

**DECISION 91-293 DC OF 23 JULY 1991**  
**Public Service (Miscellaneous Provisions) Act**

On 26 June 1991 the Constitutional Council received a referral from Mr Etienne DAILLY, Mr Charles PASQUA, Mr Marcel LUCOTTE, Mr François ABADIE, Mr Michel AMELIN, Mr Hubert d'ANDIGNE, Mr Maurice ARRECKX, Mr Bernard BARBIER, Mr Yvon BOURGES, Mr Jean BOYER, Mr Michel CALDAGUES, Mr Gérard CESAR, Mr Jean CHAMANT, Mr Jacques CHAUMONT, Mr Michel CHAUTY, Mr Jean CHERIOUX, Mr Henri COLLETTE, Mr Charles-Henri de COSSE BRISSAC, Mr Maurice COUVE de MURVILLE, Mr Désiré DEBAVELAERE, Mr François DELGA, Mr Michel DOUBLET, Mr Alain DUFAUT, Mr Pierre DUMAS, Mr Hubert DURAND-CHASTEL, Mr Marcel FORTIER, Mr Philippe FRANCOIS, Mr Philippe de GAULLE, Mr Alain GERARD, Mr François GERBAUD, Mr Charles GINESY, Mr Adrien GOUTEYRON, Mr Jean GRANDON, Mr Paul GRAZIANI, Mr Georges GRUILLOT, Mr Yves GUÉNA, Mr Jacques HABERT, Mr Hubert HAENEL, Mr Bernard HUGO, Mr Roger HUSSON, Mr André JOURDAIN, Mr Lucien LANIER, Mr Gérard LARCHER, Mr René-Georges LAURIN, Mr Max LEJEUNE, Mr Charles-Edouard LENGLET, Mr Maurice LOMBARD, Mr Roland du LUART, Mr Paul MASSON, Mr Michel MAURICE-BOKANOWSKI, Mr Jacques de MENOUE, Ms Hélène MISSOFFE, Mr Geoffroy de MONTALEMBERT, Mr Lucien NEUWIRTH, Mr Charles ORNANO, Mr Paul d'ORNANO, Mr Jacques OUDIN, Mr Sosefo Makapé PAPILIO, Mr Alain PLUCHET, Mr Christian PONCELET, Mr Michel PONIATOWSKI, Mr Henri REVOL, Mr Roger RIGAUDIERE, Mr Jean-Jacques ROBERT, Ms Nelly RODI, Mr Josselin de ROHAN, Mr Roger ROMANI, Mr Jean SIMONIN, Mr Jacques SOURDILLE, Mr Louis SOUVET, Mr Jean-Pierre TIZON, Mr Jacques VALADE, Mr Serge VINCON, Senators, pursuant to the second paragraph of Article 61 of the Constitution, for constitutional review of the Public Service (Miscellaneous Provisions) Act;

**THE CONSTITUTIONAL COUNCIL,**

Having regard to the Constitution;

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 Act 57-880 of 2 August 1957 authorising the President of the Republic to ratify in particular the Treaty establishing the European Economic Community and the documents annexed thereto, and to Decree 58-84 of 28 January 1958 publishing that Treaty;

Having heard the rapporteur;

On the following grounds:

1. The Senators making the referral submit to the Constitutional Council the Public Service (Miscellaneous Provisions) Act; in support of their referral, they argue that section 2 of the Act is unconstitutional;
2. Section 2 of the Act referred inserts in the Civil Servants (Rights and Obligations) Act (No 83-634 of 13 July 1983) a new section 5 bis consisting of five paragraphs; under the first paragraph "nationals of the Member States of the European Economic Community other than France shall have access, under the conditions provided for in the general staff regulations, to bodies, categories and posts where the functions to be exercised either are separable from the exercise of

sovereignty or entail no direct or indirect involvement in the exercise of the public-authority prerogatives of the State or of local authorities”; the second paragraph provides that interested parties “may not have the status of civil servants: 1° if they do not enjoy their civic rights in the State of which they are nationals; 2° if they have been convicted of an offence incompatible with the exercise of the functions; 3° if they have not satisfied such obligations as to national service as apply in the State of which they are nationals; 4° if they are not physically fit for the exercise of the function”; the third paragraph provides that: “The bodies, categories and posts meeting the requirements of the first paragraph above shall be designated by the specific staff regulations applying to them. These specific staff regulations shall also specify, where necessary, the terms on which civil servants not having French nationality may be appointed to consultative bodies whose opinions or proposals are binding on the decision-making authority”; the fourth paragraph provides that “civil servants to whom this section applies may under no circumstances be appointed to posts involving the exercise of functions other than those specified in the first paragraph”; by the fifth paragraph, the conditions for application of section 5 bis inserted in Act 83-634 of 13 July 1983 “shall be laid down by decree in Council of State”;

