

## Decision n° 2007-557 DC November 15<sup>th</sup> 2007

Act relating to the control of immigration, integration and asylum.

On October 25<sup>th</sup> 2007, the Constitutional Council received a referral, pursuant to paragraph 2 of Article 61 of the Constitution, from Mr Jean-Marc AYRAUT et al.... Members of the National Assembly, and on October 26<sup>th</sup> 2007 from Mr Jean-Pierre BEL et al, Senators, for review of the constitutionality of the Act relating to the control of immigration, integration and asylum. Two sets of "further submittals", the first presented by Mrs Marie-Hélène AMIABLE et al, Members of the National Assembly, the second presented by Mrs Nicole BORVO COHEN-SEAT et al, Senators, were registered on October 31<sup>st</sup> 2007

### THE CONSTITUTIONAL COUNCIL

Having regard to the Constitution;

Having regard to Ordinance n° 58-1067 of November 7<sup>th</sup> 1958 as amended (Institutional Act on the Constitutional Council);

Having regard to the Code on entry and residence of foreigners and the right of asylum ;

Having regard to the Civil Code;

Having regard to Act n° 78-17 of January 1978 as amended on Data Processing, Data Files and Individual Liberties;

Having regard to the observations of the Government registered on November 7<sup>th</sup> 2007;

Having heard the Rapporteur;

### ON THE FOLLOWING GROUNDS

1. The abovenamed Members of the National Assembly and the Senate have referred for review by the Constitutional Council the Act relating to the control of immigration, integration and asylum and contest the conformity with the Constitution of sections 13 and 63 thereof;

### WITH RESPECT TO THE ADMISSIBILITY OF THE SETS OF "FURTHER SUBMITTALS"

2. Although paragraph 2 of Article 61 of the Constitution provides that statutes may be referred to the Constitutional Council for review by Members of Parliament, the exercising of this prerogative is reserved for a group of no fewer than sixty Members of the National Assembly or sixty Senators;

3. On October 31<sup>st</sup> 2007 two sets of "further submittals" were registered by the Secretariat general of the Constitutional Council : the first set was presented in the name of fifteen members of the National Assembly whose names already appeared in the list of those Members making the first referral, the second by twenty three senators, twenty two of whom had already signed the second referral contesting other sections of the statute referred for review;

4. In view of the provisions of paragraph two of Article 61 of the Constitution referred to hereinabove, these two sets of further submittals must be held to be inadmissible

- WITH RESPECT TO SECTION 13

5. I of section 13 of the statute referred for review completes article L 111-6 of the Code on entry and residence of foreigners and the right of asylum by the nine following indents :

"An applicant for a visa for a stay exceeding three months, or the latter's representative, being a National of a country in which the Registry of Civil Status presents certain shortcomings and wishing to be reunited with or accompany one of his relatives mentioned in articles L 411-1 and L. 411-2 or having been granted refugee status or some other form of protection, may, in the event of the inexistence of a civil status document or when he/she has been informed by Diplomatic or Consular officials of a serious doubt as to the authenticity of the document presented which it has not been possible to dispel by de facto enjoyment of a status as defined by Article 311-1 of the Civil Code, may request that the identification of the visa applicant be established by genetic testing for biological markers in order to provide evidence of the claimed filiation with the mother of the visa applicant. The consent of the persons whom it is thus sought to identify must be expressly given prior to any such genetic testing. Said persons shall be duly informed of the scope and consequences of such a measure.

"Diplomatic or Consular Officials shall without delay refer the matter to the Tribunal de Grande Instance of Nantes for it to rule, after carrying out of all useful investigations and hearing all parties involved, as to the need to carry out such identification.

"If the Court deems that identification by such a means is necessary, it shall designate a person responsible for proceeding to carry out such testing from among persons duly authorised to do so in the conditions provided for in the final indent hereof

"The decision of the court, and if need be, the findings of the authorised identification tests authorised by said court, shall be communicated to Consular and Diplomatic Officials. The cost of such testing shall be borne by the State.

"A Decree issued by the Council of State, after due consultation with the National Consultative Ethics Committee, shall define :

1° The conditions under which the genetic testing of persons for identification purposes shall be carried out before application is made for a visa;

2° The list of countries in which such testing shall be introduced on an experimental basis;

3° The duration of said experiment, which shall not exceed eighteen months as from the publication hereof and shall terminate not later than December 31<sup>st</sup> 2009;

4° The conditions for authorising persons to proceed to carry out such testing;

6. The parties making the referral contend that these provisions infringe the principle of equality, do not respect the right of family reunion, infringe the right to privacy and the principle of the dignity of the human being, infringe the principle of constitutional status of the intelligibility of the law and show a failure by Parliament to exercise fully the powers vested in it;

As regards the principle of equality:

7° Article 1 of the Declaration of the Rights of Man and the Citizen of 1789 proclaims : "Men are born free and equal in rights" ;

8° The principle of equality does not preclude Parliament from treating different situations in different ways, nor from derogating from the principle of equality in the general interest provided that in each case the resulting difference of treatment is directly related to the purpose of the statute providing for such different treatment;

