

DECISION 96-377 DC OF 16 JULY 1996

Act to strengthen enforcement measures to combat terrorism and violence against holders of public office or public service functions and to enact measures relating to the criminal investigation police

On 20 June 1996 the Constitutional Council received a referral from 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 Jacques BIALSKI, Mr Pierre BIARNES, Mr Marcel BONY, Mr Jean-Louis CARRERE, Mr Robert CASTAING, Mr Francis CAVALIER BENEZET, Mr Michel CHARASSE, Mr Marcel CHARMANT, Mr Michel CHARZAT, Mr William CHERVY, Mr Raymond COURRIERE, Mr Roland COURTEAU, 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 Gérard GAUD, Mr Roland HUGUET, Mr Philippe LABEYRIE, Mr Philippe MADRELLE, Mr Jacques MAHEAS, Mr Jean-Pierre MASSERET, Mr Marc MASSION, Mr Georges MAZARS, Mr Jean-Luc MELENCHON, Mr Charles METZINGER, Mr Gérard MIQUEL, Mr Michel MOREIGNE, Mr Jean-Marc PASTOR, Mr Guy PENNE, Mr Daniel PERCHERON, Mr Jean PEYRAFITTE, Mr Jean-Claude PEYRONNET, Ms Danièle POURTAUD, Mr Paul RAOULT, Mr René REGNAULT, Mr Alain RICHARD, Mr Michel ROCARD, Mr Gérard ROUJAS, Mr René ROUQUET, Mr André ROUVIERE, Mr Claude SAUNIER, Mr Michel SERGENT, Mr Franck SERUSCLAT, Mr René-Pierre SIGNE, Mr Fernand TARDY, Mr André VEZINHET, Mr Henri WEBER, Senators, and, on 24 June 1996, a referral from Mr Laurent FABIUS, Mr Martin MALVY, 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, Mr Laurent CATHALA, Mr Henri d'ATTILIO, Mr Camille DARSIERES, Ms Martine DAVID, Mr Bernard DAVOINE, Mr Jean-Pierre DEFONTAINE, Mr Bernard DEROSIER, Mr Michel DESTOT, Mr Julien DRAY, Mr Pierre DUCOUT, Mr Dominique DUPILET, Mr Jean-Paul DURIEUX, Mr Henri EMMANUELLI, Mr Jacques FLOCH, Mr Michel FROMET, Mr Pierre GARMENDIA, Mr Kamilo GATA, Mr Jean GLAVANY, Mr Jacques GUYARD, Mr Jean-Louis IDIART, 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 Marius MASSE, Mr Didier MATHUS, Mr Louis MEXANDEAU, Mr Didier MIGAUD, Ms Véronique NEIERTZ, Mr Paul QUILES, Mr Alain RODET, Ms Ségolène ROYAL, Mr Henri SICRE, Mr Roger-Gérard SCHWARTZENBERG, Mr Daniel VAILLANT, Mr Léo ANDY, Mr Jean-Jacques FILLEUL, Mr Patrice TIROLIEN, Mr Jean-Marc SALINIER, Ms Frédérique BREDIN, Mr Maurice DEPAIX, Mr Pierre FORGUES, Mr Maurice JANETTI, Mr Michel PAJON, Mr Bernard SEUX, Mr Gérard SAUMADE, Mr Jean-Pierre CHEVENEMENT, Mr Georges SARRE, Mr Jean-Pierre MICHEL, Mr Pierre CARASSUS, Deputies, pursuant to the second paragraph of Article 61 of the Constitution, for constitutional review of the Act to strengthen enforcement measures to combat terrorism and violence against holders of public office or public service functions and to enact measures relating to the criminal investigation police;

THE CONSTITUTIONAL COUNCIL,

Having regard to the Constitution;
Having regard to Ordinance 45-2658 of 2 November 1945 relating to the conditions of entry and residence of aliens in France, as amended;
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 the Civil Code;
Having regard to the Criminal Code;
Having regard to the Code of Criminal Procedure;
Having regard to the observations of the Government, registered on 5 July 1996;
Having regard to the observations by way of rejoinder presented by the Deputies and Senators listed above, registered on 8 July 1996 and 15 July 1996 respectively;
Having heard the rapporteur;

On the following grounds:

1. The Senators and Deputies making the first and second referrals respectively refer to the Constitutional Council the Act to strengthen enforcement measures to combat terrorism and violence against holders of public office or public service functions and to enact measures relating to the criminal investigation police, contesting the constitutionality of sections 1, 10, 15, 16, 17 and 25; the Senators further contest the constitutionality of section 21 of the Ordinance of 2 November 1945 relating to the conditions of entry and residence of aliens in France, as amended; the Deputies contest section 12 of the Act referred;

