

DECISION 93-321 DC OF 20 JULY 1993
Code of Nationality (Reform) Act

On 25 June 1993 the Constitutional Council received a referral from Mr Claude ESTIER, Mr Robert LAUCOURNET, Mr William CHERVY, Mr Paul RAOULT, Mr Jean-Pierre MASSERET, Mr Jean-Louis CARRÈRE, Mr Marcel BONY, Ms Françoise SELIGMANN, Ms Marie-Madeleine DIEULANGARD, Ms Josette DURRIEU, Mr Jacques BELLANGER, Mr Jacques BIALSKI, Mr Aubert GARCIA, Mr Roland BERNARD, Mr Guy PENNE, Mr Michel DREYFUS-SCHMIDT, Mr Gérard MIQUEL, Mr Fernand TARDY, Mr Robert CASTAING, Mr Gérard DELFAU, Mr Pierre BIARNES, Ms Maryse BERGE-LAVIGNE, Mr André VÉZINHET, Mr Louis PHILIBERT, Mr Michel SERGENT, Mr Germain AUTHIE, Mr Jean BESSON, Mr Jean-Pierre DEMERLIAT, Mr Paul LORIDANT, Ms Monique BEN GUIGA, Mr Guy ALLOUCHE, Mr Léon FATOUS, Mr Claude FUZIER, Mr Claude CORNAC, Mr Gérard ROUJAS, Mr François LOUISY, Mr Marc BOEUF, Mr Francis CAVALIER-BENEZET, Mr Jacques CARAT, Mr Jean PEYRAFITTE, Mr René-Pierre SIGNÉ, Mr Marcel CHARMANT, Mr Claude PRADILLE, Mr André ROUVIÈRE, Mr Louis PERREIN, Mr Marcel VIDAL, Mr Frank SÉRUSCLAT, Mr Jean-Luc MELENCHON, Mr Charles METZINGER, Mr René REGNAULT, Mr François AUTAIN, Mr Michel MOREIGNE, Mr Michel CHARASSE, Mr Gérard GAUD, Mr Pierre MAUROY, Mr Roland COURTEAU, Mr Claude SAUNIER, Mr Bernard DUSSAUT, Mr Albert PEN and Mr Rodolphe DÉsirÉ, Senators, and on the same date a referral from Mr Martin MALVY, 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 Jean-Pierre BRAINE, Mr Laurent CATHALA, Mr Jean-Pierre CHEVÈNEMENT, Mr Henri d'ATTILIO, Ms Martine DAVID, Mr Bernard DAVOINE, Mr Bernard DEROSIER, Mr Michel DESTOT, Mr Julien DRAY, Mr Pierre DUCOUT, Mr Dominique DUPILET, Mr Jean-Paul DURIEUX, Mr Henri EMMANUELLI, Mr Laurent FABIUS, Mr Jacques FLOCH, Mr Pierre GARMENDIA, Mr Jean GLAVANY, Mr Jacques GUYARD, Mr Jean-Louis IDIART, Mr Frédéric JALTON, Mr Serge JANQUIN, Mr Charles JOSSELIN, Mr Jean-Pierre KUCHEIDA, Mr André LABARRÈRE, Mr Jack LANG, Mr Jean-Yves Le DEAULT, Mr Louis Le PENSEC, Mr Alain Le VERN, Mr Marius MASSE, Mr Dider MATHUS, Mr Jacques MELLICK, Mr Louis MEXANDEAU, Mr Jean-Pierre MICHEL, Mr Dider MIGAUD, Ms Véronique NEIERTZ, Mr Paul QUILÈS, Mr Alain RODET, Ms Ségolène ROYAL, Mr Georges SARRE, Mr Henri SICRE, Mr Camille DARSIÈRES, Mr Jean-Pierre DEFONTAINE, Mr Gilbert ANNETTE, Mr Roger-Gérard SCHWARTZENBERG, Mr Kamilio GATA, Mr Didier BOULAUD, Mr Bernard CHARLES, Mr Aloyse WARHOVER, Mr Gérard SAUMADE, Mr Emile ZUCCARRELLI, Mr Bernard TAPIE, Mr François ASENSI, Mr Rémy AUCHÈDE, Mr Gilbert BIESSY, Mr Alain BOCQUET, Mr Patrick BRAOUEZEC, Mr Jean-Pierre BRARD, Mr Jacques BRUNHES, Mr René CARPENTIER, Mr Daniel COLLIARD, Mr Jean-Claude GAYSSOT, Mr André GÉRIN, Mr Michel GRANDPIERRE, Mr Maxime GREMETZ, Ms Janine JAMBU, Mr Georges HAGE, Mr Guy HERMIER, Ms Muguette JACQUAINT, Mr Jean-Claude LEFORT, Mr Georges MARCHAIS, Mr Paul MERCIÉCA, Mr Louis PIERNA, Mr Jean TARDITO and Mr Ernest MOUTOUSSAMY, Deputies, pursuant to Article 61(2) of the Constitution, concerning the constitutionality of the Code of Nationality (Reform) 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 heard the rapporteur,

