determine whether the alien has adequate possibilities of being represented, whereas he must consider the conditions for application of section 35 bis when hearing the appeal within forty-eight hours of the reference to him;

64. The section referred is accordingly not unconstitutional;

#### **ON SECTION 17 OF THE ACT:**

65. Section 17 of the Act referred extends the conditions for application of section 132-70-1 of the Criminal Code, whereby: "The court may, after finding the accused guilty of an offence against the second paragraph of section 27 of Ordinance 45-2658 of 2 November 1945 on the conditions for the entry and residence of aliens in France, adjourn sentence and order the accused to present the appropriate administrative authority with travel documents permitting execution of the removal order made against him or to furnish information permitting such execution"; the procedure may now accordingly be applied not only to persons guilty of an offence against the second paragraph of section 27 (failure to present the appropriate administrative authority with travel documents permitting execution of a measure refusing admission to French territory, an order for removal to the border, an expulsion order or a ban on entering the territory) or, in the absence of such documents, to furnish information permitting such execution, but also to persons guilty of offences against the first paragraph of the section (failure or attempted failure to comply with a measure refusing admission to France or for removal from French territory, or entering the territory after having been expelled or refused admission or banned from entering, without authorisation); this procedure is also applicable to aliens guilty of offences against section 19 of the Ordinance of 2 November 1945, and those found guilty of an offence against the rules governing entry and residence in France or offences against the sixth paragraph of section 33 of the Ordinance (failure or attempted failure to comply with a decision taken under the section);

66. The Deputies, authors of the first referral, submit that the penalty thus provided for is manifestly disproportionate to the seriousness of the offence; that it violates the constitutional principle of equality by applying the "same treatment to aliens who voluntarily cause their documents to disappear and those who have lost them and whose sincerest desire is to have a valid residence card"; the Senators share this submission;

67. Firstly judicial detention not being a criminal penalty, the first argument is inoperative;

68. Secondly all the persons to whom section 132-70-1 of the Criminal Code might be applicable are in similar situations with regard to detention by court order since, whatever the offences defined and punishable under the Ordinance of 2 November 1945 of which they are guilty and for which they may be so detained, they have all been the subject of deportation

orders for offences against the legislation governing entry and residence of aliens; the argument that the principle of equality is violated must therefore be rejected;

#### **ON SECTION 18 OF THE ACT:**

69. Section 18 of the Act referred adds a paragraph to section 78-2 of the Code of Criminal Procedure which, within an area delimited by the land borders and coast of French Guyana and a line drawn 20 kilometres beyond them, permits the identity of any person to be checked in accordance with the rule set out in the first paragraph, in order to check compliance with the obligations as to possession and presentation of the documents specified by the statute;

70. The applicants submit that this provision excessively violates individual freedom by transposing to Guyana the rules applicable in metropolitan departments adjacent to States parties to the Schengen Agreement, which are in a specific situation not applicable here;

71. It is for the legislature to reconcile the exercise of the freedoms secured by the Constitution with the need to prevent breaches of public order and the search for offenders;

72. The identity checks provided for by the section referred are conducted, subject to judicial review, by the usual requirements as to form and substance; they are conducted in order to check compliance with the obligations as to possession, carrying and presentation of the documents specified by the statute; the areas concerned are defined precisely as to their nature and extent and are particularly vulnerable to offences and breaches of public order connected with the international movement of persons; the specific situation in French Guyana as regards illegal immigration prompted the legislature to take the measures complained of without breaking the balance required by the Constitution between the needs of public order and the safeguarding of individual freedom; the argument must accordingly be rejected;

#### **ON SECTION 19 OF THE ACT:**

73. Section 19 of the Act referred inserts in the Code of Criminal Procedure a section 78-2-1 empowering senior law-enforcement officers and, on their orders or responsibility, criminal investigation police officers and deputy criminal investigation police officers mentioned in sections 20 and 21(1) of the Code, acting on instructions from the State Counsel, to enter business premises and their annexes and dependent premises, unless used as residential accommodation; the purpose of such entry is to ensure that activities carried out in those premises have been properly registered and that returns have been made to social security and revenue departments, to inspect the registers of staff and documents attesting that pre-recruitment checks have been made, to verify the identity of persons engaged in the activities, solely in order to check that the information has been entered in the register of staff and that pre-recruitment returns have been filed;

74. According to the Deputies, authors of the first referral, only a *magistrat du siège* can authorise such operations, and the relevant measure, which may be taken without the owner's consent, is akin to a property search; the court should also have the possibility of reviewing the need for each visit and the power to control what happens, settle disputes and terminate the procedure at any time; they conclude that there is a violation of individual freedom and property rights;

75. It is necessary to seek out offenders in order to safeguard constitutional principles and rights; it is for the legislature to reconcile this constitutional objective with the need to protect private property and the exercise of individual freedom, in particular the inviolability of the home;

76. Given the need to combat illegal employment relations, the legislature was entitled to provide for inspections at private business premises, given that they are accompanied by

proper procedural safeguards; the legislature empowered State Counsel, a judicial officer, to authorise entry into business premises, requiring his warrants to specify suspected offences among those defined by sections L 324-9 and L 341-6 of the Labour Code that might be detected at the relevant premises; it requires warrants to be valid for no more than one month and to be presented to the person in charge of the premises or his representative; measures taken must be set down in a report handed to that person; operations conducted by criminal investigation police officers are under the direction and control of the State Counsel, who is responsible for monitoring their actual performance and terminating them at the right moment; given these procedural safeguards, section 78-2-1 of the Code of Criminal Procedure is constitutional;

77. In the circumstances there is no need for the Constitutional Council of its own motion to review the other provisions of the Act referred for constitutionality ;

**Has decided as follows:**

*Article 1*

The following are unconstitutional:

- in the last paragraph of section 3, the words: “and of the computerised files of fingerprints of applicants for refugee status”;
- in the second paragraph of section 7, the words: “unless the presence of the alien constitutes a threat to public order and”.

*Article 2*

Subject to the foregoing qualified interpretation, the other provisions of sections 3 and 7 and sections 1, 4, 5, 6, 8, 13, 17, 18 and 19 of the Act making various provisions in respect of immigration are not unconstitutional.

*Article 3*

This Decision shall be published in the *Journal officiel de la République française*.

Deliberated by the Constitutional Council at its sitting of 22 April 1997, attended by Mr Roland DUMAS, President, Mr Georges ABADIE, Mr Michel AMELLER, Mr Jean CABANNES, Mr Maurice FAURE, Mr Yves GUÉNA, Mr Alain LANCELOT, Ms Noëlle LENOIR and Mr Jacques ROBERT.