*As to distinctions involving personal status:*

9° Firstly, the challenged provisions shall only apply subject to international agreements which determine the law of filiation. It can be seen clearly from Parliamentary debate that Parliament did not intend to derogate from conflict of law rules as defined by Article 311-14 of the Civil Code, which subject in principle the filiation of the child to the personal law of the mother. The provisions referred are not aimed at and cannot result in, without infringing Article 1 of the Declaration of 1789, introducing in the case of children applying for visas, specific rules of filiation which might lead to not recognising a legally established bond of filiation within the meaning of the law applicable to such children. Thus

the proof of such filiation by means of the "de facto enjoyment of a status as defined in Article 311-1 of the Civil Code" could only be accepted if, under the applicable law, a comparable means of proof were admissible. Furthermore, these provisions cannot deprive a foreigner of the possibility of proving a bond of filiation by other admissible means of proof under the applicable law;

10. Secondly, the challenged provisions which are designed to compensate by genetic testing for the absence a civil status document or a document of doubtful authenticity obviously do not apply when such filiation is not based on any genetic tie. They thus do not apply to proving filiation through adoption, which is done by producing a judgment or other decision of a court of law to said effect. Hence the argument based on the "infringement of the principle of equality between biological and other children" is not supported by the facts;

11. Thirdly, the liberty proclaimed by Article 2 of the Declaration of 1789 implies the right to privacy. Paragraph 10 of the Preamble to the Constitution of 1946 provides : "The Nation shall provide the individual and the family with the conditions necessary for their development". When limiting the new means of proving parentage to mother and child filiation and in view of the purpose it is intended to achieve, Parliament passed a measure designed to achieve a conciliation which is not patently disproportionate between the right to lead a normal family life, the right to privacy of the child and the father and the safeguarding of public order, which includes combating fraud;

*- As to other distinctions*

12. Firstly, Nationals of States in which the Registers of Civil Status present certain shortcomings or States in which numerous frauds are committed are not on the same footing, as regards civil status documents, as Nationals of other States;

13. Secondly, Article 37-1 of the Constitution provides : "Statutes and regulations may contain provisions enacted on an experimental basis for limited purposes and duration". This provision allows Parliament to authorise experiments derogating, for a limited purpose and duration, from the principle of equality before the law. Parliament was thus able, on the grounds of this provision, to limit the scope of this new system of proof to visa applicants coming from States where the registration of civil status presents certain shortcomings;

14. With the qualifications set forth in paragraph 9, section 13 of the statute referred for review does not infringe the principle of equality;

As regards the right to family reunion, the right to privacy and the principle of the dignity of the human being:

15. The parties making the referral contend that, by making the right to family reunion depend upon genetic testing of the biological filiation with the mother of the visa applicant the challenged provision infringes the right to family reunion and the right to privacy. Furthermore they argue that having recourse to genetic testing for administrative police purposes constitutes a disproportionate infringement of the principle of the dignity of the human being;

16. Firstly, the provisions of section 13 of the statute referred for review do not modify the conditions governing family reunion and in particular, the definition of children entitled to benefit from such conditions as provided for by Article L 314-11 and L 411-4 of the Code on entry and residence of foreigners and the right of asylum. Their sole purpose is to authorise a visa applicant to prove by other means the bonds of filiation when the right to family reunion depends upon the proving of said filiation and the civil status document required to prove such filiation is either inexistent or has been refused by Diplomatic or Consular Officials. They do not make any other modifications to the provisions of Article 47 of the Civil Code which governs the probative force of civil status documents issued abroad and to which indent 1 of the abovementioned Article L 111-6 of the Code on entry and residence of foreigners and the right of asylum refers. The implementation of this new method of identification in the States designed by a Decree of the Council of State does not exempt Consular or Diplomatic authorities from verifying, under the control of a judge, the validity and authenticity of civil status documents presented. With this qualification these provisions do not infringe directly or indirectly the right to lead a normal family life guaranteed by paragraph 10 of the preamble of 1946;

17. The implementation of this method of identification requires the prior request of the visa applicant. Furthermore, Parliament did not intend to authorise the processing of personal data collected when implementing this method of identification and has not derogated from the provisions protecting privacy provided for by the Act of January 6<sup>th</sup> 1978 referred to hereinabove;

18. Lastly, contrary to the contentions of the parties making the referral, by authorising this additional means of proving filiation, the challenged provision does not introduce an administrative police measure. Furthermore the statute does not authorise the examining of the genetic markers of the visa applicant but makes it possible, at the request to the applicant or his/her legal representative, to establish the identity of said applicant by his/her genetic markers in conditions similar to those provided for by indent 2 of Article 16-11 of the Civil Code. Hence the argument based on an infringement of the principle of the respect for the dignity of the human being as enshrined by the preamble of 1946 is not supported by the facts;

As regards the objective of intelligibility of the law and the powers of Parliament  
:

