

Decision no. 2018-717/718 QPC of 6 July 2018

Mr. Cédric H. et al. [Offence of facilitating the illegal entry, movement and residence of a foreign person]

THE CONSTITUTIONAL COUNCIL, in the conditions provided for by Article 61-1 of the Constitution, received from the Cour de Cassation (criminal division, judgments nos. 1163 and 1164 of 9 May 2018) two applications for a priority preliminary ruling on the issue of constitutionality on 11 May 2018. These questions were raised on behalf of Mr. Cédric H. and Mr. Pierre-Alain M. by the firm SCP Spinosi et Sureau, Attorneys at the Conseil d'Etat and the Cour de Cassation. They were registered by the General Secretariat of the Constitutional Council respectively under no. 2018-717 QPC and no. 2018-718 QPC. They relate to the conformity with the rights and freedoms that the Constitution guarantees under Articles L. 622-1 and L. 622-4 of the French Code on the Entry and Residence of Foreign Nationals and the Right to Asylum.

In light of the following texts:

- the Constitution;
- Ordinance no. 58-1067 of 7 November 1958 concerning the Organic Law on the Constitutional Council;
- the Code on the Entry and Residence of Foreign Nationals and the Right to Asylum;
- Law no. 2012-1560 of 31 December 2012 on the holding of foreign nationals to verify their rights to stay and amending the offence of providing assistance for an illegal stay in order to exclude humanitarian and disinterested actions;
- The Regulation of 4 February 2010 on the procedure applicable before the Constitutional Council for priority matters of constitutionality;

In light of the following items:

- the observations presented on behalf of the applicant associations by the firm SCP Spinosi et Sureau, registered on 4 and 19 June 2018;
 - the observations presented by the Prime Minister, registered on 4 June 2018;
 - the observations from the intervening party filed on behalf of Mr. Théo B. and Mr. Bastien S. by the firm SCP Henri Leclerc and Associates, Attorneys at the Paris bar, registered on 4 June 2018;
 - the observations from the intervening party presented for the association La Ligue des Droits de l'Homme [the League of Human Rights] by the firm SCP Spinosi et Sureau, recorded on 4 and 19 June 2018;
 - the observations from the intervening party filed on behalf of the association "SOS soutien ô sans papiers" [SOS Support Undocumented Individuals] by Henri Braun, Esq., Attorney at the Paris bar and Nawel Gafsia, Esq., Attorney at the Val-de-Marne bar, registered on 4 June 2018;
 - the observations from the intervening party presented on behalf of Cimade and eleven other parties applying to be joined by the firm SCP Sevaux et Mathonnet, Attorneys at the Conseil d'État and the Cour de Cassation, registered on 4 June 2018;
 - the documents produced and attached to the case file;
- After having heard Patrice Spinosi, Esq., Attorney at the Conseil d'État and the Cour de Cassation, and Zia Oloumi, Esq., Attorney at the Paris Bar, the former for the applicants and the Ligue des droits de l'homme, intervening party, the latter for Cédric H., Henri Leclerc, Esq., Attorney at the Paris Bar, for Théo B. and Bastien S., intervening parties, Mr. Braun, Esq., on behalf of the Association SOS Soutien ô sans papiers, intervening party, Paul Mathonnet, Esq., Attorney at the Conseil d'État and the Cour de Cassation, on behalf of

Cimade and eleven other intervening parties, and Philippe Blanc, designated by the Prime Minister, at the public hearing of 26 June 2018;

And having heard the rapporteur;

THE CONSTITUTIONAL COUNCIL WAS ASKED TO DECIDE ON THE FOLLOWING:

1. It is appropriate to join the two priority matters of constitutionality in order to address them with a single decision.
2. A priority matter of constitutionality must be considered as relating to the provisions applicable to the dispute at the time it was raised. Accordingly, the Constitutional Council has been asked to decide in relation to Articles 622-1 and 622-4 of the Code of Entry and Residence of Foreign Nationals and the Right to Asylum, in their drafting resulting in the Law of 31 December 2012 mentioned above.
3. Article L. 622-1 of the Code on the Entry and Residence of Foreign Nationals and the Right to Asylum, in its drafting, states:

“Subject to the exemptions established in Article L. 622-4, any person who has, by direct or indirect action, facilitated or attempted to facilitate the illegal entry, movement, or residence of a foreign national in France is liable to five years' imprisonment and a 30,000 euro fine.

