IRAN-UNITED STATES CLAIMS TRIBUNAL

دیوان داوری دعاوی ایران - ایالات متحده

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** DECISION - Date of Decision _____

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** CONCURRING OPINION of _____

- Date _____

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** SEPARATE OPINION of _____

- Date _____

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** DISSENTING OPINION of _____

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IRAN-UNITED STATES CLAIMS TRIBUNAL

دیوان داوری دعاوی ایران - ایالات متحده

IN HIS EXALTED NAME

CASE NO. 296
CHAMBER TWO
AWARD NO. 564-296-2

PARVIZ SADIGH BAVANATI,

Claimant,

and

THE GOVERNMENT OF THE ISLAMIC REPUBLIC OF IRAN,

Respondent.

CORRECTION TO THE ENGLISH VERSION OF THE CONCURRING OPINION OF KOOROSH H. AMELI

A. The following corrections are hereby made to the English version of my Concurring Opinion, filed on 24 November 1995.

1. Page 1, paragraph 1, line 11, replace the word "on" with the word "concerning"; and at line 13, delete the word "based".

2. Page 6, paragraph 10, line 4, after the word "naturalization", add the word "as"; and at paragraph 11, line 2, replace the word "justicies" with the word "justices".

3. Page 7, paragraph 11, line 8, replace the word "the" with the word "his"; and at paragraph 12, line 19, precede the word "[w]hile" with an opening quotation mark.

4. Page 8, paragraph 13, line 13, replace the word "National" with the word "Nationals"; and at line 14, delete the word "so".

5. Page 10, paragraph 16, line 21, add the word "the" before the word "two".

6. Page 12, paragraph 18, line 9, move the words "facts clearly" to the next line, and at line 14, add a full stop after the brackets.

7. Page 13, paragraph 19, line 11, replace the word "affectivity" with the word "effectivity".

8. Page 15, paragraph 23, line 19, replace the word "conducive" with the word "conclusive".

9. Page 18, footnote 11, line 8, add the word "a" after the word "starting"; and at footnote 12, line 4 from the bottom, replace the quotation mark with a colon.

B. A copy of the corrected pages is attached.

Dated, The Hague
29 November 1995,

Koorosh H. Ameli

Koorosh H. Ameli

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CONCURRING OPINION OF KOOROSH H. AMELI

1. Although for many reasons in addition to those of my former colleagues in A18,[1] in my opinion the Tribunal has no jurisdiction over dual Iran-United States nationals, I concur in the Award in the present Case so far as it concerns dismissal of the Claim for lack of dominant and effective United States nationality of the Claimant, because the Award conforms to the practice of the Tribunal. In part One, I set forth my reasons for lack of effectiveness of the U.S. nationality of the Claimant and in part Two, I discuss the earlier decision of the Foreign Claims Settlement Commission of the United States that in contrast to the Award in this Case erroneously concluded concerning the same facts that the Claimant's U.S. nationality was dominant and effective.

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[1] See, Dissenting Opinion of the Iranian Arbitrators in The Islamic Republic of Iran and The United States of America, Decision No. 32-A18-FT (6 April 1984), reprinted in 5 Iran-U.S. C.T.R. 275.

which of the two is dominant and effective. Although agreeing that the Award's reasoning conforms to the practice of the Tribunal under A18, I would have joined rather than concurred in the Award, if it had adopted my opinion.

10. The fact that the United States has not actually revoked the Claimant's naturalization in the present Case should not be dispositive of the issue of the effectiveness of his U.S. naturalization as against Iran before this Tribunal, as was held in the cases discussed infra.

