

Nationality Act Case

(12-2 KCCR 167, 97Hun-Ka12, August 31, 2000)

Contents of the Decision

1. When a statutory provision on constitutional review upon request is revised during the review, it loses its character as the precondition of the underlying trial.
2. Whether the former Nationality Act (enacted by Act No. 16 on December 20, 1948 and prior to being wholly amended by Act No. 5431 on December 13, 1997) in which nationality by heredity follows father's nationality (the Old Law, hereinafter) violates the constitutional principle of equality.
3. A decision that finds nonconforming to the Constitution and gives only temporary effects to Article 7(1) of Supplementary Provisions ('Supplementary Provision', hereinafter) of the new Nationality Act (revised by Act No. 5431 through major revision, December 13, 1997; the New Law, hereinafter), which are transitional clauses that extended the benefit of the New Law applicable to those borne by a foreigner-father and therefore formerly ineligible for Korean nationality under the Old Law only to those born within 10 years before the effective date of the New Law.

Summary of the Decision

1. The Old Law provision would have been the precondition of the underlying trial since, had it been unconstitutional, the Complainant with the Korean mother would have acquired Korean nationality and therefore the deportation order issued on the basis of petitioner's presupposed status as an alien would have been unenforceable. However, the Old Law was revised, and acquisition of nationality by heredity followed either father's or mother's nationality in the New Law (Article 2 (1)[1]), which governed the underlying case, starting June 14, 1998 (according to Supplementary Provision, Article 1). Therefore, the Old Law provision lost its character as the precondition of the underlying trial during its pendency and is not legally valid as the subject matter at this constitutional review.

2. A. The transitional clauses of the New Law extended its benefit to the formerly ineligible borne to a foreigner mother under the Old Law but only to those borne within 10 years of the enactment of the New Law. In deciding whether the transitional clauses are constitutional, one must first decide whether the limiting of acquisition of nationality by

heredity to father's nationality in the Old Law was constitutional.

B. The Old Law adopted the paternal lineage system that coincided a child's nationality at birth to its father's nationality and discriminately granted the mother's nationality only supplementary importance. Such discrimination between the child of a Korean father and a foreigner mother and that of a Korean mother and a foreigner father disadvantages the children of Korean mothers and the mothers themselves, and therefore violates the principle of male-female equality in Article 11(1) of the Constitution.

Among marriages between Koreans and foreigners, the ones by Korean males and the ones by Korean females are not particularly different because of the sexual difference. Children of the two types of marriages are equipped with the equal abilities and potential to adapt to Korea's legal order and culture and to live without default in the community. The Old Law, however, connects the nationality of the whole family only that of the father, violating the principle that family life shall be entered into and sustained on the basis of equality of the sexes in Article 36(1) of the Constitution.

Children with Korean mothers are foreign nationals. Therefore, they cannot be public officials of the Republic of Korea. They either cannot enjoy or can enjoy only limitedly the freedom to move one's residence, the freedom to choose occupations, the right to property, the right to elect and be elected, the right to petition for the State's compensation, and social rights. Therefore, the Old Law severely discriminates against the children of Korean mothers in comparison to those of Korean fathers, and violates the principle of equality of the Constitution.

3. A. When the paternal lineage system of the Old Law was changed to the paternal-maternal lineage system of the New Law, Supplementary Provisions extend the benefit of the New Law to those formerly ineligible borne by Korean mothers as long as they were borne within 10 years before the effective date of the New Law and has taken certain steps. Supplementary Provisions again discriminate on the basis of whether the children were less than 10 years old at the time of the putting into effect of the New Law in providing relief from the unconstitutional discrimination of the Old Law. Supplementary Provisions violate the principle of equality of the Constitution.

B. If the Constitutional Court issues a decision of unconstitutionality or a simple decision of nonconformity to the Constitution, Supplementary Provisions will become ineffective on the day of the issuance. Then, even those borne by Korean mothers within 10 years before the effective date of the New Law will lose the basis to acquire the nationality (Supplementary Provisions), leaving the country governed by the principle of the rule of law with an unacceptable vacuum in law.