“Subject to the exemptions established in Article L. 622-4, the same penalties will be applied to anyone who, no matter their nationality, has committed the offence defined in the first subparagraph of this Article when they are located in the territory of a State, other than France, which is party to the convention signed in Schengen on 19 June 1990.

“Subject to the exemptions established in Article L. 622-4, the same punishment will be applied to anyone who has facilitated or attempted to facilitate the illegal entry, movement, or residence of a foreign national on the territory of another State Member which is party to the convention signed in Schengen on 19 June 1990.

Subject to the exemptions provided for in Article L. 622-4, the same punishment will be applied to anyone who has facilitated or attempted to facilitate the illegal entry, movement, or residence of a foreign national into the territory of a State which is party to the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Agreement against Transnational Organised Crime, signed in Palermo on 12 December 2000.

“The provisions of the previous subparagraph are applicable in France from the date this protocol is published in the Journal Officiel de la République Française [the Official Journal of the French Republic]”.
4. Article L. 622-4 of the Code on the Entry and Residence of Foreign Nationals and the Right to Asylum, in its same drafting, states:

“Without prejudice to Articles L. 621-2, L. 623-1, L. 623-2 and L. 623-3, there cannot be criminal prosecution on the basis of Articles L. 622-1 to L. 622-3 for assisting in providing the illegal residence of a foreign national when it relates to:

“1° The ascendants or descendants of the foreign national, his/her spouse, brothers and sisters of the foreign national or their spouse;

“2° The foreign national's spouse, the person who lives in a known marital situation with them, or ascendants, descendants, brothers and sisters of the foreign national's spouse or the person living in a known marital situation with them;

“3° Any natural or legal person, when the offending act did not give rise to any direct or indirect compensation and consisted of providing legal advice or providing food, shelter or medical care intended to ensure the foreign national aimed at ensuring humane and decent living conditions, or any other assistance aimed at preserving the dignity or physical integrity of this individual.

“The exceptions provided for in 1° and 2° do not apply when the foreign national who receives assistance as an illegal

resident is involved in a polygamous relationship or is the spouse of a polygamous person who resides in France with the main spouse”.

5. The applicants, as well as the intervening parties, hold that the disputed provisions infringe on the principle of fraternity because, on the one hand, the immunity provided for in Section 3° of Article L. 622-4 of the Code on the Entry and Residence of Foreign nationals and the Right to Asylum only apply when the person is charged with providing assistance to illegal residence, and not for the entry and movement of an illegal foreign resident within the French territory. Furthermore, they infringe on this same principle because they do not provide for immunity in the event of providing assistance to illegal residence for any action that is purely humanitarian that does not give rise to any direct or indirect compensation. For the same reasons, the disputed provisions are also contrary to the principle of the necessity and proportionality of offences and penalties. Furthermore, the applicants hold that these provisions also violate the principle that offences and penalties must be defined by law in that the terms of Section 3° are not sufficiently precise. Finally, the principle of equality before the law is also infringed in the sense that only providing assistance to the residence of a foreign national in an illegal situation is subject to exemption, and not assisting in the entry or movement of a foreign national in an illegal situation.

6. Consequently, the priority matter of constitutionality focuses on the term “illegal residence” mentioned in the first subparagraph of Article L. 622-4 of the Code of the Entry and Residence of Foreign Nationals and the Right to Asylum, as well as Section 3° of the same Article.

- On the merits:
 - . Regarding the claim of infringement on the principle of fraternity:

7. Pursuant to Article 2 of the Constitution: “The French Republic's maxim shall be ‘Liberty, Equality, Fraternity’”. The preamble and Article 72-3 of the Constitution also refers to the “common ideal of liberty, equality and fraternity”. Fraternity is a principle which has constitutional value.

8. It follows from the principle of fraternity the freedom to help one another, for humanitarian reasons, without consideration as to whether the assisted person is legally residing or not within the French territory.

9. However, no principle nor any constitutional rule ensures foreign nationals general and absolute rights of entry and residence within the French national territory. Furthermore, the objective of fighting against illegal immigration partakes of the safeguarding of public order, which is an objective that has constitutional value.

10. Therefore, it is the legislature's responsibility to ensure a balance between the principle of fraternity and the safeguarding of public order.