11. Further, as stated by the joint separate opinion of three justices of the United States Supreme Court in a case concerning Section 352(a)(1) of the Immigration and Nationality Act of the United States, not at issue in the present Case, "[t]he protection of American citizens abroad has always been a most sensitive matter and continues to be so today. This is especially true in Belgium, Greece, France, Iran, Israel, Switzerland and Turkey, because of their refusal to recognize the expatriation of their nationals who acquire American citizenship. The dissension that springs up in some of these areas adds immeasurably to the difficulty. Nor is the United States alone in making residence abroad cause for expatriation. Although the number of years of foreign residence varies from 2 to 10 years, 29 countries, including the United Kingdom and 7 commonwealth countries, expatriate naturalized citizens residing abroad. Only four -- Czechoslovakia, Poland, Afghanistan, and Yugoslavia -- apply expatriation to both native-born and naturalized citizens. Even the United Nations sanctions different treatment for naturalized and native born citizens; Article 7 of the [1961] United Nations Convention on the Reduction of Statelessness[5] provides that naturalized citizens who reside abroad for seven years may be expatriated unless they declare their intent to

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[5] 989 U.N.T.S. 175.

retain citizenship."[6] These considerations particularly assume importance with regard to a nationality law that despite its ease of conferment of nationality to nationals of other countries provides for numerous instances of loss of nationality so obtained, as a balancing factor. Such considerations are relevant in the present Case, due to the Claimant's departure from the United States almost immediately after his naturalization, to his taking up of residence in Germany for more than twenty years, and to the presence of provisions in the U.S. nationality law, conforming to the Claimant's situation, that would have denaturalized him, had the United States authorities acted accordingly.

12. In my opinion, the Award should have dismissed the Claim, because in the circumstances of the present Case Iran is under no obligation to recognize U.S. naturalization of the Claimant not only under Iranian law, referred to in para. 4 supra, but also under international and United States law. The Award should not have found the Claimant a United States national, hence a dual Iran-U.S. national, and proceeded to determine whether his U.S. nationality was dominant and effective as compared with his Iranian nationality under the erroneous A18 Decision of the Full Tribunal. The Claims Settlement Declaration, Article VII, paragraph 1, requires the Tribunal to determine whether a United States national has been a citizen of that country for the purposes of the Declaration. The Award also recognizes that under A18, "the Tribunal must first determine [] whether the Claimant was [] a national of the United States or Iran, or of both countries, and, if a national of both countries, his dominant and effective nationality during that [relevant] period." Award, para. 12. As found by the Tribunal in Paul Donin de Rosiere, "[w]hile the dispositif in that [A18] case relates only to persons having both United States and Iranian nationality, it appears that the reasoning of Case A-18 may apply

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[6] Separate Opinion of Justice Clark in which Justice Harlan and Justice White joined, Schneider v. Rusk, 377 U.S. 163, at 174, 12L.Ed.2d218, 84S.Ct.1187 (1964).

equally to persons having United States nationality and that of any other State." Order of 17 February 1986, Case No. 498.

13. The rule of dominant and effective nationality as applied by the International Court in Nottebohm and recognized in general international law is limited to determination of nationality of the State invoked in bringing the claim and the nationality of or attachments to any third State other than the respondent State, since under a more predominant rule of international law, nationality of the respondent State is a bar to the claim of dual nationals, as confirmed by the International Court in the Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion (11 April 1949), [1949] I.C.J. 174, 186. This non-responsibility rule has also been recognized by the Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States[7] of 1965 that has been widely ratified by industrially developed and developing countries, entered into force within a month of its signature and ratified by 115 States as of October 1994.[8] Various contrary proposals for retention of jurisdiction of the Convention's arbitration and conciliation center, ICSID, over physical persons who also had the nationality of the respondent state were in all circumstances rejected by the regional Consultative Meetings and the Legal Committee in the preparatory work of the Convention because of the recognition of the non-responsibility rule in international settlement of disputes to which a state is a party and thus wisely avoided the opening of

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[7] 575 U.N.T.S. 159. Article 25(2) of the Convention concerning jurisdiction of its center over claims of nationals provides:

"(2) 'Nationals of another Contracting State' means:

(a) any natural person who had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration as well as on the date on which the request was registered pursuant to paragraph (3) of the Article 36, but does not include any person who on either date had the nationality of the Contracting State party to the dispute".