Therefore, Supplementary Provisions, though unconstitutional, must be held temporarily effective until the legislature enacts a new provision.

Parties

Requesting Court

Seoul High Court (97Bu776 Request for Constitutional Review)

Petitioner

Kim Gwang-ho

Counsel of record: Ahn Sang-woon

Original Case

Seoul High Court 96Gu10128, Cancellation of Deportation

Holding

1. The request for constitutional review of Article 2(1)[1] of the former Nationality Act (enacted by Act No. 16 on December 20, 1948 and prior to being wholly amended by Act No. 5431 on December 13, 1997) is dismissed;

2. The portion that reads ‘. . .within 10 years’ in Article 7(1) of Supplementary Provisions of the Nationality Act (Wholly Amended by Act No. 5431 on December 13, 1997) is nonconforming to the Constitution. This statutory provision shall be effective until the legislature revises it.

Reasoning

1. Introduction to the Case and the Subject Matter for Review

A. Introduction to the Case

(1) The petitioner argued that the constitutionality of Article 2(1)[1] of the former Nationality Act (enacted by Act No. 16 on December 20, 1948 and prior to being wholly revised by Act No. 5431 on

December 13, 1997; the Old Law, hereinafter) that had the paternal lineage system in effect at the time of his or her birth on September 3, 1955, is a precondition of a trial, and requested constitutional review. The requesting court granted the request on August 20, 1997 and referred to the Constitution.

The outlines of the underlying cases as found by the requesting court are in the Separate Attachment (2. Outlines of Review on Merits of Reason for Requesting Constitutional Review in the decision of the Seoul High Court, 97Bu776, Request for Constitutional Review).

(2) During the pendency of the review, the Old Law was wholly revised by Act No. 5431 on December 13, 1997 into a system that accepted either a father's or a mother's lineage (the New Law, hereinafter). Article 7 (1) of the Supplementary Provisions (Supplementary Provisions, hereinafter) included a transitional measure whereby those born by Korean national mothers within 10 years before the effective date of the New Law could acquire the nationality of the Republic of Korea.

B. Subject Matter for Review

(1) The petitioner, born on September 3, 1955, cannot acquire the nationality of the Republic of Korea even in reliance on the New Law due to the 10 year period specified in the Supplementary Provision. The petitioner, however, will be able to do so if the Constitutional Court invalidates the Supplementary Provision or finds it nonconforming to the Constitution and then the National Assembly revises it. From the perspective of the integrity of the legal system and the efficiency in litigation, it is desirable to include it in the subject matter for review, and we do so. (11-1 KCCR 14, 98Hun-Ka17, January 2, 1999)

(2) The subject matter for review is the constitutionality of Article 2(1)[1] of the Old Law and the portion that reads ". . .within 10 years" in Article 7(1) of Supplementary Provisions of the New Law. They are as follows:

former Nationality Act

Article 2

(1) Those who fall under one of the following subparagraphs are Korean nationals.

1. A person whose father is a national of the Republic of Korea at his or her birth.

Nationality Act (Wholly revised by Act No. 5431 on December 13, 1997)

Article 2 (Acquisition of Nationality by Birth)

(1) A person falling under one of the following subparagraphs shall be a national of the Republic of Korea at the time of his or her birth:

1. A person whose father or mother is a national of the Republic of Korea at the time of his or her birth.

Supplementary Provisions, Article 7 (Special Cases of Acquisition of Nationality for Persons of Maternal Line by Adoption of *Jus Sanguinis* to Both Lines of Parents)

(1) A person who falls under one of the following subparagraphs among the persons who have been borne by a mother of a national of the Republic of Korea within ten years before this Act enters into force may acquire the nationality of the Republic of Korea through reporting to the Minister of Justice as determined by the Presidential Decree within three years after the enforcement date of this Act:

1. A person whose mother is currently a national of the Republic of Korea; and

2. A person whose mother was a national of the Republic of Korea at the time of her death, when his mother died.

2. Opinions of the Requesting Court and the Related Parties

A. Reason for Requesting Constitutional Review

The Old Law specifies the paternal lineage system in violation of Article 11(1) of the Constitution that bans discrimination based on gender. It also treats the position of father or husband as superior to that of mother or wife in violation of the equality of the gender in Article 36(1) of the Constitution.

