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Session : Refugees and Asylum Seekers and HIV: Deportation and Human Rights Violations

**Prevention of the expulsion of non-European HIV positive foreigners in spite of an unfavourable judgement by the European Court of Human Rights : the French case**

In France, for the last ten years, immigrants suffering from grave illnesses without the ability to receive care in their countries of origin have been protected against all measure of expulsion and can be stabilized in the frame of the right of residence for medical care. This legislation has been obtained notably due to the advocacy work of collaborating associations of patients, like Act Up-Paris, associations for the defense of the rights of immigrants and of patients, today regrouped in an inter-associative organization, ODSE (Observatoire du Droit à la Santé des Etrangers, or the Observatory of Immigrants' Right to Health). Even if the procedure anticipated by the law is less and less respected by the prefectures and illegal expulsions have been increasing in the last few years,

in the case of HIV-positive people, it is still possible to make this right recognized. Once regulated, people can have access to social security and can work.

Despite repeated attacks and a French political context that is extremely unfavorable with the government's establishment of calculated goals for annual expulsions that have been getting higher and higher, the State Council, with the highest jurisdiction in regard to administrative right in France, called the law to mind last May and the need for the administration to respect it. Thus the judges have considered that to determine if a person who is gravely ill would or would not have access to treatment in his/her country of origin, it was not simply necessary to consider the existence of treatment in the country, but the effective possibilities of a person benefitting from those resources, of the possible benefit of a financial medical reimbursement, or again from the region in which he/she originates.

We reproduce here an excerpt from the *Guide des droits sociaux* (Guide of Social Rights), edited by Act Up-Paris, which details the procedure and notably how patient confidentiality must be respected in the process of regulation.

This right of residence for medical care must be improved, and inscribed in national and international legislation.

## ***Excerpt form the Guide of Social Rights (Act Up-Paris)***

### ***Immigrant Patients in France***

#### **Entry by Medical Visa**

The systems in place that allow for individuals to receive medical care in France are basically inaccessible, because they are too restrictive and unsuitable. The CESEDA (Code de l'Entrée et du Séjour des Étrangers et du Droit d'Asile – Code of Foreign Entry and Stay and of the Right of Refuge) anticipates a "health visa" (Article L.313-11) that allows for a short medical stay in France, but not a lasting move that calls for payment for a long-term illness such as HIV/AIDS. The eligibility criteria are particularly restrictive (notably from a financial perspective). It is therefore unsuitable for the majority of situations that immigrants who have AIDS find themselves in. This is the reason why we have not developed this idea in the guide. More details can be found on our website: [HYPERLINK "http://www.actupparis.org/rubrique130" www.actupparis.org/rubrique130](http://www.actupparis.org/rubrique130).

#### **The Right to Stay for Medical Reasons**

The principle

Article L.313-11 of the CESEDA enumerates the different categories of immigrants who must be given a Carte de séjour temporaire (CST) portant la mention « Vie privée et familiale » or a temporary resident permit under the title of private and family life, provided they do not disrupt the public order. Patients residing de facto in France "whose medical state requires payment whose shortage can result in grave consequences provided that they cannot benefit from an appropriate treatment in their country of origin" makes up the eleventh category.

#### **Who can benefit?**

To benefit from the right to residence for medical reasons, you must respond to three administrative criteria, assessed by the prefect, and three medical criteria.

**A habitual residence in France.** The habitual residence designates the fact of having lived there on a permanent basis, even without the arrangement of a deed of residence. The circular of May 12, 1998 set this time period at a year of living in France. If you reside in France, but you cannot prove to have been living there for more

than one year, it is possible to obtain a provisional authorization of residence (Autorisation provisoire de séjour [APS]) provided that you fulfill the five other criteria. The requirement of time spent in France excludes, de facto, individuals residing in other countries and can constitute an obstacle for those who hold a visa in the process of being validated. In this case, we advise waiting for the expiration of this one before submitting an application for residence due to a medical reason.

**The absence of a threat to the public order.** This particularly vague notion does not necessarily signify that to have received a criminal conviction you are excluded from the right of residence for medical care. The administration must take into consideration the time that has passed since the conviction, the possible absence of a second offense, and your current situation.

