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The Federal Supreme Court (F S C) has been convened on 4.30.2018 headed by the Judge Madhat Al-Mahmood and membership of Judges Farouk Mohammed Al-Sami, Jaafar Nasir Hussein, Akram Taha Mohammed, Akram Ahmed Baban, Mohammed Saib Al-Nagshabandi, Aboud Salih Al-Temimi, Michael Shamshon Qas Georges and Hussein Abbas Abu Al-Temmen who authorized in the name of the people to judge and they made the following decision:

The Plaintiff: Head of the higher judicial Council/ being in this capacity – his agent (ain.fa.ha) Head of legal affairs in the department of public relations and legal affairs of the higher judicial Council.

The Plaintiff: (mim.mim.mim.sad) Head of public prosecution/ being in this capacity – his agent (dhad.jim) deputy of the public prosecution's Head.

The Defendant: the Speaker of the ICR/ being in this capacity – his agents the jurist officials each of the Director (sin.ta.yeh) and the legal consultant assistant (heh.mim.sin).

### The Claim

The agent of the Plaintiff the Head of the higher judicial Council/ being in this capacity claimed in the case No. (27/federal/2018) that the defendant/ being in this capacity enacted the law of foreigners' residence No. (76) for 2017, and while aforementioned law had listed a legal provisions that violates the Constitution and the ruling of the FSC in the seventh chapter (penalties) as shown below: 1. Article (43) authorized the Minister or the residence officer to impose a fine on whom violates instructions issued according to the provisions of this law. 2. Article (44) granted the General Director or whom he authorizes the power of misdemeanor judge according to provisions of

criminal procedure law to impose demurrages. 3. Article (47) granted the General Director or whom he authorizes as a misdemeanor judge according to provisions of criminal procedure law to impose the fine that stipulated in articles (38, 39, 40, 41, 42, 43, 44) of the law. 4. Article (48) granted the General Director or whom he authorizes the power of an investigation judge according to criminal procedure law, and this article authorizes him to detain the foreigner for a period not more than (7) days (extendable). This article violates the text of article (47) of the Republic of Iraq Constitution for 2005 whereas the seventh chapter of aforementioned law included issuing of penal provisions which is it (prison or fine, detention) for people are not judges belongs to the higher judicial Council. They exercise according to it a tasks and judicial competences and those people are the Minister of interior, the General Director and the residence officer. Whereas investigations with individuals and detaining or suiting them is an exclusive competence of the courts and judges in the higher judicial Council, and these competences shall not be exercised but by judges. So, these articles violates the Constitution according to provisions of articles (19, 37, 87, 88) of the Constitution. This matter is what the FSC confirmed in its decision No. (12/federal/2016) on (3.14.2016). Therefore, the agent of the plaintiff requested from the FSC to judge by unconstitutionality of articles (43, 44, 47, 48) of foreigners' residence law No. (76) For 2017, and to burden the defendant the expenses and advocacy fees. The agents of the defendant answered the petition of the case with and answering draft dated on (2.28.2018) that the ICR and according to provisions of article (61/1<sup>st</sup>) of the Constitution is competent in enacting Federal laws. The texts (challenge subject) are representing a legislative choice which the Council can activate it by taking immediacy decisions within the authorities of investigation judge as it were, and it doesn't intersects with the constitutional texts which the agent of the plaintiff indicates to. Especially that there are another laws grants the right of imposing a fine or taking decision by ceasing works, such as works in municipality of Baghdad, traffic office and others. They requested to reject the case with burdening the plaintiff/ being in this capacity the expenses of the case and advocacy fees. As well as the agent of the plaintiff the Head of public prosecution/ being in this capacity initiated the case No. (38/federal/2018) against the same defendant/

