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Case No. 277

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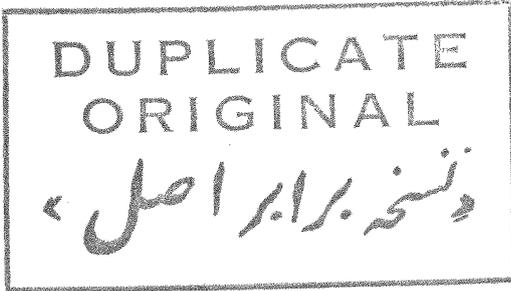
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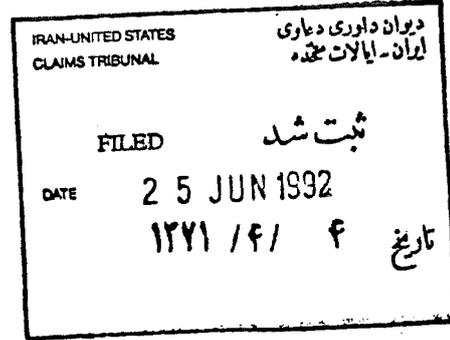


Case No. 277

Chamber Two

Decision No. DEC106-277-2

GLORIA JEAN CHERAFAT,
ROXANNE JUNE CHERAFAT,
RAMIN CHERAFAT,
Claimants,
and
THE ISLAMIC REPUBLIC OF IRAN,
Respondent.

DECISION

I. INTRODUCTION

1. The Tribunal terminated the proceedings in this Case by Order of 9 July 1985. The Tribunal has now before it a request for reinstatement of the Case submitted by two of the original Claimants, Roxanne June Cherafat and Ramin Cherafat, and their father Hossein Cherafat ("the Applicants"). The Applicants seek reinstatement on three grounds: error of law, fraud and procedural impropriety. The Islamic Republic of Iran ("the Respondent") denies these allegations and opposes reinstatement.

II. PROCEDURAL HISTORY

2. The Statement of Claim in this Case was filed on 14 January 1982 by Gloria Jean Cherafat, individually and as natural mother and next friend of Roxanne June Cherafat and Ramin Cherafat, then being minor children. The original Claimants sought compensation, in the amount of U.S.\$52,842,000, for the alleged expropriation by the Respondent of real and personal property claimed to be owned by the original Claimants.

3. On 23 January 1985, Mr. Hossein Cherafat filed a submission with the Tribunal, requesting the termination of the proceedings in the Case. Mr. Cherafat stated that, pursuant to a Decree of Divorce rendered on 4 March 1983 by the Johnson County District Court, Kansas, a Separation Agreement of the same date, and a Power of Attorney designating Mr. Cherafat as fully authorized attorney of Mrs. Gloria Cherafat, he owned all property rights relating to the Claim in Case No. 277. Mr. Cherafat also submitted that he was the natural guardian of his minor children by virtue of the Iranian Civil Code and that his custody and guardianship of the children were also stipulated in the divorce decree. Copies of the relevant documents were attached to the termination request.

4. The Tribunal in its Order of 7 February 1985 noted that "a request for withdrawal of this Case was filed by a person who is not a Party in this Case," and requested the Parties to file

their comments on Mr. Cherafat's request by 23 March 1985. On 25 March 1985, the Respondent informed the Tribunal that it had no objection to the termination of proceedings. No response was filed by the original Claimants; however, on 26 March 1985 the Tribunal received and filed a letter which contained authenticated copies of the Decree of Divorce and the Separation Agreement. The envelope in which the documents arrived bore the name of Hossein Cherafat and a return address in Tehran.