**The absence of a measure of expulsion.** If you are the subject of an Arrêté Ministériel (AME) (Ministerial Decree), a Préfectoral d'Expulsion (APE) (Prefectural Expulsion), or of an Interdiction du Territoire Français (ITF) (Ban from the French Territory), it will be necessary to ask for the release or repeal of such, and, in waiting for the release or repeal, to obtain a house arrest to speed up the process. If you are the subject of an Obligation à Quitter le Territoire Français (OQTF) (Requirement to Leave the French Territory) following the refusal of residence or an Arrêté Préfectoral de Reconduite à la Frontière (APRF) (Prefectural Decree of Expulsion to the Border), many situations can be foreseen:

If the date of the APRF or OQTF is more than one year, you can bring yourself to a prefecture but an accompaniment is preferable as a precaution. Please note that if the prefecture confiscates your passport during the process of an interview, this may be a sign that the prefecture is attempting to reactivate a process of expulsion. Seek the aid of a specialized association.

If the date of the APRF or OQTF is less than one year, but is no longer questionable, it is necessary to ask for a repeal of the decree by mail. There is no delay for this request.

Finally, individuals having been the subject of an OQTF following the refusal of recognition of refugee status can, in the months that follow, submit a request for a residence permit for medical reasons. The OQTF will have to be equally contested.

The three medical criteria are evaluated by a medical authority who passes judgment on each of the following criteria:

Your state of health "requires a medical payment": this notion is not limited to pharmaceutical or surgical treatments, but equally includes the actions of regular medical follow-up (programmed medical consultations, biological

tests, etc.) to prevent or detect possible complications or evolutions, and, should the case arrive, to adapt the necessary treatments.

The lack of medical reimbursement “could result in grave consequences”: this must be interpreted as the existence of a medical risk of handicap or premature death that is attested and significant. It is similar if the absence of medical follow-up does not allow for prevention, detection, and/or adaptation of the treatment for these complications, which has the ability to lead to grave consequences.

You cannot “effectively benefit from appropriate treatment in your country of origin”: this notion of effective benefit does not only depend on the presence of medications that are needed in your country of origin, but also on many other parameters such as the available quantities in regard to the number of people that must be treated, the cost of these treatments compared to your level of life, the distance between the hospital and your home in your country of origin, the possibility of doing all the necessary tests (blood tests, viral load, etc.).

Attention: The jurisprudence of the State Council seems to call into question the recognition of the financial and geographical aspects. The fact remains that this notion cannot become restricted to the theoretical existence of treatment in any case.

The bill DGS/SD6A/2005/443 of September 30, 2005 specifies the evaluation of these medical criteria for HIV-positive individuals. Those who fulfill de facto the first two criteria comprise “asymptomatic HIV-positive individuals whose viral load and rate of CD4 do not justify being placed under immediate treatment” and when they are originally from countries that have inefficient health systems, the third criteria is equally fulfilled. HIV-positive individuals that fulfill the administrative conditions and that come from low-income countries are, in their immense majority, likely to receive a residence permit for medical care.

### **Which permit is delivered?**

If you fulfill the six criteria, the prefecture is charged with giving you a Carte de séjour temporaire (CST) portant la mention « Vie privée et familiale », or a temporary resident permit under the title of private and family life, for the duration agreed upon by the administration’s physician within the limits of one year. This residence permit must not contain any mention of the medical reason for its issue.

If you live in France without being able to justify that you have resided in the country for more than one year, the prefecture must give you an Autorisation provisoire de séjour (APS) (Provisional Authorization of Residence) that is renewable until you can justify a year of residence in

France and therefore acquire the right for obtaining a CST. This precarious residence permit does not permit an individual to work or to benefit from the majority of social allocations. To obtain an authorization to work, the non-descriptive medical certificate presented at the counter (*See procedure*) must specify that your state of health allows you to work. However, the prefecture is not charged with giving you an authorization to work. On the other hand, when you are able to justify a year of presence in France, you have the right to either a CST or an APS.

### **What is the anticipated process by the texts?**

In order to guarantee medical confidentiality, the evaluation of medical criteria is done by Médecins inspecteurs de santé publique (MISP), or public health medical inspectors, under the authority of the DDASS (Direction Départementale des Affaires Sanitaires et Sociales), or the Departmental Management of Sanitary and Social Affairs. In Paris, the chief doctor of the Prefecture of the Police under the authority of the prefect is in charge of this evaluation. The rest of the procedure is managed by the prefecture. The procedures vary from one prefecture to another, sometimes in contradiction with the current regulations.