B. Opinion of the Petitioner

The New Law allows, among those born by Korean mothers, only those born within 10 years before the effective date of the New Law to acquire nationality, and therefore continues the infringing state of affairs upon the basic rights of the petitioner who was born before June 13, 1988.

C. Opinion of the Minister of Justice

(1) Whether to use the place of birth (*jus soli*) or the lineage (*jus sanguinis*) as the qualification for one's nationality, and how to determine other matters concerning nationality belongs to legislative discretion.

The Old Law allows a marital child to acquire nationality using its father's nationality and a non-marital child to do the same using their mother's nationality. It is customary that the legitimate child of a foreigner father acquires its father's nationality. Therefore, the Old Law adopts the paternal lineage system to prevent dual nationality, and therefore does not constitute discrimination between males and females.

The paternal lineage system has been questioned on its reasonableness as a policy due to the changes in the social environment. However, it is not unconstitutional when judged in view of the historical, social, and cultural traditions at the time of its enactment.

(2) The New Law limited the period of retroactivity to 10 years in the Supplementary Provision, firstly because retroactivity is an exception that harms the stability of law and therefore its effects should be minimized as much as possible, and secondly because the New Law was aimed at providing relief to the children without any nationality. Most people born by Korean national mothers and alien fathers more than 10 years ago acquired nationality either through naturalization or acknowledgement under the Old Law or the New Law. The special provisions on the New Law did not have to cover them.

D. Opinion of the Minister of Reunification

The petitioner has stayed in China for a significant period of time, and his base of living is also in China. Thus the petitioner does not fall under a North Korean escapee under Article 2(1) of the Act on the Protection and Settlement Support of Residents Escaping from North Korea.

E. Opinion of the Minister of Diplomacy and Trade

Our country does not recognize the nationality of North Korea. Therefore, a resident of North Korea can be considered as having our nationality. It may cause a diplomatic problem with a third country if we recognize as our nationals those North Koreans residing in the third country outside the reach of our effective control. There is no diplomatic problem in recognizing the nationality of a North Korean resident who already entered our country.

3. Decision

A. Concept and Nature of Nationality

(1) People are one of the three elements of a State, together with territory and sovereignty. Nationality means the qualifications or status of being a national of the State. Those who are not nationals are foreigners (foreign nationals, dual nationals, those of no nationality, etc.). Thus, nationals are permanent members who bear the duty to obey the State's governing power no matter where they happen to be, and only in exceptional situations, they should obey the governing power of the residing state.

Historically, before the establishment of modern states serfs belong to estates and were treated as the belongings of lords. Even in modern states, an individual belong to and was demanded of loyalty to the place of birth or to the lineage, and therefore did not have a choice in nationality. However, inborn human rights ideology gave birth to a free democratic constitution based upon people's sovereignty, and this constitution, in respect of human dignity and worth, recognized as a basic right an individual's right to choose his or her political community that will influence his or her fate profoundly, namely, the right to choose nationality. Article 15 of the United Nation's Universal Declaration of Human Rights (December 10, 1948) declares "① Everyone has the right to a nationality ② No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality". In fact, each country restricts individuals' right to choose nationalities, and nationality has not become something that one can choose as a matter of right.

(2) One acquires nationality by birth or by naturalization. Acquisition by birth follows either the lineage or the place of birth (According to a study by the Ministry of Justice, 72 countries out of 118 countries surveyed follow lineage and the other 46 follows the places of birth).

Among those following lineage, European countries usually follow both father's and mother's lineage. In Asia, our old law, Muslim countries in the Middle East, Taiwan, Indonesia, and Thailand follow father's lineage while all remaining countries including Japan and China follow both father's and mother's lineage. On the other hand, the countries in North and South Americas mostly follow the places of birth while extending nationality to those born outside the country by either a father or a mother of the same nationality.