being in this capacity. He requested from the FSC to judge by unconstitutionality of article (47) of foreigners' residence law No. (76) For 2017 which stipulates (granted the General Director or whom he authorizes the power of misdemeanor judge to impose the fine which stipulated in articles (38, 39, 40, 41, 42, 43, 44) of this law violates the text of article (47) of the Constitution, it also violated the text of article (19/5<sup>th</sup>) of the Constitution which stipulated (The accused is innocent until proven guilty in a fair legal trial. The accused may not be tried for the same crime for a second time after acquittal unless new evidence is produced). Also it violates article (13) of the Constitution, and he also challenged unconstitutionality of article (48) of foreigners' residence law No. (76) For 2017 which stipulates (granted the General Director or whom he authorizes the power of investigation judge according to criminal procedure law. This power authorizes him to detain foreigner for a period not more than seven days (extendable) as a prelude to distance or sending him out of the Republic of Iraq's lands). This matter violates the text of article (37/beh) of the Constitution which stipulates (no person may be kept in custody or investigated except according to a judicial decision). Whereas legislative power which represented by its President/ being in this capacity by granting judicial authorities to an administrative employee with a post of General Director or whom he authorizes without returning to the content of the constitutional text above-mentioned. In addition to that detention which carried out by the administrative employee according to above-mentioned text is violates the constitutional guarantees of the detainee which listed in article (19/feh1 and 12 and 13) starting of his right by assigning a lawyer to defend him. Whereas the two articles (47 and 48) of foreigners' residence law No. (76) For 2017 contained in its content a constitutional violations found by the legislator, and it granted the right to a civil administrative employees weren't from judges whom belongs to the federal judicial power. Those employees were exercising a judicial pure powers. Therefore, the agent of the plaintiff/ being in this capacity requested from the FSC to judge by unconstitutionality of articles (47 and 48) of foreigners' residence law No. (76) For 2017. He claimed that these articles violates constitutional texts which they are (13 and 19/5<sup>th</sup> and 11<sup>th</sup> and 12<sup>th</sup> and 13<sup>th</sup> and 37/beh and 47 and 87 and 88) of the Republic of Iraq

Constitution for 2005. The agents of the defendant answered the petition of the case according to their answering draft dated on (2.28.2018), and they requested to reject the case with burdening the plaintiff/ being in this capacity the judicial expenses because the ICR is competent in enacting the federal laws according to provisions of article (61/1<sup>st</sup>) of the Constitution. The texts (challenge subject) representing a legislative choice may the Council sees in necessity to take immediacy decisions within the authorities of investigation judge. The Court set a date for argument, and on the set day the agent of the plaintiff in the case (27/federal/2018) attended, as well as the agents of the defendant according to their power of attorney that attached in the dossier of the case. The public in presence argument proceeded. The agent of the plaintiff repeated what listed in the petition of the case, and he requested to judge according to it with burdening the defendant/ being in this capacity the expenses and advocacy fees. The agent of the defendant/ being in this capacity repeated what listed in their answering draft dated on (2.28.2018), and they requested to reject the case with burdening the plaintiff the expenses and advocacy fees. The Court by scrutinizing the petition of the case (27/federal/2018) and the case No. (38/federal/2018) the unity of challenged subject, as well as the unity of the defendant. It also found that the plaintiff in the case No. (27/federal/2018) is challenging unconstitutionality of articles (43, 44, 47, 47) of foreigners' residence law No. (76) For 2017, and the articles (47, 48) of above-mentioned law had been challenged in the case No. (38/federal/2018). Accordingly, and to minimize loss of time and effort the Court decided according to article (76) of the civil procedure law to unify the two cases, and to try them together. Also it decided to consider that the case No. (27/federal/2018) if the original as it was initiated precedent. The agent of the plaintiff in the case No. (38/federal/2018) and the agents of the defendant attended according to their power of attorney that attached in the dossier of the case. The public in presence argument proceeded. The agent of the plaintiff repeated what listed in the petition of the case, and he requested to judge according to it with burdening the defendant the expenses. As well as the agents of the defendant repeated what listed in their answering draft, and they requested to judge according to it with burdening the plaintiff the expenses and fees. Whereas nothing left to

be said, the Court made the end of the argument clear and the decision was made clear publicly in the session.