11. Pursuant to the first subparagraph of Article L. 622-1 of the Code of the Entry and Residence of Foreign nationals and the Right to Asylum, anyone who directly or indirectly provides assistance to facilitate the illegal entry, movement or residence of a foreign national in France is liable to five years' imprisonment and a 30,000 euro fine. However, Article L. 622-4 of the same code provides for a certain number of exemptions for people who may be criminally charged with the crime of providing assistance to facilitate the residence of a foreign national. Sections 1° and 2° of this article exclude any criminal charge in this matter when assistance is provided by the family of the foreign national or by the family of their spouse or the person in a martial situation with them. Section 3° of this same article grants immunity from criminal charges for any natural or legal person having provided such assistance to a foreign national when this action “does not give rise to any direct or indirect compensation and consists of providing legal advice or providing food, shelter or medical care aimed at ensuring humane and decent living conditions for the foreign national, or any other assistance aimed at preserving their dignity or physical integrity”.

- Regarding the limit to only providing assistance for illegal residence in terms of the exemption from charges established in Section 3° of Article L. 622-4 of the Code on the Entry and Residence of Foreign Nationals and the Right to Asylum:

12. It follows from the provisions of the first subparagraph of Article L. 622- 1, along with the contested provisions of the first subparagraph of Article L. 622-4, that any assistance provided to a foreign national in order to facilitate or attempt to facilitate their illegal entry or movement within the French national territory shall give rise to criminal prosecution, whatever the nature and the purpose of this assistance. However, assistance given to a foreign national for his/her movement does not necessarily create an illegal situation, unlike the assistance given at entry.

13. However, by criminalizing any assistance to the free movement of an illegal immigrant , including when it is the accessory to the assistance to residence and is given for humanitarian reasons, the law maker has failed to reconcile in a balanced manner the principle of fraternity and the objective of protecting public order. Consequently, and without it being necessary to assess the other claims against these provisions, the words “to the illegal residence” which are contained in the first subparagraph of Article L. 622-4 of the Code for the Entry and Residence of Foreign Nationals and the Right to Asylum are unconstitutional.

- Regarding the limit to the exemption from charges only for actions of providing legal advice or providing food, shelter or medical care intended to ensure humane and decent living conditions for the foreign national, and where assistance is aimed at preserving their dignity or physical integrity:

14. Section 3° of Article L. 622-4 provides that, when assistance to the illegal resident is provided within the French territory, without direct or indirect compensation, by a person other than a member of the foreign national's family or by the family of their spouse or the person living in a marital relationship with them, only for actions of providing legal advice benefit from an exemption of criminal charges no matter the purpose intended by the person providing assistance. If assistance is provided for the services of providing food, shelter or medical care, the person providing this assistance only benefits from criminal immunity if this action is aimed at preserving their dignity or physical integrity. Immunity does not exist for any other action that seeks to preserve the dignity and physical integrity of the foreign national. However, these provisions, without infringing on the principle of fraternity, cannot be interpreted otherwise than additionally applying to any other actions for the purpose of humanitarian assistance.

15. It follows from the foregoing that, subject to the reservation established in the preceding paragraph, the legislature has not created a manifestly unbalanced equilibrium between the principle of fraternity and the constitutional objective of protecting public order. The claim regarding infringement on the principle of fraternity of Section 3° of Article L. 622-4 of the Code on the Entry and Residence of Foreign Nationals and the Right to Asylum should thus be set aside.

. Regarding the claims of infringement on the principle of offences and penalties being defined by law and that of the necessity and proportionality of penalties:

16. According to Article 8 of the Declaration of Human and Civic Rights of 1789: "The law must prescribe only the punishments that are strictly and evidently necessary, and one may be punished except by virtue of a Law drawn up and promulgated before the offence is committed, and legally applied."

17. Pursuant to Article 34 of the Constitution: "Statutes shall determine the rules concerning... the determination of crimes and offences and the penalties they carry". Pursuant to Article 34 of the Constitution, as well as the principle of legality of offences and penalties according to Article 8 of the 1789 Declaration, the legislature is under the obligation to determine the scope of criminal law and to define crimes and offences in sufficiently clear and precise terms to avoid arbitrariness;

18. Article 61-1 of the Constitution does not grant the Constitutional Council general powers of assessment and judgement of the same nature as those belonging to the Parliament, but only grants it the competence to decide on the constitutionality of the contested laws under its consideration. If it is necessary to inflict punishment related to an offence under the legislature's power of assessment, it falls on the Constitutional Council to ensure that there is no manifest disproportionality between the offence and the penalties incurred.