(3) Nationality is a legal union between the State and its members. It means protection and subjugation. It cannot be thought of separately from the State. In other words, nationality arises with the formation of a state and disappears with the collapse of a state. Nationality comes into being not through statutory provisions but through the formation of a state. Therefore, although a constitution delegates the task to a nationality statute, the statute itself governs the matters of constitutional dimension by concretizing and realizing the definition of people, the

element of a state.

B. Scope of Nationals

(1) The Founding Constitution of July 17, 1948 states the qualifications of becoming a Korean national shall be prescribed by law (Article 3). In the same year, the Nationality Act was enacted by Act No. 16 on December 20. The Nationality Act was revised three times but only to strengthen the element of one-nationality-one-person by eliminating the possibilities of dual nationality, and has kept the original structure. The basic principles of the Old Law can be summarized as the principles that nationality must be prescribed by statute; the father's lineage takes precedence in determining one's nationality; the father takes the central role in determination of one's nationality; one can have only one nationality; the whole family should have one nationality, etc.

The New Law, wholly amended by Act No. 5431 on December 13, 1997, coincided with our withdrawal of the reservation on the male-female equality clause in the United Nation's 1984 Convention on the Elimination of All Forms of Discrimination against Women which we had reserved when we signed on it. There, the father's lineage clause was revised to conform to the principle of equality and was otherwise revised to conform to the reality and to improve on inadequate provisions reasonably.

(2) Our Constitution has stated since the Founding Constitution, The territory of the Republic of Korea shall consist of the Korean peninsula and its adjacent islands. (Article 4 of the Founding Constitution; Article 3 of the current Constitution)

The Supreme Court has ruled accordingly that North Korea is part of the Korean peninsula and therefore subject to the sovereignty of the Republic of Korea, and therefore that North Korean residency should not interfere with the acquisition of the nationality of the Republic of Korea. Therefore, the Provisional Ordinance on Nationality (South Korean Provisional Government Act No. 11, May 11, 1948) stated in Article 2(1) that a person born to a Korean father shall acquire the nationality of *Chosun*. Then, the Founding Constitution, in Article 3, stated that the qualifications of nationality of the Republic of Korea should be prescribed by statute, and in Article 100, stated that all current laws and rules were effective unless they violated then Constitution. So, the Supreme Court ruled that, a person born to a Korean father even though he or she had already acquired a North Korean nationality according to the North Korean law, acquired the nationality of Chosun according to the Provisional Ordinance and then became a national of the Republic of Korea upon the promulgation of the Founding Constitution on July 17, 1948 (Kong 1996 Ha, 3602, 96Nu1221, Supreme Court, November 12,

1996)

The Minister of Diplomacy and Trade said that, although it may cause a diplomatic problem with a third country or North Korea if we recognize as our nationals those North Koreans residing in the third country or in North Korea outside the reach of our effective control. There is no diplomatic problem in recognizing the nationality of a North Korean resident who already entered our country.

(3) The requesting court made a finding that the mother of the petitioner is a national of the Republic of Korea. Therefore, we limit our decision to whether the petitioner acquires the nationality of the Republic of Korea by birth under the Constitution and the Nationality Act.

C. Whether the Old Law is the Precondition of the Original Trial

At the time the court requested this constitutional review, the Old Law provision would have been the precondition of the underlying trial since, had it been unconstitutional, the petitioner with the Korean mother would have acquired Korean nationality and therefore the deportation order issued because of the petitioner's status as an alien would have been unenforceable (The April 13, 1996 deportation order against the petitioner was suspended by the Seoul High Court, and the petitioner released from custody). However, the Old Law was revised on December 13, 1997, and acquisition of nationality by heredity now followed both a father's and a mother's nationality in the New Law (Article 2 (1)[1]), which governed the original case, starting June 14, 1998 (according to Supplementary Provision, Article 1).

