

DECISION 98-399 DC OF 5 MAY 1998
Aliens (Entry and Residence in France and Right of Asylum) Act

On 9 April 1998 the Constitutional Council received a referral from Mr François BAYROU, Mr Jean-Louis DEBRE, Ms Nicole AMELINE, Mr François d'AUBERT, Mr Pierre-Christophe BAGUET, Mr Jean-Louis BERNARD, Mr Roland BLUM, Ms Marie-Thérèse BOISSEAU, Ms Christine BOUTIN, Mr Yves BUR, Mr Dominique BUSSEREAU, Mr Pierre CARDO, Mr Antoine CARRE, Mr Richard CAZENAVE, Mr Hervé de CHARETTE, Mr Pascal CLEMENT, Mr Georges COLOMBIER, Mr René COUANAU, Mr Charles de COURSON, Mr Henri CUQ, Mr Marc-Philippe DAUBRESSE, Mr Jean-Claude DECAGNY, Mr Francis DELATTRE, Mr Léonce DEPREZ, Mr Laurent DOMINATI, Mr Renaud DONNEDIEU de VABRES, Mr Philippe DOUSTE-BLAZY, Mr Renaud DUTREIL, Mr Charles EHRMANN, Mr Nicolas FORISSIER, Mr Claude GAILLARD, Mr Claude GATIGNOL, Mr Germain GENGENWIN, Mr Claude GOASGUEN, Mr François GOULARD, Mr Michel HERBILLON, Mr Philippe HOUILLON, Ms Anne-Marie IDRAC, Mr Denis JACQUAT, Mr Jean-Jacques JEGOU, Mr Aimé KERGUERIS, Mr Christian KERT, Mr Marc LAFFINEUR, Mr Edouard LANDRAIN, Mr Jacques LE NAY, Mr Jean-Claude LENOIR, Mr Jean LEONETTI, Mr François LEOTARD, Mr Pierre LEQUILLER, Mr Maurice LEROY, Mr Maurice LIGOT, Mr Alain MADELIN, Mr Thierry MARIANI, Mr Michel MEYLAN, Mr Pierre MICAUX, Ms Louise MOREAU, Mr Alain MOYNE BRESSAND, Mr Yves NICOLIN, Mr Arthur PAECHT, Mr Dominique PAILLE, Mr Henri PLAGNOL, Mr Bernard PERRUT, Mr Ladislas PONIATOWSKI, Mr Jean PRORIOL, Mr Jean-Luc PREEL, Mr Jean RIGAUD, Mr Gilles de ROBIEN, Mr José ROSSI, Mr Rudy SALLES, Mr André SANTINI, Mr François SAUVADET, Mr Philippe VASSEUR, Mr Michel VOISIN and Mr Pierre-André WILTZER, Deputies, pursuant to Article 61(2) of the Constitution, for constitutional review of the Aliens (Entry and Residence in France and Right of Asylum) Act;

THE CONSTITUTIONAL COUNCIL,

Having regard to the Constitution;

Having regard to Ordinance 58-1067 of 7 November 1958 laying down the Institutional Act on the Constitutional Council, as amended, and in particular Chapter II of Title II thereof;

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

Having regard to the Geneva Convention of 28 July 1951 on the Status of Refugees, and the Protocol signed at New York on 31 January 1967;

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 the Criminal Code;

Having regard to the observations of the Government, registered on 23 April 1998;

Having heard the rapporteur;

On the following grounds:

1. The Deputies, authors of the referral, refer to the Constitutional Council for constitutional review the Aliens (Entry and Residence in France and Right of Asylum) Act, contesting in particular the constitutionality of sections 1, 13 and 29;

ON SECTION 1:

2. Section I of the Act referred amends section 5(1) of the Ordinance of 2 November 1945; it now provides that decisions refusing a visa for entry into France taken by diplomatic or consular authorities must henceforth give reasons where the refusal relates to certain categories of aliens, including children aged less than twenty-one of, or dependent on, a French national;

3. The Deputies, authors of the referral, submit that this provision violates the principle of equality before the law; the distinction between children aged more or less than twenty-one creates a new form of discrimination not justified by an objectively different situation or by any consideration of general interest; the “traditional age of eighteen” should have been chosen;

4. The legislature’s purpose in requiring the competent authorities to give reasons for refusing to issue a visa to children aged less than twenty-one of French parents was to take account of the economically dependent situation of those concerned and of their right, as well as the right of their parents, to lead a normal family life; the discrimination contested is thus based on a difference in situation that is directly related to the purpose of the statute, especially as by section 15(2) of the Ordinance of 2 November 1945, the resident’s card is issued automatically to foreign children of French nationals if the child is aged less than twenty-one; it follows that the provision contested is not contrary to the principle of equality;