5. In its Order of 29 March 1985, the Tribunal noted that the original Claimants had not responded within the time limit established by the Tribunal. In view thereof, the Tribunal informed the Parties that it intended to terminate the Case unless the original Claimants, by 29 June 1985, raised justifiable grounds for objection in accordance with Article 34, paragraph 2 of the Tribunal Rules. No such objection was filed, and the Tribunal by its Order of 9 July 1985 terminated the proceedings in the Case. On the same date, the Tribunal received a letter from Mr. Hossein Cherafat's American attorney in which he stated that "all of the rights [in Case No. 277] have been set aside to Hossein Cherafat, and his former wife, Gloria Jean Cherafat, has absolutely no further rights therein."

6. On 21 October 1988, three and one half years later a different attorney representing Mr. Hossein Cherafat submitted a letter to the Tribunal in which he requested permission for the Applicants to file a memorial for reinstating the Claim on the grounds that there had been no agreement to terminate the Claim. The letter suggested that the circumstances in which the termination request was made were such that they would render it invalid. After some initial confusion between the Tribunal Registry and Mr. Cherafat's attorney¹, on 9 March 1989 Mr. Cherafat's attorney submitted a new request; a power of attorney by Roxanne June Cherafat was enclosed with this letter.

¹It appears that the confusion followed from the fact that Mr. Hossein Cherafat was not listed as a Claimant in the Case.

7. On 20 March 1989, the Tribunal requested the Respondent to submit its comments regarding Hossein Cherafat's and Roxanne June Cherafat's request by 16 May 1989. In its response of 16 May 1989, the Respondent argued that the request be dismissed as unfounded because, the Case having been terminated, there did not exist any longer a case before the Tribunal.

8. On 12 November 1990, the Applicants, now including Ramin Cherafat, again requested that the Claim be reinstated, and that they be permitted to submit a brief in support of reinstatement.

9. The Tribunal, in its communication of 4 December 1990, informed the Applicants that the Tribunal Rules contain no provisions allowing the reinstatement of claims which have been terminated and the Tribunal has not made any decision with respect to whether or not there might exist implied powers according to which, in exceptional cases, it could reinstate a terminated case. The Tribunal noted that in these circumstances any person requesting reinstatement would at the very least have to show prima facie that the Tribunal possesses such implied powers, that the individual circumstances would be such that they would be covered by such implied powers, if any, and that the request was timely made.

10. The Applicants submitted their "Request for Leave to Submit Memorial for Reinstatement of Claims in Case No. 277/2" on 27 March 1991. The Tribunal in its communication of 21 May 1991 to the Respondent noted the Applicants' request, and indicated that it intended to rule on the Applicants' request in due course. The Tribunal also requested the Respondent to comment on the Applicants' request within a reasonable period of time.

11. On 15 August 1991, the Applicants submitted a memorandum in which they presented "newly-developed points in favor of reinstatement." The Respondent submitted its response on 11 March 1992; the Applicants submitted a further brief and evidence on 9 April 1992.

II. CONTENTIONS

A. The Applicants' Contentions

12. The Applicants argue that the Tribunal has implied authority to reinstate the Claim, and that this power should be exercised in the circumstances of the Case. They seek the reinstatement of the Claim on three grounds; first, error of municipal law, second, fraud and third, procedural impropriety.

13. The Applicants argue that the Tribunal's Order to terminate the Case was based on error of municipal law because both when their Claims arose and when they were dismissed, Roxanne and Ramin Cherafat were United States citizens and legal residents of Kansas. Under Kansas law -- which the Applicants argue is the applicable law -- Hossein Cherafat had no authority to withdraw his minor children's claims; according to the relevant rule, if a minor is represented by a next friend or guardian in a proceeding, a parent who is not the representative cannot intervene and purport to act on behalf of the child. In this Case, Mr. Cherafat was not his children's representative, either in making or in prosecuting their claims; the children were represented by counsel.