19. On the one hand, the provisions of Section 3° of Article L. 622-4 are not ambiguous and are sufficiently precise to avoid arbitrariness. The claim of infringement on the principle of legality of offences and penalties must be set aside.

20. Furthermore, it follows from the reservation mentioned in Paragraph 14 that the criminal immunity established in Section 3° of Article L. 622-4 applies to any assistance for residence provided for humanitarian purposes. Therefore, by not providing for a criminal exception, outside of the family, for providing assistance for illegal residence for a purpose other than a humanitarian one, the legislature did not infringe on the principles of necessity and proportionality of offences and punishment. The claims of infringement on these principles should be set aside.

21. It follows from the foregoing, subject to the reservation established in Paragraph 14, that Section 3° of Article L. 622-4, which does not infringe on any other right or freedom guaranteed by the Constitution, are constitutional.

- On the Effects of the Ruling of Unconstitutionality:

22. According to the second Subparagraph of Article 62 of the Constitution:

"A provision declared unconstitutional on the basis of Article 61-1 shall be repealed as of the publication of the said decision of the Constitutional Council or as of a subsequent date determined by said decision. The Constitutional Council shall determine the conditions and the limits according to which the effects produced by the provision shall be liable to challenge". In principle, the declaration of unconstitutionality should benefit the individual who brought up this priority matter and the provision declared unconstitutional may not be applied in proceedings pending on the date of publication of the Constitutional Council's Decision. However, the provisions of Article 62 of the Constitution provide the Constitutional Council with the power to set the date of repeal and to defer its effects as well as to provide for the review of the effects that the provision generates before this declaration takes effect.

23. The Constitutional Council does not have general discretionary powers of the same nature as Parliament does. It cannot indicate the modifications that must be made in order to remedy the ascertained unconstitutionality. In this case, the immediate repeal of the contested provisions would have the effect of extending the criminal exemptions established in Article L. 622-4 to actions that facilitate or attempt to facilitate illegal entry into French territory. It would result in clearly excessive consequences. Consequently, it is best to postpone the date of repeal of these contested provisions to 1 December 2018

24. In order to bring an end to the unconstitutionality from the time this decision is published, it is best to find that the criminal exemption established in Section 3° of Article L. 622-4 of the Code on the Entry and Residence of Foreign Nationals and the Right to Asylum must also apply to acts that facilitate or attempt to facilitate, in addition to entry into French national territory, movement that is considered an accessory to the residence of an illegal foreign national in France when these actions are carried out for humanitarian purposes.

THE CONSTITUTIONAL COUNCIL DECIDES:

Article 1. - The words "illegal residence" as provided for in the first Subparagraph of Article L. 622-4 of the French Code on the Entry and Residence of Foreign Nationals and the Right to Asylum, in its drafting from Law number 2012-1560 of 31 December 2012 relating to retention to verify the right to residence and modifying the offence to provide assistance to

illegal residents to exclude humanitarian and disinterested actions, are unconstitutional.

Article 2. - Subject to the reservation established in Paragraph 14, Section 3° of Article L. 622-4 of the Code on the Entry and Residence of Foreign Nationals and the Right to Asylum, in its drafting from the same law, is constitutional.

Article 3. - The declaration of unconstitutionality of Article 1 takes effect under the conditions set out in Paragraphs 23 and 24 of this decision.

Article 4. - This decision will be published in the Journal officiel of the French Republic and notified under the conditions provided for in Article 23-11 of the Ordinance of 7 November 1958 referred to herein above.

Deliberated by the Constitutional Council in its session of 5 July 2018, in attendance: Mr. Laurent FABIOUS, Chairperson, Ms. Claire BAZY MALAURIE, Mr. Jean-Jacques HYEST, Mr. Lionel JOSPIN, Ms. Dominique LOTTIN, Ms. Corinne LUQUIENS, Ms. Nicole MAESTRACCI and Mr. Michel PINAULT.

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À voir aussi sur le site : Communiqué de presse, Commentaire, Dossier documentaire, Décision de renvoi Cass., Décision de renvoi Cass. 2, Références doctrinales, Vidéo de la séance.