ON SECTION 13:

5. Section 13 of the Act referred adds a paragraph to section 21 ter of the Ordinance of 2 November 1945 whereby bodies corporate may be declared criminally liable for offences of directly or indirectly aiding the unlawful entry, movement and residence of aliens in France contrary to section 21 of the Ordinance; the effect of the amendment made by section 13 of the Act referred is that section 21 ter “shall not apply to non-profit-making associations pursuing humanitarian objects of which a list shall be determined by order of the Minister of the Interior or to Foundations which, in pursuance of their objects, provide aid and assistance to aliens residing lawfully in France”;

6. The Deputies, authors of the referral, submit that, freedom of association being one of the fundamental rights enjoyed by citizens in the exercise of public freedoms, only “the legislature has power to regulate the operation of associations”, with no power to submit the constitution of associations to advance checks; consequently, by enabling the Minister of the Interior to determine by order the list of associations eligible for immunity from criminal proceedings, the legislature has violated Article 34 of the Constitution and the principle of freedom of association; moreover, the provision contested discriminates between associations in a manner contrary to the principle of equality before the law;

7. Pursuant to Article 34 of the Constitution, it is for the legislature, given its public interest objectives regarding entry, residence and movement of aliens, which might warrant a scheme of criminal penalties applicable both to bodies corporate and to natural persons, to lay down rules for the determination of offences and the penalties incurred for their commission, in compliance with constitutional principles; it may also, subject to respect for rules and principles of constitutional status, and in particular the principle of equality, that certain bodies corporate or natural persons shall be immune from criminal proceedings; it follows from Article 34 of the Constitution and from the principle that offences and penalties must be defined by statute, pursuant to Article 8 of the Declaration of Human and Civic Rights, that the legislature must itself determine the scope of a criminal statute, define offences and penalties clearly and precisely enough to allow offenders to be identified and to exclude the

possibility of arbitrary sentencing, and to determine likewise the scope of such immunities as are provided for; by leaving to the discretion of the Minister of the Interior the decision whether an association is pursuing a “humanitarian purpose”, a concept nowhere defined by statute but serving to found entitlement to the said immunity, the provision contested renders the scope of a criminal statute dependent on administrative decisions; despite the power of the criminal courts, acting in accordance with section 111-5 of the Criminal Code, to review the legality of any administrative act, the provision violates the principle that offences and penalties must be defined by statute and encroaches on the area in which power is conferred on the legislature by Article 34 of the Constitution;

8. The Constitutional Council must accordingly declare unconstitutional the words “the list of which shall be drawn up by order of the Minister of the Interior” in the new paragraph inserted by section 13 of the Act referred in section 21 ter of the Ordinance of 2 November 1945; the Parliamentary debates reveal that those words are inseverable from the rest of section 13; section 13 of the Act referred must accordingly be declared unconstitutional; it will be for the courts, acting in accordance with the principle that offences and penalties must be defined by statute, to interpret strictly the components of the offence defined by section 21 of the Ordinance of 2 November 1945, notably where the body corporate is a non-profit-making association pursuing a humanitarian object or a foundation providing aid and assistance to aliens in pursuance of its objects;

ON SECTION 29:

9. Section 29 of the Act referred amends section 2 of the Act of 25 July 1952, which determines the powers of the French Office for the protection of refugees and stateless persons, replacing its second paragraph by two new paragraphs; the first of them provides that refugee status will henceforth be recognised by the Office not only in respect of persons subject to the Office of the United Nations High Commissioner for Refugees by virtue of Articles 6 and 7 of its Statute or being within the definitions given in Article 1 of the Geneva Convention of 28 July 1951 on the status of refugees, but also of “any man persecuted in virtue of his actions in favour of liberty”, this form of words being taken over by the legislature from the fourth paragraph of the Preamble to the Constitution of 1946; the second paragraph provides that any person recognised as having refugee status will be governed by the provisions applicable to refugees by virtue of the Geneva Convention of 28 July 1951;

10. The Deputies, authors of the referral, submit that these provisions are contrary to Article 55 of the Constitution, and to a fundamental principle recognised by the laws of the Republic whereby the courts act “in the name of the French people”;

Regarding the submission that Article 55 of the Constitution is violated:

11. The Deputies, authors of the referral, submit that a representative of the Office of the United Nations High Commissioner for refugees is a member of the Appeals Commission which reviews decisions of the French Office for the protection of refugees and stateless persons; this specific component of the composition of this judicial body was hitherto justified by the fact that the purpose of the Act of 25 July 1952 was to implement the Geneva Convention of which the UNHCR is the “guardian”; but there is nothing in the Convention to empower the UNHCR to apply the Preamble to the Constitution de 1946 or to confer rights on persons to whom the Preamble applies; the hierarchy of norms determined by Article 55 of the Constitution is accordingly violated;