Therefore, the Old Law provision lost its character as the precondition of the original trial during its pendency, and the relevant portion of the constitutional review should be dismissed according to Holding 1.

D. Decision on Supplementary Provision

(1) The Nature of Supplementary Provision

Supplementary Provision is a transitional clause of the New Law occasioned by the revision of the paternal lineage system of the Old Law into the paternal-maternal lineage system of the New Law that extended its benefit to the formerly ineligible borne to a foreigner mother under the Old Law but only to those borne within 10 years before the effective date of the New Law.

In deciding whether the transitional clauses are constitutional, one

must first decide whether the limiting of acquisition of nationality by heredity to that of father's nationality in the Old Law was constitutional.

(2) Unconstitutionality of the Old Law Provision

(A) The preamble of the Constitution shows that it is people that legislated the Constitution. Article 1(2) states that the sovereignty of the Republic of Korea shall reside in the people, declaring people as the owner of the sovereignty. Chapter 2 of the Constitution is titled 'Rights and Responsibilities of People', and each provision of the Chapter explicitly shows that 'people' are the owners of basic rights. Article 2(1) states, the qualifications of becoming a Korean national shall be prescribed by law, leaving the matters about the owners of basic rights to the formation of the legislature.

The Minister of Justice argues that, since the legislature has a broad discretion in determining the qualifications of a national, whether to use the place of birth (*jus soli*) or the lineage (*jus sanguinis*) as the qualification for one's nationality. The Minister argues also that, even if the lineage system is adopted, whether it will consider the place of birth or requires both parents to be Korean and whether one can be a dual national at birth all belong to the legislative discretion. However, when the qualifications of being a national are determined by statute under the delegation of the Constitution, human dignity and worth, the principle of equality, and other constitutional mandates protecting basic rights restrict the legislation. Therefore, we reject the argument by the Minister of Justice that all provisions about nationality should be reviewed under the standard of whether the legislature exceeded the scope of reasonable discretion.

(B) Article 11(1) of the Constitution states "all citizens shall be equal before the law, and there shall be no discrimination in political, social or cultural life on account of sex, religion or social status", announcing the principle of equality.

The principle of equality in Article 11(1) of the Constitution is a fundamental mandate of the order of rule of law. It prohibits all state agencies from treating adversely a person or a certain group without just cause in applying laws. Therefore, all people bear the same obligations and enjoy the same rights under the laws, and no state actor can apply or cannot apply law to certain people disadvantageously or advantageously. The normative meaning of Article 11(1) does not stop at 'equality in application of law.' It also requires the legislature to justify its standard of value used in distributing the rights and responsibilities through legislation. Hence 'equality in law-making.' Therefore, the principle of equality rejects any criterion of discrimination aimed at extending different legal effects to people if the criterion cannot be objectively justified. How much the legislature is bound by the Article

11(1) principle of equality is determined by the regulated subject matter and the characteristics of the criterion of discrimination.

The Constitution ruled in Discharged Soldiers' Assistance Act Article 8(1) Unconstitutionality Case as follows (11-2 KCCR 789-791, 98Hun-Ma363, December 23, 1999);

In equality review, whether a strict or relaxed standard shall be used depends on the scope of the legislative-formative power given to the legislature. However, those cases where the Constitution specially demands equality shall be scrutinized under a strict standard. If the Constitution itself designates certain standards not to be used as reason for discrimination or certain domains in which discrimination shall not take place, it is justified to strictly scrutinize the discrimination based on that standard of in that domain. Also, if differential treatment causes a great burden on the related basic rights, the legislative-formative power shall be curtailed and strictly scrutinized.

The veterans' extra point system requires a strict standard of review for both of the two reasons. Article 32(4) of the Constitution states, "women's labor is specially protected, and they are not unjustly discriminated in hiring, wages, and conditions of employment," specially requiring gender equality in the domain of 'labor' of 'employment'. The veterans' extra point system differentiates men and women in that domain. Also, it causes a great burden on the Article 25 of the Constitution the right to hold public offices.