[8] NEWS FROM ICSID, vol. 12, No. 1, p.6 (Winter 1995).

> international law." OPPENHEIM'S INTERNATIONAL LAW, 9th ed. by Sir Robert Jennings and Sir Arthur Watts, vol. 1, p. 853 (Longman Group, Essex 1992).

16. Even Nottebohm, decided by the International Court of Justice and strongly relied upon by the erroneous Decision in A18, identifies the issue as follows:

> "In order to decide upon the admissibility of the Application, the Court must ascertain whether the nationality conferred on Nottebohm by Liechtenstein by means of a naturalization which took place in the circumstances which have been described, can be validly invoked as against Guatemala". Nottebohm Case (Liechtenstein v. Guatemala) (Second Phase, Judgment of 6 April 1955), [1955] I.C.J. 1, 16-17.

The Court added that

> "In this connection, counsel for Liechtenstein said: 'the essential question is whether Mr. Nottebohm, having acquired the nationality of Liechtenstein, that acquisition of nationality is one which must be recognized by other States'. This formulation is accurate, subject to the two fold reservation that, in the first place, what is involved is not recognition for all purposes but merely for the purpose of the admissibility of the Application, and secondly, that what is involved is not recognition by all States but only by Guatemala." Id., at 17.

The Court also stated that:

> "International practice provides many examples of acts performed by States in the exercise of their domestic jurisdiction which do not necessarily or automatically have international effect, which are not necessarily and automatically binding on other States or which are binding on them only subject to certain conditions: This is the case, for instance, of a judgment given by the competent court of a State which it is sought to invoke in another State." Id., at 21.

the Liechtenstein nationality of Nottebohm.

18. The Court found that after naturalization of Nottebohm in Liechtenstein,

> "No intention of settling there was [] realized in the ensuing weeks, months or years -- on the contrary, he went to Guatemala very shortly after his naturalization and showed every intention of remaining there. Id., at 25.

The Court held that the

> "facts clearly establish, on the one hand, the absence of any bond of attachment between Nottebohm and Liechtenstein and, on the other hand, the existence of a long-standing and close connection between him and Guatemala []. In both respects it was lacking in the genuineness requisite to an act of such importance, if it is to be entitled to be respected by a State in the position of Guatemala. It was granted without regard to the concept of nationality adopted in international relations." Id., at 26.

Consequently, as to the Liechtenstein nationality of Nottebohm, acquired by naturalization, the Court concluded that

> "Guatemala is under no obligation to recognize a nationality granted in such circumstances." Id., at 26.

19. The competence to proceed beyond the naturalization certificate to examine whether the individual concerned was entitled to it has been elaborated upon in the well-known Case of Flegenheimer (20 September 1958) before the Italian-United States Conciliation Commission. The decision states:

> "It is the duty of this Commission to establish Albert Flegenheimer's true nationality at the relevant dates specified in Article 78, paragraph 9 of the Treaty of Peace, and it has a right to go into all the elements of fact or law which would establish whether the claimant actually was, on the aforementioned dates, vested with the nationality

> of the United States; ... It must therefore freely examine whether an administrative decision such as that taken in favor of Albert Flegenheimer in the United States, was of such a nature as to be convincing.
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> ***
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> The right of challenge of international court authorizing it to determine whether, behind the nationality certificate or the acts of naturalization produced, the right to citizenship was regularly acquired, is in conformity with the very broad rule of effectivity which dominates the Law of Nations entirely and allows the court to fulfill its legal function and remove the inconveniences specified." Para. 25, 14 R.I.A.A. 327, 338.