12. Although it is proper for the Constitutional Council, acting under Article 61 of the Constitution, to ensure that a statute remains within the scope allowed by Article 55, it is not

for the Council to review a statute for conformity with an international treaty or agreement; there is accordingly no basis for determining whether section 29 of the Act referred is in conformity with the Geneva Convention or indeed any other international convention;

Regarding the submission that the constitutional principle that the courts act “in the name of the French people” is violated:

13. The Deputies, authors of the referral, submit that the presence of a foreign judge, representing the Office of the United Nations High Commissioner for refugees, in a court having jurisdiction to interpret a provision of the Constitution, is contrary to a fundamental principle recognised by the laws of the Republic, enshrined in Article 61 of the Constitution of 1793 and Article 81 of the Constitution of 1848, that judgments are given “in the name of the French people”;

14. Article 3 of the Declaration of Human and Civic Rights of 1789 states that “the principle of any sovereignty lies primarily in the Nation”; the first paragraph of Article 3 of the Constitution of 1958 provides that “national sovereignty shall belong to the people, who shall exercise it through their representatives and by means of referendum”; the fourteenth paragraph of the Preamble to the Constitution of 1946 declares that the French Republic “shall respect the rules of public international law”, and the fifteenth paragraph declares that “subject to reciprocity, France shall consent to the limitations upon its sovereignty necessary to the organisation and preservation of peace”;

15. It follows from these provisions that as a matter of principle functions that are inseparable from the exercise of national sovereignty may not be entrusted to foreign nationals or to representatives of international organisations; this applies in particular to judicial functions since both the ordinary and the administrative courts act “in the name of the French people”; it may, however, be legitimate to depart from this principle to such extent as may be necessary to give effect to an international agreement entered into by France, provided there is no impact on the essential conditions for the exercise of national sovereignty;

16. On the one hand the Refugees Appeal Commission is an administrative court established by the Act of 25 July 1952 to review decisions of the French Office for the protection of refugees and stateless persons acting on applications for recognition of refugee status made by persons subject to the jurisdiction of the Office of the United Nations High Commissioner for refugees pursuant to Articles 6 and 7 of its Statute or being within the definitions given in Article 1 of the Geneva Convention of 28 July 1951 on the status of refugees; its purpose is accordingly to secure protection of refugees as required by international agreements entered into by France;

17. On the other hand the presence of representatives of the Office of the United Nations High Commissioner for refugees, accounting for one third of each of the sections of the Refugees Appeal Commission and of the “combined sections” formation, being a minority presence, does not jeopardise the essential conditions for the exercise of national sovereignty;

18. The composition of the Refugees Appeal Commission, having regard to the jurisdiction currently conferred on it, is accordingly not contrary to the relevant constitutional requirements;

19. It is admittedly true that the effect of section 29 of the Act referred is to confer on the Refugees Appeal Commission, over and above its existing jurisdiction, the jurisdiction to hear appeals against decisions of the French Office for the protection of refugees and stateless persons acting on requests for recognition of refugee status made, in the terms of the fourth paragraph of the Preamble to the Constitution of 1946, by “any man persecuted in virtue of his actions in favour of liberty”;

20. However, there is a close link between applications for refugee status based on Article 1 of the Geneva Convention and those based on the fourth paragraph of the Preamble to the Constitution of 1946; although made on different legal bases, they demand careful scrutiny of the same factual situations and, by virtue of the second paragraph of section 29 of the Act referred, seek the benefit of the same protection; in the interests both of applicants and of the sound administration of justice, it was legitimate for the legislature to unify the procedures in such a way as to introduce a single investigation and rapid decisions subject to review and annulment by the Council of State; section 29 of the Act referred is accordingly contrary to no principle or rules of constitutional status;

21. There are no grounds for the Constitutional Council to review any other provisions of the Act referred for constitutionality of its own motion;

Has decided as follows:

Article 1

Section 13 of the Aliens (Entry and Residence in France and Right of Asylum) Act is unconstitutional.

Article 2

The National Assembly shall be notified of this decision, which shall be published in the *Journal officiel de la République française*.

Deliberated by the Constitutional Council at its sitting of 5 May 1998, attended by Mr Yves GUÉNA, taking the chair as oldest member, Mr Georges ABADIE, Mr Michel AMELLER, Mr Jean-Claude COLLIARD, Mr Alain LANCELOT, Ms Noëlle LENOIR, Mr Pierre MAZEAUD* and Ms Simone VEIL.

* At his own request Mr MAZEAUD took part neither in the deliberation nor in the voting on the part of the decision relating to section 29 of the Act referred.