14. The Applicants also argue that the Claim must be reinstated for the independent reason that the dismissal was based on fraud. Mr. Cherafat's request to withdraw the Claim was not made voluntarily but resulted from duress and fear for personal safety. The Applicants suggest that Mr. Cherafat was induced to return to Iran by "Iranian political figures," who indicated that if he returned to Iran, expropriated family property could be returned to him. After his arrival in Iran, however, Mr. Cherafat was allegedly forced, "by persons who may or may not have been connected officially with the Iranian government," to sign documents purporting to withdraw the Claim. It is also alleged that a few months after the termination of the Case, despite being seriously ill and requiring hospitalization, Mr. Cherafat was imprisoned and forced to sign yet another set

of documents relating to the the Case. The Applicants contend that Mr. Cherafat was not allowed to leave Iran for three years, and only in June 1988 was he able to leave by escaping through Turkey. Consequently, the Applicant's suggest that, under the circumstances, they acted properly and promptly in seeking the reinstatement of the Claim.

15. Finally, the Applicants contend that because Hossein Cherafat was never appointed as the children's representative pursuant to Note 2 to Article 4 of the Tribunal Rules, his withdrawal of their claims is not binding on them.² In this connection, the Applicants argue that the Cherafats' separation agreement transferred to Hossein Cherafat only the proceeds of Gloria Cherafat's claim, not the children's claims.

B. The Respondent's Contentions

16. The Respondent argues that the Applicants' request for reopening should be dismissed on two "preliminary" grounds: first, the Tribunal has no jurisdiction to examine the circumstances of withdrawal of the claim because the proceedings in Case No. 277 were terminated at a stage where the Tribunal's jurisdiction had not been determined, and second, the Tribunal lacks jurisdiction in the Case because the Claim has been owned at all times solely by Mr. Hossein Cherafat, an exclusively Iranian national.

²Note 2 to Article 4 of the Tribunal Rules states as follows:

For the purpose of a particular case, the two Governments may each appoint representatives in addition to their Agents and each of the other arbitrating parties may appoint representatives. An appointed representative shall be deemed to be authorized to act before the arbitral tribunal on behalf of the appointing party for all purposes of the case and the acts of the representative shall be binding upon the appointing party. A representative is not required to be licensed to practice law. Parties who appoint a representative shall file with the Registrar notice of appointment in such form as the Registrar may require.

17. The Respondent also argues that the Applicants' request should be dismissed as untimely. The Respondent contends that the Applicants have presented no evidence to show that Mr. Cherafat departed from Iran in June 1988, as alleged by him. Moreover, even assuming that Mr. Cherafat left Iran in June 1988, there was unjustified delay on his part in seeking reinstatement. The Respondent asks that the Tribunal apply by analogy the time limits established in Articles 35-37 of the Tribunal Rules. Consequently, the Respondent argues, because the Applicants' request was not filed within 30 days after the removal of the alleged impediment, the request should be dismissed on this ground.

18. As to the substance of the Applicants' request, the Respondent argues that the Applicants have not been able to present a prima facie case for allowing reinstatement. While denying that the Government of the Islamic Republic of Iran or its agents have exerted any pressure on Mr. Cherafat to withdraw the Claim, the Respondent argues that the evidence produced in support of reinstatement is in any case inadequate. The Respondent refers to certain points in the Applicants' and their witnesses' affidavits which it regards as inconsistencies, and argues that the evidence submitted is mostly hearsay and therefore lacks probative value. In any event, to the extent the Applicants' statements are supported by evidence, they do not, according to the Respondent, relate to grounds which would justify reinstatement.

IV. REASONS FOR THE DECISION

19. As to the existence, or the exercise of any inherent power to reinstate a terminated Case, the Tribunal practice fails to provide conclusive guidance; indeed, the Tribunal has specifically reserved its position as to whether it has inherent power to revise an award under exceptional circumstances. See, e.g., World Farmers Trading Inc. and Government Trading Corporation et al., Decision No. DEC 93-764-1, para. 3 (3 Oct. 1990), reprinted in 25 Iran-U.S. C.T.R. 186, 187; Dames & Moore

and Islamic Republic of Iran et al., Decision No. DEC 36-54-3, pp. 18-21 (23 Apr. 1985), reprinted in 5 Iran-U.S. C.T.R. 107, 117-18; Mark Dallal and Islamic Republic of Iran et al., Decision No. DEC 30-149-1, p. 2 (12 Jan. 1984), reprinted in 5 Iran-U.S. C.T.R. 74, 75; Henry Morris and Government of the Islamic Republic of Iran et al., Decision No. DEC 26-200-1, p. 2 (16 Sept. 1983), reprinted in 3 Iran-U.S. C.T.R. 364, 365.