The standard of constitutional review concerning a violation of the principle of equality and the reasoning that male-female discrimination is unconstitutional proposed in the above case can be adopted for this case. The Old Law adopted the paternal lineage system that coincided a child's nationality at birth to its father's and discriminatorily granted the mother's nationality only supplementary importance. Such law is unconstitutional. In other words, a discrimination between the child of a Korean father and a foreigner mother and that of a Korean mother and a foreigner father disadvantages the children of Korean mothers and the mothers themselves, and is clearly against the principle of male-female equality in Article 11(1) of the Constitution. It is constitutionally unacceptable.

(C) The Constitution in Article 36(1) states, "marriage and family life shall be entered into and sustained on the basis of individual dignity and equality of the sexes, and the State shall do everything in its power to achieve that goal."

Article 36(1) of the Constitution states the constitutional principle of the institution of marriage and family. It declares that the institution of marriage and family must be structured with due respect to human dignity and pursuant to the principle of democracy. (9-2 KCCR 17,

95Jun-Ka6, July 16, 1997) This provision codifies the requirement that family life be established and maintained on the basis of the equality of the two sexes. When the legislature forms the institution of family, it must consider that.

Let us review the situation governed by the Old Law provision. Among marriages between Koreans and foreigners, the ones by Korean males and the ones by Korean females are not particularly different because of the sexual difference. Children of the two types of marriages are equipped with the equal abilities and potential to adapt to Korea's legal order and culture and to live without default in the community. The Old Law, however, connects the nationality of the whole family only that of the father. The father is made the leader or the center of the family. It is questionable whether such practice is just in light of the provisions of the Constitution that declares the equality of the two sexes in family life.

Acquisition of nationality based on lineage guarantees a membership in the social unit, a family, and a membership in a particular national community, while providing the basis for strengthening the parent-child relationship. If this relationship is recognized only between the father and the child but not between the mother and the child, such result amounts to the denigration of women's status within the family and a threat to maternal authority.

Therefore, the Old Law provision violates the principle of the equality of the two sexes in family life in Article 36(1) of the Constitution.

(D) The Old Law provision that governs the nationality of a child of parents with different nationalities discriminates on the basis of one parent's nationality. As a result, Korean mothers and their children are significantly disadvantaged in comparison to Korean fathers and their children in legal status.

Children with Korean mothers are foreigners. They enjoy exemption from military services but most of the disparate treatments are disadvantageous to them. As foreigners, they cannot be the public officials of the Republic of Korea (the State Public Officials Act, Article 35; the Local Public Officials Act, Article 33; the Diplomatic Public Officials Act, Article 8). They cannot enjoy freedom of residence and the right to move at will (Constitution, Article 14; Immigration Control Act, Article 7, 17), freedom of occupation (Constitution, Article 15; Fisheries Act, Article 5; Pilotage Act, Article 6), right of property (Constitution, Article 23; Foreigner's Land Acquisition Act, Article 3; Patent Act, Article 25; Aviation Act, Article 6), right to vote and right to hold public office (Constitution, Article 24, 25; Act on the Election of Public Officials and the Prevention of Election Malpractices, Article 15,

16), right to claim compensation (Constitution, Article 29(2); State Compensation Act, Article 7), right to receive aid for injury from criminal acts (Constitution, Article 30; Crime Victims Aid Act, Article 10), right to vote on Referendum (Constitution, Article 72; National Referendum Act, Article 7) and other social rights or enjoy only limitedly. There is no substantive public interest that justifies this discrimination in granting children different nationalities depending on their father's or mother's nationality.

The Minister of Justice argues that the Old Law allows a marital child to acquire its father's nationality and a non-marital child to do the same using its mother's nationality and therefore does not constitute discrimination between males and females. Since it is customary that the marital child of a foreigner father acquires its father's nationality, the Old Law on the basis of the paternal lineage system is reasonable as a measure to prevent dual nationality. However, the above said discrimination is not justified just because the Old Law Provision contributes to the prevention of dual nationality in the relationship between the children and the State. From the children's perspective, the demerits of dual nationality are not greater than the merits in obtaining the additional nationality of the mother. There is no absolute public interest that mandates rejection of the children's joining of the State. Thus, the Minister of Justice's argument should be rejected.