19. Parliament must exercise to the full the powers vested in it by the Constitution and in particular by Article 34 thereof. The full exercise of such powers, together with the object of constitutional status that the law be intelligible and accessible, which derives from Article 4,5,6 and 16 of the Declaration of 1789, place it under a duty to enact provisions which are sufficiently precise and unequivocal. Protection must be afforded to all from interpretations which run counter to the Constitution or from the risk of arbitrary decisions, without leaving it to Courts of law or Administrative authorities to determine rules which the Constitution provides should be the sole preserve of statute law;

20. Firstly, the provisions of section 13 of the statute referred for review, which determine the conditions and means whereby a minor child applying for a visa for a stay of over three months, or the legal representative of said minor, may request that his/her identity be verified by genetic testing in order to furnish evidence of filiation are not worded in any imprecise or equivocal terms;

21. Secondly, Parliament has not failed to exercise its powers when leaving it to a Decree issued by the Council of State to draw up the list of States in which the registration of civil status presents shortcomings and where the new system will be applied on an experimental basis, the conditions under which the genetic testing of persons for identification purposes shall be carried out, the duration of said experiment in the limits fixed by statute and the conditions for authorising persons to proceed to carry out such testing. The applicable procedure in such cases before the Tribunal de Grande Instance is not included in the list set out in Article 34 of the Constitution;

22. Parliament has thus not failed to act within the scope of its powers nor infringed the objective that the law be intelligible;

23. By reason of the foregoing, with the qualifications set forth in paragraphs 9 and 16, section 13 of the statute referred for review is not unconstitutional;

#### WITH RESPECT TO SECTION 63 :

24. Section 63 of the statute referred for review, which is the result of an amendment passed by the National Assembly on first reading, amends II of section 8 and I of section 25 of the Act of January 6<sup>th</sup> 1978 referred to hereinabove. It is designed to allow processing of personal data "indicating, directly or indirectly, the racial or ethnic origins" of persons for the carrying out of studies of diversity of origin, discrimination and integration, and subject to the authorisation of the National Committee on Data Processing and Individual Liberties,;

25. The parties making the referral contend that the amendment giving rise to this section was devoid of any connection with the provisions of the initial Bill;

26. Article 6 of the Declaration of 1789 proclaims: " The law is the expression of the general will". Paragraph 1 of Article 34 of the Constitution provides : "Statutes shall be enacted by Parliament". The first paragraph of Article 39 provides : "Both the Prime Minister and Members of Parliament shall have the right to initiate legislation". The right of amendment which the Constitution confers on Members of Parliament and the Government is exercised in the conditions and subject to the qualifications provided for by Articles 40,41,44,45,47 and 47-1;

27. The consequence of the combination of the provisions referred to in the foregoing paragraph is that Members of Parliament and the Government must be able to exercise to the full the right of amendment vested in them on the first reading of Government Bills and Private Members' Bills by each of the two Houses. This right can only be limited, at this stage of proceedings and in compliance with the requirement that debate be clear and sincere, by rules governing admissibility and the requirement that an amendment be not unconnected with the purpose of the statute tabled before the first House called upon to debate it;

28. In the case in hand, the Government Bill containing the challenged section, comprised eighteen clauses when tabled before the National Assembly, the first House called upon to debate it. Fifteen of the clauses of said Bill amended solely the Code on entry and residence of foreigners and the right of asylum, the purpose of the three other clauses being merely to refer to said Code by coordination or to provide for particular measures of application for overseas communities. Those provisions appearing in Chapter 1 related to the conditions in which foreigners wishing to reside in France may have the benefit of the right of family reunion. The other provisions dealt essentially, as is shown by the titles of the chapters in which they are found, with asylum and immigration for professional reasons;

29. Although the processing of data necessary for carrying out studies regarding the diversity of origin of peoples, discrimination and integration may be done in an objective manner, such processing cannot, without infringing the principle laid down in Article 1 of the Constitution, be based on ethnicity or race. In all events the amendment giving rise to section 63 of the statute referred for review was devoid of any connection with the provisions in the Bill from which it derives. Section 63 was thus passed in proceedings which were irregular and as such should be held to be unconstitutional;

30. The Constitutional Council is not required proprio motu to review any other question of conformity with the Constitution,

**HELD**

Article 1 - Section 63 of the Act relating to the control of immigration, integration and asylum is unconstitutional.

Article 2 – With the qualifications set forth in paragraphs 9 and 16 hereinabove, section 13 of said Act is not unconstitutional.

Article 3 - This decision shall be published in the Journal officiel of the French Republic

Deliberated by the Constitutional Council sitting on November 15th 2007 and composed of Mr Jean-Louis DEBRE, President, Messrs Guy CANIVET, Renaud DENOIX de SAINT MARC, Olivier DUTHEILLET de LAMOTHE and Valéry GISCARD d'ESTAING, Mrs Jacqueline de GUILLENCHMIDT, Messrs Pierre JOXE and Jean-Louis PEZANT, Mrs Dominique SCHNAPPER and Mr Pierre STEINMETZ