20. Of the Decisions cited above, the Decision most on point is Dames & Moore. There, the Tribunal rejected the Respondent's request to reopen a case allegedly based on forged documents and perjured affidavits. The Tribunal concluded that even a generous reading of the Respondent's allegations of fraud did "not raise justified concern that the processes of the Tribunal [had] been subverted." The Tribunal thus did not need to decide whether it possessed inherent authority to reopen a case procured by fraud:

In the absence of an express grant of authority to the Tribunal to reopen and reconsider cases on the merits after issuance of an award, the question has been posed as to whether an "inherent power" to do so may exist "under exceptional circumstances", at least where an award "was based on forged documents or perjury." [citing Henry Morris and Mark Dallal, supra]. The implied or inherent power of an international claims tribunal in this area is an issue which has been subjected to learned analysis and limited judicial scrutiny, with wholly inconsistent results. [citations]. The instant request for reopening and reconsideration, however, falls well short of justifying any such effort to ascertain the precise balance struck between finality of Tribunal dispositions, on the one hand, and the integrity of its processes on the other.

21. As in Dames and Moore, the Tribunal has first to examine the request to determine whether there exists a prima facie case to justify reinstatement and if such a case exists, whether the Tribunal possesses inherent power to do so under the circumstances. The requirement that the Applicants be able to show that the reopening of proceedings is prima facie justified can be based on the provisions of Article 34, paragraph 2 of the Tribunal Rules and, in the circumstances of this Case, on the fact that the Tribunal specifically based its termination order

on these provisions. Article 34, paragraph 2 of the Tribunal Rules provides as follows:

2. If, before the award is made, the continuation of the arbitral proceedings becomes unnecessary or impossible for any reason not mentioned in paragraph 1, the arbitral tribunal shall inform the parties of its intention to issue an order for the termination of the proceedings. The arbitral tribunal shall have the power to issue such an order unless a party raises justifiable grounds for objection.

22. As noted above, the Tribunal in its Order of 29 March 1985 informed the Parties that it intended to terminate the Case unless the Parties, by a time limit established in the Order, raised justifiable grounds for objection in accordance with Article 34, paragraph 2 of the Tribunal Rules. No such objection was filed by the Applicants. In these circumstances the crucial requirement for the Applicants is to show, prima facie, that the fact that they did not object to the termination of proceedings cannot be justifiably equated with a consent to such termination because the circumstances of termination were such that the termination order cannot be meaningfully regarded as being based on consent.

23. This is in substance what the Applicants are now arguing: they in fact did not agree to the termination of proceedings because Mr. Cherifat was coerced to sign the withdrawal request. Although the Applicants also argue that the Tribunal erred in not applying the rules of Kansas law governing the representation of minors, this argument cannot be considered independently of the allegation of coercion. The fact remains that the Applicants did not raise the error of law argument in 1985 when the Tribunal informed the Parties of its intention to terminate the proceedings in the Case, and they can justifiably raise this argument now only if the reason for the failure to object in 1985 was the fact that Mr. Cherifat was under duress and the Applicants refrained from objecting for this reason. But based on its finding infra, the Tribunal determines that the Applicants have failed to show that this was the case.