Therefore, the Old Law Provision clearly discriminates against the children of Korean mothers in comparison to those of Korean fathers from the children's perspectives, and therefore violates the principle of equality of the Constitution.

(E) As examined above, the Old Law Provision based on the paternal lineage system violates the principle of equality of Article 11(1) of the Constitution and the principle of equality of the two sexes in family life in Article 36(1) of the Constitution, and through such discrimination, materially restricts basic rights of the children. It is unconstitutional.

(3) The Supplementary Provision is nonconforming to the Constitution

(A) The legislature revised the Old Law by Act No. 5431 through major revision on December 13, 1997, and changed the rule on acquisition of nationality by heredity from that of a paternal lineage system to a paternal-maternal one (the New Law, Article 2(1)[1]). As a result, the unconstitutionality of the Old Law Provision was cured. However, in restoring to the children of Korean mothers basic rights formerly infringed by the Old Law Provision, the Supplementary Provision granted Korean nationality only to those children born within 10 years before the effective date of the New Law, and not to those children like

the petitioner born more than 10 years before the effective date of the New Law. The issue is whether the time limit of '10 years' can be constitutionally justified.

The Minister of Justice argues that most people born by Korean national mothers and foreigner fathers more than 10 years before the effective date of the New Law already resolved their nationality issues by acquiring Korean nationality either through naturalization or acknowledgement under the Old Law or the New Law.

However, there is no reasonable proof that people older than 10 years had resolved their nationality issues. There is no believable statistics proposed for those older than 10 years without any nationality.

Also, the fact that the Supplementary Provision grants the opportunity for acquiring nationality only to those born within 10 years before the effective date of the New Law may be explained by the recent change in the standard of values concerning sex. However, there is no reasonable basis to believe that the legal conception of anti-sex-discrimination came into being during the ten years before the effective date of the New Law. Article 8 of the Founding Constitution stated, all citizens shall be equal before the law, and there shall be no discrimination in political, economic, social, or cultural life on account of sex, religion or social status. The change in the legal conception about sex discrimination had already taken place then at the latest.

Therefore, we do not find much weight in the argument of the Minister of Justice that the broad application of the Supplementary Provision to all victims of the Old Law Provision may threaten the stability of law because it is retroactive legislation. When the Supplementary Provision provides relief to those disadvantaged by the unconstitutional discrimination due to the Old Law Provision, the age 10 years is not a constitutionally appropriate standard to use. The Supplementary Provision thereby works yet another discrimination and violates the principle of equality of the Constitution.

(B) When a statutory provision violates the Constitution, we must in principle issue a decision of unconstitutionality and thereby protect the normative power of the Constitution. However, when the elimination of the statutory provision from the codes may cause vacuum or confusion in law, we can issue a decision of nonconformity to the Constitution and leave the statutory provision effective temporarily. In other words, if a constitutional state of leaving the unconstitutional statutory provision temporarily effective is far more constitutionally desirable than an unconstitutional state of vacuum in law brought on by a decision of unconstitutionality, the Constitutional Court may need to subscribe to the perspective of the stability of law and prevent vacuum in law and the resulting disorder, which are unacceptable to the government by rule of

law, by leaving the un-constitutional statutory provision temporarily effective for a limited period until the legislature improves it in the manner consistent with the Constitution (11-2 KCCR 417, 97Hun-Ba26, October 21, 1999).