ON SECTION 1 OF THE ACT:

2. Section 1 of the Act referred amends Article 421-1 of the Criminal Code, in particular by supplementing the provisions of paragraph 3, which as a result of other amendments becomes paragraph 4; pursuant to this paragraph, acts of terrorism henceforth include acts done intentionally, in relation to an individual or collective act calculated to seriously disrupt law and order by intimidation or terror, to assist the unlawful entry, movement or residence of foreign nationals within the meaning of section 21 of the Ordinance of 2 November 1945;

3. Section 21 of that Ordinance provides: "I. Any person who, while in France, by direct or indirect assistance, facilitates or attempts to facilitate the unlawful entry, movement or residence of foreign nationals in France shall be liable to imprisonment for five years and to a fine of 200 000 francs..."; by section 25 of the Act referred, the following paragraph is added to section 21: "III. Without prejudice to section 19, there shall be no criminal proceedings on the base of this section in respect of assistance for the unlawful residence of a foreign national where such assistance is given by: 1) an ascendant or descendant of the foreign national; 2) the spouse of the foreign national, unless the spouses are legally separated or are authorised to reside separately.";

4. Firstly, the Senators making the first referral argue that section 21 of the Ordinance of 2 November 1945 is unconstitutional; they submit that this section, by providing for an absolute, general and indistinct prohibition of any form of assistance for the unlawful residence of immigrants violates the principle of safeguarding human dignity; they further submit that this provision does not satisfy the requirements of the constitutional principle that offences and penalties must be defined by statute, laid down by Article 8 of the Declaration of Human and Civic Rights; they conclude that, given the imprecise drafting of section 21, the legislature has defined an offence in relation to acts of terrorism which is itself insufficiently precisely defined and is consequently contrary to the principle that offences and penalties must be defined by statute;

5. Secondly the Senators and the Deputies submit that, by introducing into the list of offences in section 421-1 of the Criminal Code the acts classed as an offence by section 21, the legislature has violated the principle that penalties must be defined by statute; they argue in particular that persons who intentionally give assistance to the perpetrator of an act of terrorism can already be prosecuted, in particular as an accomplice;
6. Lastly, the Deputies making the second referral contest section 421-1-4 of the Criminal Code as violating the principle of equality before the criminal law, since it aggravates the penalties incurred by accomplices of terrorists solely where the terrorists are illegal immigrants, by allowing them to be described as perpetrators of an act of terrorism for the purposes of the criminal law;
7. By Article 8 of the Declaration of Human and Civic Rights, “Only punishments which are strictly and clearly necessary may be provided for by law ...”; it is accordingly for the Constitutional Council to verify whether there is no manifest error of judgment in the scale of penalties incurred for offences as defined in terms of fact;
8. Unlike the offences enumerated in section 421-1 of the Criminal Code, section 21 creates offences not only of material acts detrimental to the safety of persons and property but also of directly or indirectly assisting illegal immigrants; there is no immediate link with terrorism; moreover, where there is such a link, the conduct constituting an offence could be prosecuted as complicity with terrorism, concealing criminals or conspiracy, all of which offences are provided for elsewhere; the description of an act as an act of terrorism has the effect not only that heavier penalties are incurred but also that some of the procedural rules of the ordinary law cease to apply;
9. By regarding the offence defined by section 21 of the Ordinance of 2 November 1945 as being an offence of terrorism within the meaning of section 421-1 of the Criminal Code, the legislature has manifestly acted disproportionately; the provision of section 1 of the Act referred that inserts in section 421-1 of the Criminal Code the words “assistance for the unlawful entry, movement or residence of foreign nationals within the meaning of section 21 of Ordinance 45-2658 of 2 November 1945 relating to the conditions of entry and residence of aliens in France, as amended” is accordingly unconstitutional;

ON SECTION 21 OF THE ORDINANCE OF 2 NOVEMBER 1945 AND SECTION 25 OF THE ACT:

10. Firstly, the constitutionality of an Act already promulgated may be disputed upon a referral to the Constitutional Council of provisions of an Act amending, amplifying or affecting it; the Act referred to the Constitutional Council contains provisions (in section 25) to restrict the scope of section 21 of the Ordinance of 2 November 1945; it is accordingly for the Constitutional Council to review it for constitutionality;
11. It is in order for the legislature, given its avowed public-policy objectives in relation to the entry and residence of aliens which could validly justify provision for criminal-law penalties, to lay down rules defining offences in that respect and the penalties incurred, provided constitutional requirements are met; the offences defined by section 21 of the Ordinance of 2 November 1945 are defined in such manner as to enable the courts, required by the principle of legality to interpret provisions of criminal law strictly, to rule on cases before them without risking criticism on grounds of arbitrariness; they are not so defined as to violate the principle of constitutional status of safeguards for human dignity; the arguments presented by the Senators making the first referral must be dismissed;
12. Secondly, the Deputies making the second referral contest, as violating the principle of equality before the criminal law, the provision of section 25 of the Act referred, without prejudice of section 19 of the Ordinance, whereby there shall be no criminal proceedings by