3. These provisions are criticised on two grounds; first, they are alleged to violate Article 48 of the Treaty of Rome and consequently Article 55 of the Constitution; second, they are alleged to violate the constitutional principle whereby access to public employment is reserved for French nationals;

#### **ON THE ALLEGED VIOLATION OF AN INTERNATIONAL COMMITMENT AND CONSEQUENTLY OF ARTICLE 55 OF THE CONSTITUTION:**

4. The authors of the referral submit that Article 48 of the Treaty of Rome establishing the European Economic Community, relating to freedom of movement for workers within the Community, provides (paragraph 4) that “the provisions of this Article shall not apply to employment in the public service”; they conclude that section 2 of the Act referred, by opening access to public employment to nationals of Member States of the European Economic Community other than France, violates Article 55 of the Constitution, whereby treaties prevail over Acts of Parliament;

5. Article 55 of the Constitution provides that “Treaties or agreements duly ratified or approved shall, upon publication, prevail over Acts of Parliament, subject, in regard to each agreement or treaty, to its application by the other party”; it is for the various bodies of the State, within the context of their respective powers, to ensure the application of international agreements; it is for the Constitutional Council, acting on a referral pursuant to Article 61 of the Constitution, to ensure that the Act complies with Article 55, but not to consider the consistency of an Act with the provisions of an international treaty or agreement; there is accordingly no need to review section 2 of the Act referred for conformity with international treaties;

#### **ON THE ARGUMENT THAT A CONSTITUTIONAL PRINCIPLE RESERVES ACCESS TO PUBLIC EMPLOYMENT FOR PERSONS HAVING FRENCH NATIONALITY:**

6. The authors of the referral present a twofold argument; their principal argument is that access of foreign nationals to public employment is prohibited by Article 6 of the Declaration of Human and Civic Rights; in the alternative, they argue that section 2 of the Act referred is not precise enough to satisfy the constitutional requirement that “only nationals may exercise functions which affect the sovereignty of the Nation”;

***Regarding the plea of the breach of Article 6 of the Declaration of 1789:***

7. Article 6 of the Declaration of Human and Civic Rights states that: “The Law is the expression of the general will. All citizens have the right to take part, personally or through their representatives, in its making. It must be the same for all, whether it protects or punishes. All citizens, being equal in its eyes, shall be equally eligible to all high offices, public positions and employments, according to their ability, and without other distinction than that of their virtues and talents”;

8. With regard to the public service, one of the aims of these provisions is to provide a basis in French law for the principle of equal access of all to public employment; they cannot be interpreted as reserving exclusively for citizens the principle which they declare; they do not preclude the legislature, exercising the power conferred by Article 34 of the Constitution to determine the fundamental guarantees granted to civil and military personnel employed by the State and the fundamental principles of the self-government of territorial units, from enacting general terms of access to public employment, in compliance with the principle of equality and with other rules and principles of constitutional status;

***Regarding the violation of provisions reserving for nationals the exercise of functions which affect the sovereignty of the Nation:***

9. The authors of the referral submit that there is a principle of constitutional status reserving for nationals the exercise of functions which affect the sovereignty of the Nation; they argue that section 2 of the Act jeopardises that principle, firstly by doing away with the rule that no-one may accede to the status of established civil servant if he or she does not have French nationality, and secondly because section 2 does not contain adequate details or assurances to secure compliance with the principle they plead;

10. Section 2 of the Act referred does not remove the requirement of French nationality as a condition for civil servant status; it merely provides for an exemption for the benefit of nationals of other Member States of the European Economic Community than France;

11. Section 2 of the Act allows access by the persons it specifies only to bodies, categories and posts the functions of which are “severable from the exercise of sovereignty”; this automatically excludes any attack on the essential conditions for the exercise of national sovereignty;

12. By determining in section 2 of the Act referred the general terms for access for nationals of Member States of the European Economic Community other than France to posts within the ambit of Act 83-634 of 13 July 1983, the legislature did not fail to exercise to the full the power conferred on it by Article 34 of the Constitution;

13. In any event, section 2 of the Act referred does not violate the principle invoked;

14. It follows from the foregoing that the argument of the authors of the referral cannot be entertained;

**Has decided as follows:**

*Article 1*

The Public Service (Miscellaneous Provisions) Act is not unconstitutional.

*Article 2*

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

Deliberated by the Constitutional Council at its sitting of 23 July 1991.