

DECISION 92-307 DC OF 25 FEBRUARY 1992

Act amending Ordinance 45-2658 of 2 November 1945 on the conditions for entry and residence of aliens in France, as amended

On 25 January 1992 the Prime Minister referred to the Constitutional Council, pursuant to Article 61(2) of the Constitution, the question whether section 8 of the Act amending Ordinance 45-2658 of 2 November 1945 on the conditions for entry and residence of aliens in France was in conformity with the Constitution.

THE CONSTITUTIONAL COUNCIL,

Having regard to the Constitution;

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 Act 54-290 of 17 March 1954 authorising ratification of the Geneva Convention of 28 July 1951 on the status of refugees, together with Decree 54-1055 of 14 October 1954 publishing the Convention;

Having regard to Act 70-1076 of 25 November 1970 authorising the commitment of France to the protocol on the status of refugees, signed at New York on 31 January 1967, together with Decree 71-289 of 9 April 1971 publishing the Protocol;

Having regard to Act 91-737 of 30 July 1991 authorising approval of the Convention implementing the Schengen Agreement between the Governments of the Member States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic for the gradual removal of controls at their common borders, together with Decision 91-294 DC of 25 July 1991;

Having regard to Decree 91-902 of 6 September 1991 publishing Ordinance 45-2658 of 2 November 1945 on conditions for entry and residence of aliens in France, as amended;

Having regard to Title II of Act 91-1383 of 31 December 1991 to strengthen the fight against clandestine labour and against the unlawful entry and residence of aliens in France, as amended;

Having regard to Decree 82-442 of 27 May 1982 for the implementation of section 5 of Ordinance 45-2658 of 2 November 1945, as amended;

Having heard the rapporteur,

On the following grounds:

ON THE DETERMINATION OF THE PROVISIONS REFERRED TO THE CONSTITUTIONAL COUNCIL:

1. Although the letter from the Prime Minister dated 25 January 1992 asked the Constitutional Council to rule on the constitutionality of “section 8 of the Act amending Ordinance 45-2658 of 2 November 1945, as amended”, this does not preclude the Constitutional Council from reviewing other provisions of the Act and drawing its conclusions;

ON SECTION 8:

Regarding the content of section 8:

2. Section 8 has two paragraphs; paragraph I inserts in Ordinance 45-2658 of 2 November 1945 a section *35quater*; paragraph II accordingly repeals certain provisions of sections 5 and *35bis*;
3. The new section *35quater* of Ordinance 45-2658 has three subsections;
4. By the first, “an alien who has not been authorised to enter France at an air or sea frontier or who has applied for admission as an asylum-seeker may be detained in the transit area of the port or airport for such time as is strictly necessary for his departure or for the examination of his application, which shall in no case exceed twenty days. That area shall be demarcated by Order of the Prefect and shall embrace the points of embarkation and disembarkation on French territory at places where persons are checked upon entering and leaving the territory. It may be extended to include one or more places of accommodation within the port or airport domain”; by the second, “detention in the transit area shall be ordered by a reasoned written decision of the head of the border checks service or an official designated by him having the rank of inspector. Such decision shall be recorded in a register specifying the alien’s marital status and means of subsistence”; by the third, “the alien shall be free to leave the transit area at any time for a foreign destination”; he may ask for the assistance of an interpreter or a doctor and communicate with any person of his choice; he must be informed of his rights “at the time of the detention decision”, through an interpreter if he does not know French; performance of this formality must be recorded in the register provided for in the second subsection, which the alien must sign;
5. The first subparagraph of paragraph II of section *35quater* provides that detention in the transit area, over 20 days, may be authorised for no more than ten days by the President of the Administrative Court or by a judge delegated by him; the second subparagraph imposes on the President or his delegate a deadline for giving his decision of forty-eight hours from the receipt of the referral from the Prefect and states that “the hearing may take place in the transit area”; by the third subparagraph the alien may ask for the assistance of an interpreter and for access to the file on him; the fourth subparagraph determines the rules of procedure applicable to the hearing following which the President of the Administrative Court or his delegate gives his decision; among other things, the hearing must be in public and the alien may be assisted by a lawyer selected by him or designated by the President of the Administrative Court or his delegate; the fifth subparagraph determines the conditions for appeals against the decision of the President of the Administrative Court or his delegate;
6. Paragraph III of section *35quater* provides that the section applies in like manner to an alien who is transit in a port or an airport where “the transport company which was to bring him to a subsequent country of destination refuses to embark him” or “the authorities of the country of destination have refused to admit him or have returned him to France”;
7. The purpose of paragraph II of section 8 is to repeal the provisions of Ordinance 45-2658 of 2 November 1945 which provide that an alien who is refused admission to France may be detained in premises not belonging to the prisons administration for such as time as is strictly necessary for his departure, as provided by section *35bis* of the Ordinance;

