

ORIGINAL DOCUMENTS IN SAFE

Case No. 193

Date of filing: 11 Aug '92

** AWARD - Type of Award _____
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** DECISION - Date of Decision _____
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** CONCURRING^{and Dissenting} OPINION of A. Olsson
 - Date 11 Aug '92
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** SEPARATE OPINION of _____
 - Date _____
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CASE NO. 193

CHAMBER THREE

AWARD NO. 534-193-3

REZA SAID MALEK,
Claimant,

and

THE GOVERNMENT OF THE
ISLAMIC REPUBLIC OF IRAN,
Respondent.

IRAN-UNITED STATES CLAIMS TRIBUNAL	دیوان دآوری دعاوی ایران - ایالات متحدہ
FILED	ثبت شد
DATE	11 AUG 1992
	تاریخ ۱۳۷۱/۵/۲۰

CONCURRING AND DISSENTING OPINION
OF RICHARD C. ALLISON

1. I agree that, for the reasons set forth in the Award, the claims based upon the alleged expropriation of real estate located in Anjirak and Arak, as well as the claims based upon the alleged expropriation of Claimant's shares in Bank Mellat and Bank of Industry and Mines, must be dismissed. I also agree, for the reasons set forth below, that the claim for the alleged expropriation of Claimant's unimproved real property (described and defined below as the "wooded land") must likewise be dismissed. My disagreement with the Award relates to the dismissal of the claim for an interest in the parental home described below. In my view Claimant is entitled to be compensated for the taking of that interest.

2. Claimant Reza Said Malek maintains that in 1980 the Government of Iran took certain real estate located within the former Malek family compound in the Shemiran section of Tehran consisting of:

- (1) Land and improvements thereon that had been the home of Claimant's parents (the "parental home") in which he had inherited a 2/7ths interest.
- (2) An unimproved parcel of 3930.5 m² that was deeded to Claimant by his father in 1967 (the "wooded land").

Claimant's interest in both of these properties at the time of their alleged expropriation has been established by the proofs that he has submitted, and, indeed, his continuing title to the wooded land is expressly confirmed by Respondent. In respect of these two interests in real estate the majority has found that Claimant has failed to make an adequate showing that a taking attributable to the Government of Iran occurred within the jurisdictional period delimited by the date of Claimant's naturalization as a United States citizen and the date of the Algiers Accords (i.e., from November 5, 1980 to January 19, 1981).

3. With regard to the wooded land, the evidence indicates that, during the said jurisdictional period, agents of Respondent trespassed upon this property by causing vehicles to be parked upon it from time to time. This evidence, however, falls short of establishing a de facto taking of Claimant's wooded land. Moreover, the Government of Iran has stated repeatedly in its pleadings filed in this Case (most recently in its Hearing Memorial filed on 24 January 1991) and at the Hearing that "Claimant's ownership of the plot of wooded land with an area of 3,930.5 sq. meters remains intact and valid." Statements such as this would not override clear evidence of actions attributable to the Government that amounted to a taking. It seems to me, however, that Respondent's unequivocal affirmation of Claimant's ownership of the wooded land should be accepted, and it is for that reason that I concur in the dismissal of the claim in respect of the wooded land.

4. My view of the conclusions to be drawn from the record concerning the parental home, however, differs from that of my colleagues. I believe that Claimant has established by a

preponderance of the evidence that the parental home and consequently his 2/7ths interest therein was taken by the Government of Iran in December 1980.

5. Respondent initially took the position that Claimant had failed to establish his title to 2/7ths of the parental home. This argument was not based upon any review by Respondent of the relevant probate and real estate registries but rather upon Claimant's failure to present documentation relating to the probate of the estate of Dr. Said Malek, Claimant's father, which had occurred in 1972. Respondent stated that: "Claimant and his Counsel must clarify on the basis of the certificate of which judicial authority is the Claim of Reza Malek to own 2/7 of the alleged house (assuming he has three sisters and one brother) is based." In the Hearing Memorial filed by Claimant on 3 December 1990, and under the Tribunal's Award accepted into evidence, Claimant provided certain documentation concerning the administration of his father's estate alleging that it had only recently been found in the files of his sister. He further stated that the originals of the documents had been lost when the house of Issa Malek, who was the executor of the father's estate, was seized by Iranian agents in October 1980. The documents filed by Claimant included a copy of a "Certificate of Probate" dated 51/7/5 (equivalent, in the western calendar, to 27 September 1972) in which a Judge of the District Court of Tehran certified that:

The principal [Issa Malek, as executor of Dr. Said Malek] and Reza Said Malek, holder of identification No. 78, were the sons and Ms. Parvin Malek, holder of identification No. 38 and Ms. Saideh Mehri Malek, holder of identification No. 22 and Ms. Hamideh Homa Malek, holder of identification No. 352, were the daughters and Madam Roghieh Rais, holder of identification No. 16298 was the permanent legal wife of the deceased [Dr. Said Malek], and all the said persons were the heirs of the deceased at the time of his death. Having completed the necessary requirements and published the said facts three times and due to expiration of the time limit required by law, and in the absence of any contest during that period, and subsequent to the examination of the inheritance tax clearance No. 6387 dated 51/6/24 (day and month somewhat unclear) from district 9 of Shemiran, finally Chamber 1 of the district court of Tehran, on 1351/6/29

(September 28, 1972), during an extraordinary session, under the supervision of the undersigned, subsequent to reviewing contents of the file, hereby attest to the fact that the said persons are the only heirs of the deceased and that there is no other heir and from the estate of the deceased, after the deductions of fees and dues from the estate, one eighth of moveable property and the value of buildings and trees will go to the wife and the rest to the children, on the basis of son receiving twice as much as daughter.

6. In response to this filing, Respondent shifted ground, stating that: "Under the laws of Iran the mere presentation of a decree of heirship and certificate of payment of inheritance tax is not sufficient to establish the ownership of a property which has been registered in the register of properties." It went on to assert that Claimant should have submitted further evidence in the form of a recording of his 2/7ths interest under the Registration of Deeds and Properties Act. However, in an affidavit submitted in 1990, Issa Malek had stated that, after the completion of the probate procedures, and the payment to their mother of her 1/8th interest in their father's estate, the children intended that their mother go on living in the parental home during her lifetime and for that reason had not recorded the title in the names of the heirs. Respondent did not challenge the authenticity of the probate certificate submitted by Claimant, and it seems clear that Claimant has established his ownership of the 2/7ths interest in the parental home. Any difficulties that he experienced in an earlier stage in the Case in obtaining original documentation can readily be understood, and it is not unreasonable to assume that, had it so desired, Respondent could have itself confirmed the probate proceedings by reference to documents in official files available to it.

7. Claimant was not in Iran when the parental home allegedly was appropriated by officials of the Government in late 1980. In presenting his Claim, therefore, he has necessarily relied in large part on the accounts of persons claiming to have witnessed certain concrete events or their aftermath. Several of these persons have provided affidavits and one of them, Mr. Hossein Vossough, a cousin of Claimant, testified at the Hearing. Mr. Vossough's testimony and two affidavits submitted by Claimant's

mother are pivotal, and the weight to be given to them is subject to sustained attack by Respondent. As discussed below, however, Respondent's attack upon the credibility of these witnesses is based exclusively upon assertions of presumed bias in favor of Claimant. Respondent has refrained from providing affirmative proof concerning the substance of their testimony -- even where such proof clearly should have been available to it.

8. There is, however, considerable agreement between the Parties as to various events that took place within the Malek family compound in 1980-81. It is common ground that agents of the Iranian Government entered the home of Claimant's brother, Issa Malek, in the compound on or about 6 October 1980 and removed documents and personal property. It is also common ground that sometime after 6 October 1980 an official Iranian Government tribunal was established in the former Issa Malek house with facilities for the detention of accused persons and the conduct of criminal proceedings. Respondent maintains that this tribunal was "set up" in February 1981. Although it provided no documentary evidence to support the February 1981 date, Respondent, in an effort to substantiate that timing, offered the testimony of Mr. Hassan Babaie Saleh, a prisons official assigned in February 1981 to work in the former Issa Malek house. At the Hearing Mr. Babaie Saleh disclaimed any knowledge of the Malek compound prior to February 1981.