On the following grounds:

1. Unlike the Senators, authors of the first referral, who offer no specific criticism of the Act referred, the Deputies, authors of the second referral, submit that the Act violates principles and rules of constitutional status and that sections 9(3), 11, 12, 44, 47 and 48 are accordingly unconstitutional;

ON SECTION 9:

2. The Deputies, authors of the second referral, submit that legislation requiring two years to elapse after the marriage of an alien or stateless person with a French national before nationality may be acquired by declaration is contrary to the principle of equality since that qualifying period is not imposed where a child established to be the child of both parents is born before or after the marriage;

3. The principle of equality does not preclude legislation from laying down different rules for categories of persons in different situations where the difference of treatment is compatible with the purpose of the legislation;

4. Aliens who are parents of children having French nationality are not in the same position as aliens who are not in the same relationship giving entitlement to nationality; it follows that, by making the distinction in relation to an objective of integration into the national community, the legislature has not violated the principle of equality;

ON SECTION 11:

5. The Deputies, authors of the second referral, submit that, by requiring young aliens born in France to foreign parents to make a clear statement of desire to acquire French nationality, the legislature has violated a fundamental principle recognised by the laws of the Republic whereby birth in France, combined in certain circumstances with conditions as to age and residence, confers an automatic entitlement to French nationality;

6. The legislature may at any time, when enacting measures which it has power to enact by virtue of Article 34 of the Constitution, amend, repeal or replace earlier provisions, but may not exercise this power in such manner as to remove the legal protection accorded to requirements of constitutional status;

7. The Nationality Act of 26 June 1889, as confirmed by the Nationality Act of 10 August 1927, provides that upon attaining majority any person born in French territory of foreign parents may enjoy that nationality, without any specific act being required of him, provided certain residence requirements are met; the legislation was enacted to meet notably constraints of conscription;

8. The Act referred provides that the applicant must make a clear statement of his desire to acquire French nationality; this being a condition imposed for the acquisition of French nationality by reason of birth in France, the legislature has the power to impose the formal requirement without violating a constitutional principle; the submission must accordingly be rejected;

ON SECTION 12:

Regarding the principle of equality:

9. The Deputies, authors of the second referral, submit that section 12 of the Act referred, providing for loss of French nationality enjoyed by reason of birth on French territory where certain penalties are imposed or administrative police measures are taken, is contrary to the principle of equality since persons applying for French nationality are not in the same position as persons already enjoying it;

10. For the purposes of the conditions for acquiring French nationality determined by the legislature, applicants cannot be regarded as being in the same situation as French nationals; the submission must accordingly be rejected;

Regarding the principle of proportionality:

11. The Deputies, authors of the second referral, submit that, by providing that the imposition of certain penalties or measures disqualifies the applicant from access to French nationality in accordance with the rules of section 11, the legislature has introduced a manifestly excessive penalty contrary to Article 8 of the Declaration of Human and Civic Rights;

12. The principles declared by Article 8 of the Declaration of Human and Civic Rights apply not only to penalties imposed by the judicial authorities but also to disqualifications that the law attaches to them; the same principles apply where legislation attaches such disqualifications to decisions taken by administrative authorities;

13. The Act referred imposes a disqualification in the form of loss of entitlement to acquire French nationality by means of a straight declaration of intention by persons born in France meeting certain age and residence requirements; entitlement is lost where certain penalties have been imposed or certain measures taken, the reason being that they are evidence of conduct irreconcilable with the acquisition of French nationality;

14. Given the nature of the offences concerned and the nature and duration of the penalties that the criminal courts may impose, the disqualification is not manifestly contrary to Article 8 of the Declaration of 1789; the same applies to prohibitions on residence in French territory not fully executed, provided they are ordered by a judicial court, and of expulsions orders, since these can be made only in the event of a serious threat to public order;