Regarding conformity of section 8 with the Constitution:

8. The State is entitled to define the conditions for entry of aliens into its territory, subject to compliance with international agreements which it has signed and to constitutional principles; the latter include both the right of asylum and individual freedom; conformity of section 8 with the Constitution must be considered in the light of the State’s entitlement and of these principles;

• *Respect for the right of asylum:*

9. The fourth paragraph of the Preamble to the Constitution of 27 October 1946, to which the Constitution of 1958 refers, declares that “Any man persecuted in virtue of his actions in favour of liberty may claim the right of asylum upon the territories of the Republic”; this principle is implemented by statutes and by international conventions transposed into domestic law;

10. The combined effect of sections 2 and 5 of Ordinance 45-2658 of 2 November 1945 is that documents relating to the purpose and terms of residence and to the assurance of repatriation are required of an alien wishing to enter France only “subject to international conventions”; this reservation applies in particular to the Geneva Convention of 28 July 1951 on the status of refugees, as amended by the New York Protocol of 31 January 1967, the provisions of which preclude the said documents being required of persons desirous of entering France who are eligible for political refugee status;

11. It follows that an alien who has applied for admission to France by way of asylum may be detained in a transit area for the time strictly necessary for his departure, subject to suitable guarantees, only if his asylum application is manifestly unfounded; subject to this interpretation, section 8 of the statute is not contrary to the fourth paragraph of the Preamble to the Constitution of 1946;

• *Respect for individual freedom:*

12. By Article 66 of the Constitution, the judicial authority is the guardian of individual freedom and it exercises this function “as provided by statute”;

13. In the exercise of its powers the legislature may determine rules for the exercise of judicial authority which may differ according to the nature and scope of the measures affecting individual freedom which it is minded to order; it is under no obligation to subject to the same rules a measure depriving an individual of the right to come and go and a measure confining that right;

14. The detention of an alien in a transit area as provided by section 35*quater*(I), inserted in the Ordinance of 2 November 1945 by section 8-I of the Act referred, does not affect the liberty of the detainee to the same extent as detention in a detention centre pursuant to section 35*bis* of the Ordinance;

15. But detention in a transit area, given the degree of constraint exerted, has the effect of affecting the individual’s freedom in a manner to which Article 66 of the Constitution applies; while the power to decide on detention is conferred by the statute on an administrative authority, the legislature must provide appropriately for the intervention of the judicial authority so that it can exercise its review responsibility and power;

16. Whatever guarantees are provided by section 35*quater* to accompany detention of aliens in a transit area, there is no provision for intervention by the judicial authority to authorise its renewal and to review the need for the measure in practical terms; in any event, the duration may not exceed what is reasonable;

17. It follows that by conferring on the administrative authority the power to detain an alien in a transit area for a considerable period without conferring on the judicial authority power to intervene at an early stage, section 35*quater* inserted in the Ordinance of 2 November 1945 by section 8-I of the Act referred is, as it stands, unconstitutional;

18. Paragraph II of section 8 of the Act referred is inseverable from paragraph I;

ON SECTION 3:

Regarding the content of section 3:

19. Section 3 inserts a section *20bis* in the Ordinance of 2 November 1945, consisting of three paragraphs;

20. Paragraph I consists of four subparagraphs; by the first, “any air or sea transport company which disembarks in France an alien coming from another state, not being a national of a Member State of the European Community and not holding a travel document or, as the case may be, a visa required by the relevant statute or international convention by reason of his nationality, shall be liable to a fine not exceeding FRF 10 000”; the second determines rules for ascertaining offences and provides that they “shall incur a fine ordered by the Minister of the Interior”, which shall be paid to the Treasury; the third provides that the transport company shall have access to the file in the case and the opportunity to make its views known before the fine is ordered; the decision ordering the fine must be in formal, reasoned form and there must be the possibility of an appeal; by the fourth subsection, the Minister of the Interior may not order fines in respect of acts done more than one year earlier;

21. Paragraph II of section *20bis* precludes the imposition of a fine in two distinct situations: first, where the alien, not being a national of a Member State of the European Community, applies for asylum and is admitted to French territory, or his application is not manifestly unfounded; second, where the transport company establishes that the documents required were presented to it at the time of embarkation or where the documents are not manifestly out of order;

22. Paragraph III of section *20bis* renders the foregoing paragraphs applicable to road haulage companies operating international routes from states not party to the Schengen agreement of 19 June 1990, subject to adaptations and to a maximum fine of FRF 5000 per passenger;

Regarding conformity with Article 3 of the Constitution:

23. Conformity with Article 3 of the Constitution falls to be assessed with particular reference to the constitutional provisions governing the imposition of penalties and the right of asylum;

• *Respect for the provisions governing the imposition of penalties:*

24. Article 8 of the Declaration of Human and Civic Rights provides: “The Law must prescribe only the punishments that are strictly and evidently necessary; and no one may be punished except by virtue of a Law drawn up and promulgated before the offence is committed, and legally applied”;

25. It follows, as fundamental principles recognised by the laws of the Republic, that a penalty may be imposed only if the principle of the legality of offences and penalties, the principle that penalties must be necessary, the principle that a stricter criminal-law statute may not have retroactive effect and the principle of respect for defence rights are observed;

26. These requirements apply not only to penalties imposed by the criminal courts but to all penalties that are punitive in nature, even if the legislature confers power to impose them on non-judicial bodies;

27. The offence defined by section *20bis* inserted in the Ordinance of 2 November 1945 by section 3 of the Act is defined in clear and precise enough terms to exclude arbitrary decisions; the new offence consists solely of acts done after the entry into force of section 3;

28. The amount of the fine to which transport companies are liable, FRF 5000 or FRF 10 000 as the case may be, is not manifestly out of proportion to the conduct that the Act seeks to repress; moreover, these are maximum amounts; the fines are not automatic; reasons must be given for all decisions imposing fines;

29. By the third subparagraph of section 20*bis*(I) inserted in the Ordinance of 2 November 1945, in accordance with the principle of respect for rights of the defence, no penalty may be imposed on a transport company unless the company has had the opportunity of access to the file in the case and of presenting its observations on the allegations made against it; by the fourth subparagraph of Article 20*bis*(I), no fines may be imposed for acts done more than one year earlier;

30. Moreover, an appeal lies against all decisions imposing fines to the administrative exercising full jurisdiction; an application may be made for suspension of the decision in accordance with the rules of the ordinary law; since the transport company has a right of redress, its situation may not, in accordance with the general principles of the law, be aggravated by the fact that it exercises that right;

31. It follows that section 3 of the Act referred is not contrary to constitutional principles governing the imposition of penalties;

• *Respect for the right of asylum:*

32. Paragraph II of section 20*bis* inserted in the Ordinance of 2 November 1945 by section 3 of the Act referred specifies the circumstances in which the transport company may be released from liability, including the case where the alien wishes to apply for asylum and his application is not “manifestly unfounded”; this ground for release means that the company must only understand the alien’s situation, not undertake its own investigation; paragraph II of section 20*bis* cannot, therefore, be interpreted as conferring police powers on transport companies in place of the public authorities; its purpose is to avert the risk that companies will refuse to carry asylum-seekers into France simply because they do have entry visas;

33. It will be for the administrative courts to assess the scale of the transporter’s liability in the event of a dispute, having regard to the grounds for release from liability stated by the Act;

34. Subject to these interpretations, section 3 of the Act referred does not violate the above provisions of the Preamble to the Constitution of 27 October 1946;

ON SECTION 10, RELATING TO THE ENTRY INTO FORCE OF THE ACT:

35. Section 10 of the Act referred reads: “Sections 5-2, 19(II), 22(II) and (III) and the second subparagraph of section 26*bis* of Ordinance 45-2658 of 2 November 1945, as amended by this Act, shall apply from the date of entry into force of the Convention signed at Schengen on 19 June 1990. They shall apply solely to the metropolitan departments of the Republic”;

36. The provisions applicable only after the entry into force of the Convention signed at Schengen on 19 June 1990 include section 19(II) of Ordinance of 2 November 1945, as amended by section 2 of the Act referred; section 19(II) creates an offence and imposes penalties on aliens, not being nationals of a Member State of the European Community, entering or residing metropolitan France contrary to the stipulations of the Convention or sought for purposes of non-admission by virtue of an enforceable order made in another signatory state;

37. By Article 8 of the Declaration of Human and Civic Rights, no-one may be punished otherwise than by virtue of a Statute passed and promulgated prior to the offence; by reason of

this principle, the reference by section 10 of the Act referred to the date of entry into force of the Convention signed at Schengen on 19 June 1990 must be taken to be not to the date of international entry into force pursuant to Article 139(2) of the Convention but to the date of publication of the Convention in the *Journal officiel de la République Française*; any other interpretation would be unconstitutional;

Has decided as follows:

Article 1

Section 8(I) of Act amending Ordinance 45-2658 of 2 November 1945 relating to the conditions of entry and residence of aliens in France, as amended, is unconstitutional.

Article 2

Section 8(II) of the Act is inseverable from the provision declared unconstitutional.

Article 3

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

Deliberated by the Constitutional Council at its sittings of 24 and 25 February 1992.