

Decision n° 2010-1 QPC of May 28th 2010
(Mr and Mrs L.)

On April 14th 2010 the Constitutional Council, in the conditions provided for by Article 61-1 of the Constitution, received an application for a priority preliminary ruling on the issue of constitutionality transmitted by the Conseil d'Etat (decision n° 336753 of April 14th 2010), application made by Mrs Khedidja L. and Mr Moktar L. concerning the conformity with the Constitution of :

- section 26 of the Supplementary Finance Act for 1981 n° 81-734 of August 3rd 1981;
- section 68 of the Supplementary Finance Act for 2002 n° 2002-1576 of December 30th 2002;
- section 100 of the Supplementary Finance Act for 2007 n° 2006-1666 of December 21st 2006

THE CONSTITUTIONAL COUNCIL

Having regard to the Constitution;

Having regard to Ordinance n° 58-1067 of November 7th 1958 as amended (Institutional Act on the Constitutional Council);

Having regard to the Code of Civil and Military Retirement Pensions;

Having regard to the Code of Military Pensions for Disabled Veterans and War Victims;

Having regard to the Finance Act for 1960 n° 59-1454 of December 26th 1959;

Having regard to the Regulation of February 4th 2010 as to the procedure applicable before the Constitutional Council with respect to applications for priority preliminary rulings on the issue of constitutionality;

Having regard to the observations of the President of the National Assembly, registered on April 22nd 2010;

Having regard to the observations made on behalf of Mr and Mrs L. by the SCP Lyon-Caen, Fabiani, Thiriez , Attorneys at the Conseil d'Etat and the Cour de cassation, registered on May 4th 2010;

Having regard to the observations of the Prime Minister, registered on May 4th 2010;

Having regard to the further observations on behalf of Mr and Mrs L. made by the SCP Lyon-Caen, Fabiani, Thiriez , Attorneys at the Conseil d'Etat and the Cour de cassation, registered on May 12th 2010;

Having regard to the documents produced and appended to the case file;:

Maitre Arnaud Lyon-Caen on behalf of Mr and Mrs L. and Mr Thierry-Xavier Girardot, representing the Prime Minister, were heard by the Council in open court on May 25th 2010;

Having heard the Rapporteur;

ON THE FOLLOWING GROUNDS

1. Under section 26 of the Supplementary Finance Act for 1981 n° 81-734 of August 3rd 1981 : " Pensions, annuities or lifelong allowances allocated to Algerian Nationals in the budget of the State or State Public Establishments and guaranteed under Article 15 of the Declaration of principle of March 19th 1962 pertaining to economic and financial cooperation between France and Algeria shall not be revisable starting on July 3rd 1962 and shall continue to be paid on the basis of the rates applicable on said date.

They may be revalued in the conditions and at rates determined by Decree.

The provisions contained in the foregoing paragraphs shall apply to benefits of a similar nature, also charged to the budget of the State or State Public Establishments, which have been allocated to Algerian Nationals after July 3rd 1962 under provisions of ordinary law or specific statutory or regulatory provisions in particular under Decree n° 62.319 of March 20th 1962.

A veteran's military pension may be granted, at the rate defined hereinabove, to veterans who meet the requirements laid down after the date of the coming into effect of this Article."

2. Section 68 of the Supplementary Finance Act for 2002 n° 2002-1576 of December 30th 2002 provides :

"I. Benefits paid out under sections 170 of Ordinance n° 58-1374 of December 30th 1958 being a Finance Act for 1959 , section 71 of the Finance Act for 1960 (n° 59-1454 of December 26th 1959) and section 26 of the Supplementary Finance Act for 1981 (n° 81-734 of August 3rd 1981) shall be calculated in the manner provided for in the following paragraphs .

II. When at the time of the final computation of direct rights or rights to reversion, the holder of such rights does not have his actual place of residence in France, the value of the point serving as a basis for the computation of such benefits, were such benefits to be paid out in France, shall be calculated on the basis of a coefficient proportionate to the parities of purchasing power in the country of actual residence and those in France. The residence shall be established on the basis of internationally recognized borders on the date of the publication hereof.