In this case, the Supplementary Provision is absolutely needed as a transitional measure to give relief to the children of Korean mothers who formerly could not acquire nationality because of the Old Law Provision. If the Constitutional Court issues a decision of unconstitutionality or a simple decision of nonconformity to the Constitution, the Supplementary Provision becomes immediately void upon the Constitutional Court's announcement of its decision. As a result, the provision opening the door to acquisition of nationality at least to those born within 10 years of the enactment of the New Law will become void, and we will have vacuum in law unacceptable to the government by rule of law. Then, it will be another violation of the Constitution to bring about vacuum in law with respect to those who could benefit from the Supplementary Provision or to sow another cinder of legal instability with respect to the responsible administrative agencies and the related families. The Supplementary Provision shall remain effective for those who can benefit from it until it is revised.

Therefore, the Supplementary Provision is nonconforming to the Constitution but is hereby ordered to be effective temporarily until the legislature enacts a new law.

4. Conclusion

For the above reasons, all Justices decide upon a unanimous decision that the request for constitutional review of Article 2(1)[1] of the Old Law is dismissed. The portion that reads '. . .within 10 years' in Article 7(1) of Supplementary Provisions of the New Law is nonconforming to the Constitution, but it shall remain effective until the legislature revises it.

Justices Kim Yong-joon(Presiding Justice), Kim Moon-hee, Chung Kyung-sik, Koh Joong-suk, Shin Chang-on, Lee Young-mo (Assigned Justice), Han Dae-hyun, Ha Kyung-chull, Kim Young-il

[Separate Attachment]

Summary of the Original Cases

(1) The petitioner was born on September 3, 1955 to the father Kim Tae-ik (born October 13, 1928) and the mother Yum Hae-soo (born

March 27, 1933), grew up in the City of Manpo in North Pyongan Province, and moved to China.

(2) The petitioner entered the Republic of Korea secretly through the sea shore of Mooan-Gun of Chonnam Province around 3 a.m. on November 4, 1955 and came up to Seoul. On the following day, when stopped for a questioning by a police officer, the petitioner expressed the intent to defect but was detained at the Seoul Foreigner Protection Facility on the eighth of the same month. The manager of the Seoul Foreigner Protection Facility issued a forceful deportation order against the petitioner.

(3) The petitioner then argued that he was a national of the Republic of Korea under the Constitution and the Nationality Act of the country, and he was not a 'foreigner' subject to the deportation order. The petitioner then sought cancellation of the deportation order in this instant suit.

(4) The petitioner argues that it is a Korean national on the basis that its father Kim Tae-ik was a Korean national. Under Article 2(1) of the Provisional Ordinance Regarding Nationality (Announced on May 11, 1948 by South Korean Provisional Government Act No. 11) and Articles 3 and 100 of the Founding Constitution, the said Kim acquired nationality of the Republic of Korea as soon as the Founding Constitution was announced, and then the petitioner was born to the said Kim on September 3, 1955, thereby acquired nationality of the Republic of Korea under Article 2(1)[1] of the Nationality Act enacted by Act No. 16 on December 20, 1948. However, the records show that the said Kim, although born a Korean (Chosun-in), acquired Chinese nationality while living in China before the said Provisional Ordinance Regarding Nationality was enacted. The records are not sufficient in showing that the said Kim later abandoned his Chinese nationality. Therefore, the petitioner born to the said Kim while he was a Chinese national was not a national of the Republic of Korea.

(5) The petitioner alternatively argues that it is a Korean national on the basis that its mother Yum Hae-soo was a Korean national. Her father was a Korean (Chosun-in). Also, under Article 2(1) of the Provisional Ordinance Regarding Nationality (Announced on May 11, 1948 by South Korean Provisional Government Act No. 11) and Articles 3 and 100 of the Founding Constitution, the said Yum acquired nationality of the Republic of Korea as soon as the Founding Constitution was announced. The petitioner was then born to the said Yum on September 3, 1955, and it argues that it should have rightfully acquired the nationality of the Republic of Korea. The petitioner points out that Article 2(1)[1] of the Nationality Act enacted by Act No. 16 on December 20, 1948 is based on paternal lineage and therefore allows the children only of the fathers who are the nationals of the Republic of Korea to acquire the

nationality of the Republic of Korea. The petitioner argues that it violates the principle of equality of the Constitution and unjustly discriminates males from females, and filed this request for constitutional review.