20. Albert Flegenheimer was a U.S. national at birth, who was naturalized as a German citizen at the age of 4 as indicated in his father's German naturalization certificate of 1894. At least since 24 February 1942 he was again recognized and treated by the United States as its national. Under Article 78, paragraph 9 of the Treaty of Peace, a claimant to be eligible must have been a United Nations national on 3 September 1943, the date of the Armistice and 15 September 1947, the date of the coming into force of the Treaty. Italy, the respondent State considered Flegenheimer a German and not a United States national and therefore not a United Nations national. The Commission however found:

> "that according to a well established international jurisprudence, where international law and the international bodies who must apply that law are concerned 'national laws are simple facts, an indication of the will and the activity of States, just like judicial decisions or administrative measures'. Case concerning certain German Interests in Upper Silesia, (Decision of 25 May 1926) P.C.I.J. Series A, No. 7, p. 19.
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> The result is that in an international dispute, official declarations, testimonials or certificates do not have the same effect as in municipal law. They are statements made by one of the Parties to the dispute

R.I.A.A. 1163, 1184 and 1185.

23. In the Medina Case (31 December 1862), the United States-Costa Rica Claims Commission dealt with the U.S. naturalization of Crisanto Medina and his sons, which was disputed by Costa Rica as not being in conformity with United States law. The Medinas, previously subjects of Argentina, had not resided in the United States before or after the grant of the naturalization decree for the period that was required by U.S. law. They had maintained their place of residence in Costa Rica, only staying in the United States for short intervals in one of which the application had been filed with the U.S. court and in another the naturalization decree had been obtained. The claimants argued that their U.S. naturalization decree, granted by the competent U.S. court, had final and conclusive effect on Costa Rica until it was revoked by a competent U.S. court and that naturalization of subjects of another State involved a political question, a matter of sovereign right, to be dealt with diplomatically. Costa Rica argued that although as a general proposition of U.S. municipal law, one may agree that naturalization decrees are final and conclusive, they are not conclusive on all the world in all cases, especially because the Commission before which the Case was pending was "a tribunal deriving its jurisdiction not alone from the United States, but in equal degree from another sovereign power-- the Republic of Costa Rica. The Convention, which is its charter, obliges it to inquire into, and determine amongst other things, the citizenship of the claimants." See, infra.

24. The umpire, Bertinatti, in dismissing the claim for lack of standing based on the U.S. nationality held:

> An act of naturalization, be it made by a judge ex parte in the exercise of his voluntaria jurisdictio, or be it the result of a decree of a king bearing an administrative character; in either case its value, on the point of evidence, before an international commission, can only be that

for educational purposes is not persuasive, as he remained in Germany on the basis of a German residence permit, rather than a student stay permit, and continued his residence there even after completion of his studies, marrying a German national in the meantime. Award, paras. 4 and 16. Moreover, such a person, having no place of residence in the United States, Iran or any country but Germany since 1974, should be readily considered as having his permanent residence or domicile in Germany.

29. Section 340(d) also requires that the diplomatic and consular officers of the United States in foreign countries shall through the Department of State furnish the Department of Justice with statements of the names of the naturalized persons who take up permanent residence in their respective jurisdictions. Section 340(a) of the Act[12] further provides that it shall be

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presumption here could not be regarded as yielding to anything short of substantial and convincing explanation); United States v. Banafshe, 616 F. 2d 1143 (9th Cir. 1980), (naturalized citizen does not present sufficient countervailing evidence to overcome such presumption where his explanation, that he returned to Iran because of his father's illness, is insufficient to explain his continued residence there and his engaging in activities there, such as starting a family, which are entirely consistent with the intent to remain there permanently).

[12] Section 340(a), 8 U.S.C. §1451(a) provides:
"(a) Concealment of material evidence; refusal to testify. It shall be the duty of the United States attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court specified in subsection (a) of section 310 of this title [8 USC 1421(a)] in the judicial district in which the naturalized citizen may reside at the time of bringing suit, for the purpose of revoking and setting aside the order admitting such person to citizenship and canceling the certificate of naturalization on the ground that such order and certificate of naturalization were illegally procured or were procured by concealment of a material fact or by willful misrepresentation, and such revocation and setting aside of the order admitting such person to citizenship and such canceling of certificate of naturalization shall be effective as of the original date of the order and certificate, respectively: Provided, That refusal on the part of a naturalized citizen within a period of ten years following his naturalization to testify as a witness in any