The parities of purchasing power shall be those published annually by the United Nations Organization or, failing that, shall be calculated on the basis of existing economic data.

III. The coefficient of the value of one pension point shall remain unchanged until December 31st of the year following that in which the final computation of rights was carried out in application hereof. This coefficient, corresponding to the country of residence of the holder at the time of the final computation of his rights, shall be revalued each year thereafter.

The specific revaluation mechanism mentioned in II and the foregoing paragraph of III shall not be affected by any measures for the revaluation of indices by category which have occurred since the dates of application of the statutes referred to in I or as may hereafter become applicable.

The amount of benefits resulting from the application of said coefficients shall not be less than that which the holder of an allowance has received pursuant to the provisions mentioned in I hereinabove, increased by 20%.

IV. Subject to the reservations mentioned in the following paragraph 2 of IV and without prejudice to the prescriptions provided for in Articles L.108 of the Code of Military Pensions for Disabled Veterans and War Victims, L.74 of the Code of Military and Civil Retirement Pensions, as worded pursuant to Act n° 48-1450 of September 20th 1948 modifying the system of military and civil pensions and the opening of credits for the implementation of said modification, and L 53 of the same Code, as worded pursuant to Act n° 64-1339 of December 26th

1964 modifying the Code of Civil and Military Retirement Pensions (Legislative part), the provisions of II and III shall apply as from January 1st 1999.

This specific provision shall not apply to decisions of courts of law which have become res judicata and litigation based on the discriminatory nature of the statutes referred to in I, when such proceedings have been brought before November 1st 2002.

V. Disability pensions may be revised, at the request of the holders thereof, when said a request is made subsequent to the coming into effect hereof, on the grounds of the worsening of the disabilities having given rise to the disability pension or to take into account fresh disabilities which have arisen in connection with those carrying entitlement to such pensions

Requests for compensation for disabilities which have not given rise to payment of any indemnity shall be admissible as from January 1st 2007 in the conditions set out in the Code of Military Pensions for Disabled Veterans and War Victims.

VI. Benefits paid under the statutes referred to in I hereinabove may be the object of a revision when due request is made to such effect. The application of the rights to a pension of the parties concerned and the situation of the family shall be appraised at the date of the coming into effect of the provisions referred to in I hereinabove for each State involved (.....)

VIII. Persons receiving the benefits referred to in I hereinabove may, at their request and upon the withdrawal of any other claims, replace said benefits by an overall lump sum payment depending on the age of the applicant and the situation of the family. The person requesting the replacing of the benefit by a single lump sum payment shall retain the rights to free medical care and prostheses which accompanied the original benefit.

IX. A Decree issued after consultation of the Conseil d'Etat shall determine the manner of application of II, specify the conditions in which the conferment of benefits mentioned in V may be adapted to specific situations and determine the manner of application of VIII hereinabove."

2. Section 100 of the Finance Act for 2007 n° 2006-1666 of December 21st 2006 provides :

"I. Military pensions for Disabled Veterans and Military retirement pensions for veterans who are Nationals of countries or territories belonging to the French Union or the French Community or placed under French protectorate or French trusteeship pursuant to sections 170 of Ordinance n° 58-1374 of December 30th 1958 being a Finance Act for 1959 , section 71 of the Finance Act for 1960 (n° 59-1454 of December 26th 1959) and section 26 of the Supplementary Finance Act for 1981 (n° 81-734 of August 3rd 1981) and section 68 of the Supplementary Finance Act for 2002 (n° 2002-1576 of December 30th 2002) shall be calculated in the manner provided for in the following paragraphs .

II. Starting on January 1st 2007 the value of a basic point for veterans' military retirement pensions and pensions for disabled veterans referred to in I hereinabove shall be equal to the value of the basic point for military retirement pensions and pensions for disabled veterans paid in France as defined by Article L.8 bis of the Code of Military Pensions for Disabled Veterans and War Victims;

III. Starting on January 1st 2007 indices used to calculate military pensions for disabled veterans referred to in I hereinabove shall be equal to the indices of military pensions for disabled veterans paid in France as defined in Article L.9 of the Code of Military Pensions for Disabled Veterans and War Victims.