24. The evidence submitted by the Applicants falls short of establishing a prima facie case. While the Applicants have submitted some evidence, primarily hearsay affidavits from persons living in the United States, they have failed to present any contemporaneous evidence from 1985 -- such as letters, telephone logs or records maintained by their attorneys -- to corroborate their allegations. The Tribunal notes in particular that on 9 July 1985, that is, after the issuance of the Order indicating the Tribunal's intention to terminate the proceedings unless the Applicants raised justifiable grounds for objection, it received a letter from Hossein Cherafat's American attorney submitting copies of Decree of Divorce and Separation Agreement and stating that Mrs. Cherafat's rights had been set aside to Mr. Hossein Cherafat, and that Mrs. Cherafat "has absolutely no further rights therein." No evidence has been presented by the Applicants which would indicate that the circumstances which prompted Mr. Cherafat's attorney to send this letter were suspect.

25. In addition, the Applicants have failed to indicate why, prior to the withdrawal request in January 1985, neither Gloria Cherafat nor Hossein Cherafat had informed the Tribunal of the assignment of claims to Hossein two years earlier. This omission, when combined with other documents in the record submitted by the Government of Iran, lends credence to Iran's suggestions that Mr. Cherafat voluntarily sought to use his control over the claims in the Case to regain his properties through negotiations in Iran and that Mr. Cherafat's request that the Case be withdrawn in 1985 was part of that effort, as was the children's failure to object to the termination notice. In support of this interpretation of events, the Government of Iran submits a letter signed by Hossein Cherafat on 19 December 1985 -- some five months after the withdrawal of the Case -- in which Mr. Cherafat makes reference to his voluntary withdrawal of the Case before the Tribunal as part of an agreement with the Mostazafan Foundation to regain control of his children's expropriated property. The Applicants maintain that this letter was one of the documents that Iranian authorities forced

Mr. Cherafat to sign. But in light of the total absence of concrete corroborating evidence of coercion, the Government of Iran's contrary representations (including the 19 December 1985 letter), and the Applicants unexplained omissions recounted above, the Tribunal cannot credit the Applicants' allegations of fraud.

26. Finally, the Applicants argue that Hossein Cherafat was not a representative of the Cherafat children within the meaning of Article 4 of the Tribunal Rules. Even assuming for purposes of argument that such an error would constitute a ground for reinstatement of the children's claims, the Applicants' argument lacks merit. First, the separation agreement between Gloria Cherafat and Hossein Cherafat appears to have assigned both Gloria's and the children's claims to Hossein. Second, the fact remains that the Tribunal's Order of 29 March 1985, in which the Tribunal informed the Parties of its intention to terminate the proceedings, provided the Applicants with an opportunity to object to such termination. However, although the Applicants had an opportunity to make an argument based on Article 4 of the Tribunal Rules, they failed to do so. Absent an argument that they lacked notice of the impending termination, and absent proof of the duress or fraud allegations which they maintain explain why they did not respond, this argument too must be rejected as a basis for reinstatement.

27. Because the Tribunal rejects the Applicants' request for reinstatement of Case No. 277 for the reasons stated above, it need not address the other bases for rejection proffered by the Respondent.

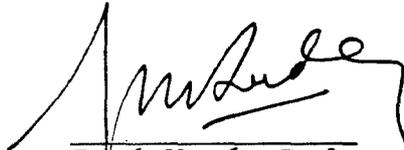
V. DECISION

28. For the foregoing reasons,

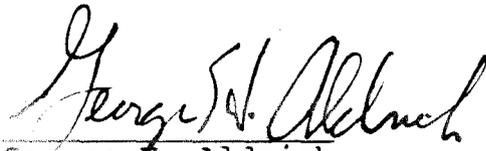
THE TRIBUNAL DECIDES AS FOLLOWS:

The request of Hossein Cherafat, Roxanne June Cherafat and Ramin Cherafat for reinstatement of Case No. 277 is hereby denied.

Dated, The Hague
25 June 1992



José María Ruda
Chairman
Chamber Two



George H. Aldrich

In the Name of God



Koorosh H. Ameli
Concurring Opinion