15. Under the legislation governing the entry and residence of aliens, any alien who has attained the age of majority may be detained and conducted to the frontier either without delay or within one month on the sole ground that he has entered France illegally; an order made by the representative of the State in the department or by the Prefect of Police in Paris may be contested only within the twenty-four hours following its notification; a home-arrest order may be made by the Minister of the Interior against any person against whom an expulsion order has only been proposed that may not be possible to carry out; it follows that loss of entitlement to acquire French nationality by virtue of birth in France simply because either an order for removal to the frontier or a home-arrest order has not been suspended or withdrawn is a manifestly excessive penalty in relation to the facts in respect of which the order has been made, and is contrary to Article 8 of the Declaration of 1789; consequently, the words “or of a home-arrest order that has not been suspended or withdrawn, or of an order for removal to the frontier” are unconstitutional;

ON SECTION 44:

Regarding the second paragraph:

16. By the Act referred French nationality may be granted to a child born in France only if at least one of his/her parents was born in a territory which, at the time of the parent's birth, was a territory or colony of the French Republic and the child was born before 1 January 1994;

• *The principle of the indivisibility of the Republic:*

17. The authors of the second referral, submit that the abolition after that date of entitlement to French nationality is contrary to the principle of the indivisibility of the Republic since it concerns children born in France to parents born in overseas territories or colonies, whether or not they have acquired independence; however it is clear from an analysis of the provision contested in the light of the legislative history that the legislature's intention is to impose the new condition only where territories in which the parents are born acquire independence thereafter; subject to this strict rule of interpretation, the Act is not contrary to the principle of the indivisibility of the Republic;

• *The alleged violation of a fundamental principle recognised by the laws of the Republic:*

18. Although legislation of 1851, confirmed in 1874, 1889 and 1927, established the rule that any person born in France of parents born there is French, the rule became absolute only in 1889, to meet constraints of conscription, among others; by terminating the right where the applicant's parents were born in overseas territories or colonies having subsequently attained independence, the legislation referred did not violate the fundamental principles recognised by the laws of the Republic;

• *The principle of equality:*

19. Given the legislation's avowed objective of establishing a presumption that aliens and their children born in France are integrated into French society, children born to parents who were themselves born in territory still part of France and those born to parents born in territories that have acquired independence are in different positions; the principle of equality is not violated as alleged by the authors of the second referral;

Regarding the third paragraph:

• *The principle of the indivisibility of the Republic:*

20. The authors of the second referral, submit that the five-year regular residence requirement for parents born in former French departments in Algeria before 3 July 1962 for their children born in France after 31 December 1993 to enjoy French nationality violates the principle of the indivisibility of the Republic since it concerns only certain persons, depending on their links with what was, until 3 July 1962, part of French territory;

21. The fact that the legislation has regard, for the determination of the right of entitlement to French nationality by children born in France, to the acquisition of independence by territories in which the parents of applicants were born, even where such territories earlier had department status, is not contrary to the principle of the indivisibility of the Republic;

• *The principle of equality:*

22. Given the legislation's avowed objective of establishing a presumption that aliens and their children born in France are integrated into French society, the principle of equality is not

violated by the legislature which distinguishes for the determination of the right of entitlement to French nationality, children born to parents who were themselves born in territory still part of France and those born to parents born in territories that have acquired independence are in different positions;

• *Article 72 of the Constitution:*

23. It is submitted that the contested provision confuses the departments of Algeria with the overseas territories and colonies, contrary to Article 72 of the Constitution;

24. The change made by the legislation to the nationality rights enjoyed by children born in France to parents born in the departments of Algeria that have attained independence has no impact on the status that those departments enjoyed by virtue of Article 72 of the Constitution;

Regarding the fourth paragraph:

• *The principle of the indivisibility of the Republic:*

25. The provision to remove the distinction as regards access to French nationality between children born in Mayotte and the Wallis and Futuna Islands of parents born elsewhere in places enjoying the status of French colony or overseas territory still being part of France removes a restriction on the exercise of rights flowing from connection with a particular part of France and is not contrary to the principle of the indivisibility of the Republic;

• *The principle of equality:*

26. Contrary to what the applicants argue, the purpose of the provision referred is to remove the distinction made up till now as regards access to French nationality between children born in Mayotte and the Wallis and Futuna Islands and children born elsewhere in French territory; the submission fails on the facts;