Pensions referred to in the foregoing paragraph shall be revalued, without carrying an entitlement to interest for late payment, as from January 1st 2007 at the request of the beneficiaries thereof made after the coming into effect hereof addressed to the administration responsible for establishing their pension rights.

IV. Starting on January 1st 2007, indices used to calculate pensions paid to surviving spouses and orphans of persons receiving a military disability pension referred to in I hereinabove shall be equal to the indices of pensions paid to surviving spouses and orphans in France, as defined by articles L.49, L.50; L.51 (paragraphs 3 to 8), L.51-1, L.52, L.52-2 and L.54 (paragraphs 5 to 7) of the Code of Military Pensions for Disabled Veterans and War Victims.

Pensions referred to in the foregoing paragraph shall be revalued, without carrying an entitlement to interest for late payment, as from January 1st 2007 at the request of the beneficiaries thereof made after the coming into effect hereof addressed to the administration responsible for establishing their pension rights.

The benefit of Articles L.51 (paragraphs 1 and 2) and L.54 (paragraphs 4 and 8) of the same Code shall inure solely to the persons referred to in paragraph 1 of IV hereof residing in a settled and continued manner in mainland France and the overseas Departments in the conditions provided for in Articles L 380-1, L. 512-1 and L.815-1 of the Social Security Code.

VIII of Article 170 of the Ordinance being a Finance Act for 1959 referred to above, IV of section 71 of the Finance Act for 1960 referred to above, the final paragraph of section 26 of the Supplementary Finance Act for 1981 referred to hereinabove, section 132 of the Finance Act for 2002 (n° 2001-1275 of December 28th 2001) and VI of section 68 of the Supplementary Finance Act for 2002 shall no longer apply as from January 1st 2007 concerning pensions paid to surviving spouses of persons receiving military disability pensions. As from said date pensions paid to surviving spouses of persons receiving military disability pensions shall be computed in the conditions of the Code of Military Pensions for Disabled Veterans and War Victims and the foregoing paragraph.

4. Firstly, according to the parties making the application, the Constitutional Council should, going beyond the statutory provisions at the heart of the application, rule as to the conformity with constitutionally protected rights and freedoms of all the statutory provisions pertaining to the "crystallisation" of pensions, in particular that of section 71 of the Act of December 26th 1959 referred to hereinabove. According to the Prime Minister section 100 of the Act of December 21st 2006, which is not applicable to the case in hand, has wrongly been included on the application for a priority preliminary ruling on the issue of constitutionality transmitted to the Constitutional Council.

5. Secondly, the parties making the application contend that the statutory provisions referred to hereinabove infringe the principle of equality. They contend that sub-paragraph 1 of Paragraph IV of section 68 of the Act of December 30th 2002 made the provisions of this section retrospective.

WITH RESPECT TO THE PROCEEDINGS BEFORE THE COUNCIL:

6. It is not incumbent upon the Constitutional Council, when ruling on an application for a priority preliminary ruling on the issue of constitutionality, to call into question the decision whereby the Conseil d'Etat or the Cour de cassation has found, pursuant to section 23-5 of the Ordinance of November 7th 1958, that a provision was or was not applicable to the case in hand or the proceedings or was or was not the grounds for the proceedings.

7. The submittals whereby the parties making the application petition the Constitutional Council to rule on the conformity with the Constitution of section 71 of the Act of December 26th

1959 referred to hereinabove and the other statutory provisions pertaining to the "crystallisation" of pensions must be dismissed insofar as these provisions are not found in the application transmitted by the Conseil d'Etat to the Constitutional Council. The same holds good for the submittals of the Prime Minister requesting the Constitutional Council not to rule on the conformity to the Constitution of section 100 of the Act of December 21st 2006, insofar as this provision is one of those included in the application transmitted by the Conseil d'Etat to the Constitutional Council.