### The Decision

After scrutiny and deliberation by the FSC, the Court found that the agent of the plaintiff in the case No. (27/federal/2018) is challenging unconstitutionality of articles (43, 44, 47, 48) of foreigners' residence law No. (76) For 2017 because they violates the Constitution. Also the plaintiff in the unified case (38/federal/2018) is challenging unconstitutionality of articles (47, 48) of the above-mentioned law because of unconstitutionality and violation to the provisions of the Constitution for reasons listed in the petition of the case. After scrutiny, the Court found that article (47) of the Constitution stipulated that federal powers which they are legislative, executive and judicial. Exercising its competence and tasks on the base of separation between powers, and also article (87) of it adjudged on (the judicial power is independent. The courts, in their various types and levels, shall assume this power and issue decisions in accordance with the law). Also article (48) of foreigners' residence law No. (76) For 2017 stipulated (the General Director shall be granted or whom he authorizes the power of an investigation judge according to criminal procedure law. This power authorizes him to detain the foreigner for a period not more than (7) days (extendable) prelude to distance or sending him out of the Republic of Iraq's lands). Whereas granting this authority to the General Director of imposing penalties which decided in the law above-mentioned or to whom he authorizes from civil employees not from judges whom belongs to federal judicial power. So, it is unconstitutional for him to exercise a pure judicial tasks and competences. Whereas investigating with individuals or detaining them or suiting them or imposing penalties on them are exclusive competences of the Courts, and theses competences shall not be exercised from people are not judges. Therefore, the text of article (48) of foreigners' residence law No. (76) For 2017 is violating the provisions of the Constitution according to article (87) of it. The texts of the Constitution has the superiority in implementation. When returning to the other articles of

challenged law because of unconstitutionality which is it article (43) of above-mentioned law which stipulated (the Minister or residence officer has the right to impose a fine not less than (50000) fifty thousand Iraqi dinars and not more than (100000) one hundred thousand Iraqi dinars on everyone violated the instructions issued according to the provisions of this law)). Article (44) of foreigners' residence law No. (76) for 2017 stipulated (granted the General Director or whom he authorizes the power of misdemeanor judge according to provisions of criminal procedure law to impose demurrages of the foreigners' delay if he didn't visit residence office within (15) first fifteen days from the date of his entrance to Iraq shall pay a financial fine not less than (100000) one hundred thousand Iraqi dinars, adding to it (10000) ten thousand Iraqi dinars for each day delay. The amounts of fines shall not be more than (5000000) five million Iraqi dinars, and official holidays shall be exempted from the stipulation of visiting residence office). Article (47) of challenged law stipulated (the General Director or whom he authorizes shall be granted the power of a misdemeanor judge according to provisions of criminal procedure law to impose the fine stipulated in articles (38) and (39) and (40) and (41) and (42) and (43) of this law. The FSC finds that granting the Minister of interior of the General Director of foreigners' residence or whom he authorizes the power of misdemeanor judge according to challenged articles above-mentioned are a restricted power and limited by fines which determined in aforementioned articles. These authorizations are commissioned to those according to aforementioned articles to regulate a matters that related to foreigners' residence in Iraq, and these matters interfere the core of tasks to those whom commissioned this authority. Whereas the authorities which commissioned to the Minister or the General Director or to whom they authorizes according to articles (43, 44, 47) of foreigners' residence law No. (76) for 2017 are not containing prison or detention, and granting this power which is required by works of foreigners' residence directorate officials in Iraq to secure speediness in accomplishing these procedures. Therefore, it is not possible to make it the base on the other cases to facilitate foreigners' affairs. As for article (48), the challenge of unconstitutionality of these articles hasn't substantiation in the Constitution. It also doesn't conflicts with the provisions of

article (47) of the Constitution. Therefore, and according to aforementioned reasons, the FSC decided to judge by unconstitutionality of article (48) of foreigners' residence law No. (76) For 2017 because of its violation for the provisions of the Constitution. And to reject the case on challenged article which challenged for unconstitutionality of above-mentioned law. These articles are (43, 44, 47) of the law, because these articles are not conflicting provisions of the Constitution. The FSC also judged by burdening the plaintiffs the case's expenses of the rejected part of the case and advocacy fees for the agents of the defendant amount of one hundred thousand Iraqi dinars, and to burden the defendant/ being in this capacity the expenses of the case of the part which adjudged for the benefit of the plaintiffs and advocacy fees for the agent of the plaintiff in the original case. As well as the expenses for the agent if the plaintiff in the unified case an advocacy fees amount of one hundred thousand Iraqi dinars divided equally between them. The decision issued in presence of both parties, decisively according to provisions of article (94) of the Republic of Iraq Constitution, and according to the FSC law No. (30) For 2005, and made clear on 4.30.2018.