Documents to provide:

An identification document that can be all documents of record, passport, identity card, family record book (married person and/or with child), or birth certificate (unmarried);

Proof by any means of the amount of time present in France (except for renewals): personal bills, the age of entry stamp on passport, certificate of the receipt of benefits of medical aid from the State, a certificate of a doctor or of an association, etc.;

A document certifying your address if you have a place of residence (receipts, bills, certificate of the housing of a third party) or, if you do not have a stable place of residence, an address;

3 photographs of identity;

A non-descriptive medical certificate to present to the counter (*see the opposite box*)

A medical report in a confidential sealed envelope (*see box*). Certain prefectures require the presentation of a medical report from the introduction of the request, others ask you to pass it on by yourself through the following

Attention: Many prefectures require documents that are not anticipated by the regulations. (*See farther below the restricted principles.*)

### **The non-descriptive medical certificate and the medical report in a confidential, sealed envelope**

Two documents established by a doctor are necessary at the procedure: a non-descriptive medical certificate and a medical report in a confidential sealed envelope. Nevertheless, it is advisable to distinguish them in order to protect oneself of any violation of medical confidentiality and of the interference of the prefecture in the medical evaluation of the request. Each of these two documents respond to a distinct interest and from particular conditions of form and content:

The non-descriptive medical certificate (to be presented at the counter) is not intended by any text, but its requirement has been validated by a jurisprudence of the State Council. Its role is uniquely to testify to the agents of the prefectures that you fulfill the medical criteria without precisely describing your state of health before the introduction of your request.

Form: it must date less than three months from the request; it must be signed by a physician holding the rank of hospital practitioner or by a physician registered by the prefecture.

Content: the medical certificate must testify (without giving precise medical details) that the state of your health requires medical payment; the lack of medical reimbursement may result in grave consequences; and (for more precautions) that you cannot effectively benefit from appropriate treatment in your country of origin as well as the duration of anticipated medical care in France and possibly that the state of your health is compatible with the exercise of professional activity subject to the pursuit of medical payment. The medical report in a confidential, sealed envelope must be addressed to the administration's physician so that he/she will have all the information necessary about the three medical criteria for the evaluation, its content was not known from the prefectural services. It will be asked of you the moment of the presentation of the request or later, according to the prefectures.

Form: it must date less than three months from the request. It must be put back in a confidential, sealed envelope with the words "confidential/patient confidentiality" on the envelope and must be addressed to the MISP or the chief physician, according to the prefecture. It must be signed by a physician holding the rank of hospital practitioner (if the hospital physician that you see does not have this title, his/her relationship can be countersigned by a hospital practitioner in his/her service) or by a physician registered by the prefecture. The list of physicians registered by the prefecture is handed over to you when you pick up your file from the prefecture.

Content: the medical report must specify: the nature of the ailment(s) and the circumstances of the diagnosis; the possible complications and

associated risk factors; the modes of medical payment (surveillance, doctors, and structures); the modes of treatment (molecules and dosage); the prognosis in the absence of medical payment; if possible, the elements that allow for the evaluation of the risk of exclusion or of the insufficiency of care in the country of origin.

### **Where do you present the request?**

In most cases, you must be physically present at the prefecture or sub-prefecture, depending on your place of residence or address. For people who are hospitalized, the social service of the hospital can present the request by mail. Certain prefectures have put specific procedures in place for the presentation of requests, by mail like in the Hauts-de-Seine, or in reception centers for immigrants like in Paris. It is therefore advisable to become informed beforehand (for Ile-de-France and the PACA, see the *guide du Comede 2008*).

### **How is the request examined?**

If you fulfill the different criteria predetermined by the law and you have submitted a request for a residence permit, the prefecture is charged with recording this request and handing over a receipt of the first request or of renewal to you. This receipt attests that you are temporarily accepted to stay throughout the time of the examination of your first request. If you arrange for a residence permit with an authorization to work, the receipt of the request for renewal preserves all the rights of your previous deed, and includes that which exerts professional activities. This certificate is fundamental so as to not be subjected to a breakdown of your rights (in the case of renewal) or for justifying that you have made a request for regularization at the time of police control.

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