WITH RESPECT TO THE CONSTITUTIONALITY OF THE CHALLENGED PROVISIONS:

8. Article 6 of the Declaration of the Rights of Man and the Citizen of 1789 proclaims that the law "shall be the same for all, whether it protects or punishes". The principle of equality does not preclude Parliament from treating different situations in different ways, nor from departing from the principle of equality for reasons of general interest provided that, in each case, the resulting different treatment is directly connected with the purpose sought to be achieved by the statute which introduces said different treatment.

- As regards section 26 of the Act of August 3rd 1981 and section 68 of the Act of December 30th 2002

9. The combined provisions of section 26 of the Act of August 3rd 1981 and section 68 of the Act of December 30th 2002 are intended to guarantee holders of civil or military retirement pensions, in accordance with their actual place of residence abroad when they became entitled to such pensions, living conditions reflecting the dignity of their service to the State. When providing for revaluation conditions different from those provided for by the Code of Civil and Military Retirement Pensions, they continue to apply different treatment from that applicable to French Nationals residing in the same foreign country. Although Parliament was at liberty to base the difference in treatment on the place of residence when taking into account differences in purchasing power, it could not, in view of the purpose of the statute, establish a difference based on nationality between those holding a civil or military retirement pension paid out of the budget of the State or State Public Establishments and residing in the same foreign country. To this extent these statutory provisions infringe the principle of equality.

As regards section 100 of the Act of December 21st 2006 :

10. The abrogation of section 26 of the Act of August 3rd 1981 and section 68 of the Act of December 30th 2002 results in excluding Algerian Nationals from the scope of the provisions of section 100 of the Act of December 21st 2006. This leads to a difference in treatment based on nationality between holders of veterans' disability pensions and retirement pensions depending on whether or not they are Algerian Nationals or Nationals of other countries belonging to the French Union or the Community or placed under French protectorate or trusteeship. This difference is unjustified as regards the statute which is designed to re-establish equality between benefits paid to veterans, whether they be French or foreign Nationals. Section 100 of the Act of December 21st 2006 must also be found to infringe the principle of equality.

11. Without it being necessary to examine the other arguments raised, the challenged statutory provisions must be held to be unconstitutional.

WITH RESPECT TO THE EFFECTS OF THE FINDING OF UNCONSTITUTIONALITY

12. The repeal of section 26 of the Act of August 3rd 1981, of section 68 of the Act of December 30th 2002 and section 100 of the Act of December 21st 2006 will result in placing all foreign Nationals, other than Algerian, holding military retirement pensions in a situation of inequality due to their nationality as a result of the provisions prior to the coming into effect of section 68 of the Act of December 30th 2002. In order to enable Parliament to remedy the finding of

unconstitutionality made by the Council, the repeal of the aforementioned provisions shall take effect as of January 1st 2011. In order to preserve the usefulness of this decision for cases pending, it is firstly incumbent upon courts to stay their ruling under January 1st 2011 in cases where the outcome depends on the application of provisions found to be unconstitutional, and secondly incumbent upon Parliament to provide for an application of the new provisions to such cases pending at the date of this decision.

HELD

Article 1: The following provisions are held to be unconstitutional

- section 26 of the Supplementary Finance Act for 1981, n° 81-734 of August 3rd 1981;
- section 68 of the Supplementary Finance Act for 2002, n° 2002-1576 of December 30th 2002, with the exception of paragraph VII;
- section 100 of the Finance Act for 2007, n° 2006-1666 of December 21st 2006, with the exception of paragraph V.

Article 2. The finding of unconstitutionality set out in the foregoing Article 1 shall take effect as from January 1st 2011 in the conditions laid down in paragraph 12 hereof.

Article 3 : This decision shall be published in the Journal officiel of the French Republic and notified in the conditions provided for in Section 23-11 of the Ordinance of November 7th 1958 referred to hereinabove.

Deliberated by the Constitutional Council sitting on May 27th 2010 and composed of Messrs Jean-Louis DEBRE, President, Messrs Jacques BARROT, Guy CANIVET, Michel CHARASSE, Jacques CHIRAC, Renaud DENOIX de SAINT MARC, Mrs Jacqueline de GUILLENCHMIDT, Messrs Hubert HAENEL, Jean-Louis PEZANT and Mr Pierre STEINMETZ.

Decision announced on May 28th 2010.