• *Article 74 of the Constitution:*

27. The Deputies, authors of the second referral, accuse the legislature of violating Article 74 of the Constitution since an amendment adopted at first reading by the National Assembly changes the situation regarding the nationality of children born in Mayotte and in the Wallis and Futuna Islands without the assemblies for these two territories having been consulted in advance;

28. By Article 74 of the Constitution, the specific terms concerning the organisation of the overseas territories other than their status are to be determined and amended by statute after consultation of their local assemblies;

29. This does not apply to Mayotte, which is not an overseas territory for the purposes of Articles 72 and 74 of the Constitution; consultation of the local assembly is accordingly not mandatory under the Constitution;

30. By opposite by conferring on children born in the Wallis and Futuna Islands the right to acquire French nationality if their parents were born in places enjoying the status of French colony or overseas territory and still being part of French territory, the legislature puts an end to the specific legal status flowing from the special organisation of that territory;

31. While as a matter of principle there is no need for further consultation of the territorial assembly on amendments to Bills on which it was initially consulted, the same would not apply if there had been no consultation on the bill in the first place;

32. The words “and the Wallis and Futuna Islands” are accordingly unconstitutional;

ON SECTION 47 OF THE ACT REFERRED, REPEALING SECTION 161 OF THE CODE OF FRENCH NATIONALITY:

33. The Deputies, authors of the second referral, submit that section 47 of the Act referred is unconstitutional as it repeals for the Wallis and Futuna Islands section 161 of the Code of Nationality, whereby the benefit of sections 23 and 24 of the Code is reserved for persons at least one of whose parents had French nationality;

34. The repeal of Article 161 of the Code of Nationality as applicable to the Wallis and Futuna Islands puts an end to the specific legal status flowing from the special organisation of that territory; failure to consult the territorial assembly is accordingly contrary to Article 74 of the Constitution; section 47 must therefore be regarded as unconstitutional in that it repeals section 161 of the Code of Nationality for the Wallis and Futuna Islands;

ON SECTION 48 OF THE ACT REFERRED:

Regarding Article 55 of the Constitution and the pacta sunt servanda rule:

35. By this section, inserting a new provision in the Code of National Service, a French citizen subject to national service who also has the nationality of another State must perform national service in France if he habitually resides there;

36. The Deputies, authors of the second referral, submit that this provision violates the rule of Article 55 of the Constitution that Treaties prevail over statutes and the *pacta sunt servanda* rule enshrined in paragraph 14 of the Preamble to the Constitution of 1946, as it conflicts with a Franco-Algerian Convention of 1983 allowing persons holding the nationality of the two countries to opt for military service in one of them;

37. Article 55 of the Constitution must be complied with in all cases, even where the statutes are silent; the various authorities in the State must, within their respective areas of power, see that international conventions are observed so long as they remain in force; contrary to what is asserted by the applicants, there is no reason why exceptions should be provided for in the legislation; there is accordingly no violation of the fourteenth paragraph of the Preamble to the Constitution of 1946;

Regarding the principle of equality:

38. The contested legislative provision provides identical rules regarding military obligations for all persons having French nationality who are nationals of other countries; the submission by the authors of the second referral, that it is contrary to the principle of equality must accordingly be rejected;

ON THE OTHER PROVISIONS OF THE ACT:

Regarding section 24:

39. The legislature’s intention was to deprive of all rights to or possibility of access to French nationality, subject to sections 21-7, 21-8 and 22-1 of the Civil Code, all aliens against whom

either a home-arrest order has been made but not suspended or withdrawn or an order for removal to the frontier has been made; given the forms and conditions in which, by the legislation governing the entry and residence of aliens, these administrative measures may lawfully be taken, this is a manifestly excessive penalty in relation to the facts in respect of which the order has been made, and is contrary to Article 8 of the Declaration of 1789; consequently, the words “or of a home-arrest order that has not been suspended or withdrawn, or of an order for removal to the frontier” are unconstitutional;

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

Has decided as follows:

Article 1

The following provisions of the Code of Nationality (Reform) Act are unconstitutional:

- in section 12, the words “or of a home-arrest order that has not been suspended or withdrawn, or of an order for removal to the frontier”;
- in section 24, the words “or of a home-arrest order that has not been suspended or withdrawn, or of an order for removal to the frontier”;
- in section 44, fourth paragraph, the words “and the Wallis and Futuna Islands”;
- section 47 in that it repeals section 161 of the Code of nationality for the Wallis and Futuna Islands.

Article 2

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

Deliberated by the Constitutional Council at its sitting of 20 July 1993.