virtue of section 21 of the Ordinance in respect of assistance for the unlawful residence of a foreign national where such assistance is given by an ascendant or descendant of the foreign national or the spouse of the foreign national, unless the spouses are legally separated or are authorised to reside separately; they submit that it is not legitimate to exclude brothers, sisters and concubines from family immunity; the Deputies and Senators making the referrals further submit that this restriction on that immunity would have the effect of causing persons not enjoying the immunity to incur unnecessary penalties;

13. In view of its avowed objective of reconciling the need to take account of legally protected situations on humanitarian grounds and the concern to avoid facilitating illegal immigration, it is not contrary to the principle of equality for the legislature to confer immunity from criminal prosecution on the relatives in the ascending and descending lines and spouses without extending it to brothers, sisters and concubines; the penalties incurred by the latter categories cannot be regarded as contrary to Article 8 of the Declaration of Human and Civic Rights;

ON SECTION 10 OF THE ACT:

14. Section 10 of the Act referred amends section 706-24 of the Code of Criminal Procedure by adding four paragraphs; under the first three, with regard to offences within the definition of acts of terrorism, visits, searches and seizures may henceforth be made at night if the needs of the investigation so require; the fourth lays down specific rules of allocating jurisdiction as between Presidents of *Tribunaux de grande instance*;

15. The Senators making the first referral submit that the rule laid down by section 59 of the Code of Criminal Procedure, which prohibits visits and searches between 9 p.m. and 6 a.m., is a fundamental principle recognised by the laws of the Republic; the Senators and Deputies making the referrals submit that there can be no departures from the principle of individual freedom guaranteeing the inviolability of the residence unless they are necessary to safeguard law and order, and that this requirement for a perceived undeniable need does not exist at the preliminary investigation stage; they submit, finally, that a warrant issued by the judicial authority does not on its own guarantee respect for individual freedom;

16. The search for offenders is necessary for safeguarding principles and rights of constitutional status; it is for the legislature to reconcile this constitutional objective with the exercise of the public liberties secured by the Constitution, among them individual freedom and in particular the inviolability of the home;

17. Given the demands of public order, it is legitimate for the legislature to provide for the possibility of visits, searches and seizures by night where an offence potentially classable as an act of terrorism is being or has just been committed, provided the warrant is given by the judicial authorities as guardians of individual freedom and provided the measures are surrounded by appropriate procedural guarantees; the law in this case empowers senior judges in the persons of the President of the *Tribunal de grande instance* or his delegate to issue the warrants by written decision giving reasons and specifying the offence for which evidence is sought, the address of execution, and the facts of the case justifying the search; moreover, operations are subject to control by the judge authorising them, who can move to the place of execution, to ensure compliance with the Act's requirements; and the operations would be void as a matter of public policy unless directed solely to detecting and establishing offences of the relevant categories; the concept of the "needs of the investigation" is to be interpreted as allowing a visit, search or seizure to be made only if it cannot otherwise be done within the time scales allowed by section 59 of the Code of Criminal Procedure; and once the warrant has been given the visit, search or seizure must be made with all due dispatch; the legislature

has accordingly not excessively violated the principle of inviolability of the home, given the needs of the investigation in the event of *flagrante delicto*;

18. In contrast, the possibility of visits, searches and seizures by night, at unspecified times, in all places, including those used exclusively for residential purposes, in the event of a preliminary investigation and in the course of a preparatory inquiry, on the understanding that they are within the discretion of the Prosecutor or carried out under his control by officers of the criminal investigation police and that the authority responsible for the inquiry is now empowered to authorise, direct and control the relevant operations, constitutes an excessive violation of individual freedom;

19. It follows that section 706-24 of the Code of Criminal Procedure, as it applies to the preliminary investigation, is unconstitutional; it follows in turn that the words “or of the investigation” and “unless they are authorised by the examining magistrate”, which refer to the case of a judicial inquiry, must be considered unconstitutional and that the remainder of section 10 of the Act can be considered constitutional only insofar as it refers solely to investigations in cases of *flagrante delicto*;

ON SECTION 12 OF THE ACT:

20. Section 12 of the Act referred adds a new provision to the second paragraph of section 25 of the Civil Code; the effect of the new provision is that persons having acquired French nationality may be deprived of that nationality where they are convicted of a crime or an offence constituting an act of terrorism; by section 25-1 of that Code, such deprivation is incurred only if the offence of which the person concerned is charged was committed within ten years following acquisition of French nationality; moreover it can be ordered only within ten years following commission of the material offence;

21. The Deputies making the second referral contest section 12 as violating the principle of equality before the criminal law and the principle that penalties must be necessary; they submit that the fact that the perpetrator of the act of terrorism acquired French nationality by naturalisation or by birth does not justify any difference in treatment under the criminal law; they further submit that this provision, which is in the nature of a penalty provision, is neither necessary nor useful for the upholding of public order;

22. The principle of equality does not preclude the legislature from treating different situations differently nor from derogating from equality for reasons of general interest, provided in both cases that the difference of treatment is in relation to the object of the statute providing for it;

23. In relation to the law governing nationality, persons having acquired French nationality and persons who enjoy French nationality by birth are in the same situation; however, in view of the avowed objective of combating terrorism, it is in order to provide that for a limited period the administrative authorities may deprive a person of French nationality without the resultant difference in treatment being a violation of the principle of equality; given the serious intrinsic gravity of offences of terrorism, it is not contrary to Article 8 of the Declaration of Human and Civic Rights for the legislature to provide for such penalty;

ON SECTIONS 15, 16 AND 17 OF THE ACT:

24. The authors of the referrals contest sections 15, 16 and 17 of the Act referred as violating the principle that penalties must be necessary, on the ground that they provide for aggravated criminal penalties;

25. Section 15 supplements section 222-13 of the Criminal Code to strengthen the repression of voluntary acts of violence causing a period of incapacity for work for a period of no more

than eight days where there are two or three aggravating circumstances listed by the section; such acts of violence incur a penalty of imprisonment for five years and a fine of 500 000 francs or imprisonment for seven years and a fine of 700 000 francs, as the case may;

26. Section 16 adds to section 433-3 of the Criminal Code a new paragraph which represses threats to commit a crime or offence against persons or property where they are to the detriment of persons exercising official authority or a public service mission in the exercise or on the occasion of the performance of their duties, if the threat is reiterated or is recorded in a document, image or other object; such offences incur a penalty of imprisonment for two years and a fine of 200 000 francs, or imprisonment for five years and a fine of 500 000 francs in the event of threatened death or threat of violation of property such as to be hazardous to persons;

27. Section 17 supplements section 433-5 of the Criminal Code; the effect of the new provision is that verbal attacks on a person exercising a public service mission in the exercise or on the occasion of the performance of his duties incur a penalty, when they are made at a meeting, of imprisonment for six months and a fine of 50.000 francs; where they are directed at a person exercising official authority and made at a meeting, the penalty incurred is imprisonment for one year and a fine of 100 000 francs;

28. The penalties provided for by sections 15, 16 and 17 of the Act, which can be ordered on a lighter basis by the courts, are not manifestly disproportionate; as they are not disproportionate, it is not in order for the Constitutional Council to substitute its evaluation for that of the legislature as regards the necessity of the penalties incurred for the offences defined; the arguments presented by the authors of the referrals must be dismissed;

ON SECTION 27 OF THE ACT:

29. Section 27 of the Act reads: “This Act shall extend to the overseas territories, where it shall enter into force on 1 May 1996”; the principle that criminal legislation may not have retroactive effect laid down by Article 8 of the Declaration of Human and Civic Rights precludes the determination of that date of entry into force of the Act in the overseas territories;

30. It follows from the foregoing that words “where it shall enter into force on 1 May 1996” must be declared unconstitutional;

31. There is no need for the Constitutional Council to review the other provisions of the Act referred for constitutionality;

Has decided as follows:

Article 1

The following are unconstitutional:

– section 1, inserting in the fourth paragraph of section 421-1 of the Criminal Code the words “assistance for the unlawful entry, movement or residence of foreign nationals within the meaning of section 21 of Ordinance 45-2658 of 2 November 1945 relating to the conditions of entry and residence of aliens in France, as amended”;

– the words “or of the investigation” and “unless they are authorised by the examining magistrate” and the first three paragraphs inserted by section 10 in section 706-24 of the Code of Criminal Procedure insofar as they relate to preliminary investigation;

– in section 27, the words “where it shall enter into force on 1 May 1996”.

Article 2

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

Deliberated by the Constitutional Council at its sitting of 16 July 1996, attended by Mr Roland DUMAS, President, Mr Etienne DAILLY, Mr Maurice FAURE, Mr George ABADIE, Mr Jean CABANNES, Mr Michel AMELLER, Mr Jacques ROBERT, Mr Alain LANCELOT and Ms Noëlle LENOIR.