9. The timing of the taking of the Issa Malek house and its conversion into a governmental facility is of significance because of the bearing that it has on the chronology of other events affecting the real estate in the Malek compound. Although Respondent argues that, "if" the Issa Malek house was appropriated by the Government of Iran, this action "occurred on 6 October 1980," it also argues that the tribunal/detention center did not go into operation in the former Issa Malek house until February 1981. Given that a luxurious private home would require some modifications to make it serve as a courtroom and prison, these assertions are not necessarily at odds with one another. What does the evidence tell us, however, about the status of the

parental home during the period of modification of the former Issa Malek house?

10. Claimant's evidence provides a logical answer to this question. The taking of the parental home is placed by Claimant in December 1980. Respondent does not dispute that Mrs. Roghieh Malek, Claimant's mother, was living in the parental home at the time of the authorities' original entry into the adjacent Issa Malek house in October 1980 and that she continued to reside there for a period thereafter. According to affidavits submitted by Mrs. Malek and summarized below, the parental home, in which she had lived for some 50 years, was taken over by Revolutionary Guards in December 1980 to be used for offices associated with the tribunal/detention center. At that time she was evicted from the home. Respondent has not addressed these assertions directly, and it has offered no evidence contradicting Mrs. Malek.

11. Since Claimant does not assert that the appropriation of the parental home was the subject of an official decree of the Iranian Government, the Tribunal's view as to whether he has substantiated the fact and timing of the home's taking¹ depends upon the evidence, including affidavits and Hearing testimony, that has been presented. Although the facts adduced by Claimant have not been controverted by evidence offered by Respondent, the credibility of Claimant's witnesses is attacked by Respondent by

¹ Tribunal awards recognize that compensable taking does not require a formal decree or formal transfer of title to the government. The test is whether there has occurred an unreasonable interference with property or with the owner's enjoyment of its benefits. Harza Engineering Company and The Islamic Republic of Iran, Award No. 19-98-2 (30 Dec. 1982), reprinted in 1 Iran-U.S. C.T.R. 499, 504. See Dames & Moore and Islamic Republic of Iran, et al., Award No. 97-54-3 (20 Dec. 1983), reprinted in 4 Iran-U.S. C.T.R. 212. Moreover, interference which at first is inconsequential may ripen incrementally into a taking. In such a case the deprivation is deemed to take place when it is manifest that the interference is not merely ephemeral. See International Technical Products Corporation and Islamic Republic of Iran, et al., Award No. 196-302-3 (28 Oct. 1985), reprinted in 9 Iran-U.S. C.T.R. 206, 240-41; Tippetts, Abbett, McCarthy, Stratton and TAMS-AFFA Consulting Engineers, et al., Award No. 141-7-2 (29 June 1984), reprinted in 6 Iran-U.S. C.T.R. 219, 225-26.

reason of their being persons who are related to Claimant by ties of blood or friendship. Indeed, this indirect line of attack is the sole form of rebuttal by Respondent of Claimant's prima facie case in respect of the parental home.

12. The evidence concerning the taking of the parental home can be summarized as follows. Mrs. Roghieh Malek submitted two affidavits, the first executed in 1984 and the second in 1990. In both of them she recounted the seizure of the parental home and her eviction from it by Revolutionary Guards in December 1980, a date which she fixed as being "two or three weeks after Ashura," a solemn Islamic holy day that in 1980 occurred on 18 November in terms of the western calendar. According to Mrs. Malek, the seizure took place some two months after the official entry in October 1980 into the home of her son Issa, which was on a plot of land contiguous to the parental home. Both of the means of reckoning employed by Mrs. Malek place her eviction from her home during the first part of December.

13. In corroboration of the affidavits of Mrs. Malek, who at age 90 did not travel from the United States to testify at the Hearing, Claimant offered the affidavit and Hearing testimony of his cousin, Mr. Hossein Vossough, who had left Iran in 1987. According to Mr. Vossough, his mother (who was the sister of Mrs. Malek) lived with Mrs. Malek in the parental home until her death shortly before Mrs. Malek was evicted by the Revolutionary Guards in December 1980. Mr. Vossough testified that he had personal knowledge of the events as he described them. For him, the lodestar event was the death of his mother, which he said occurred on 17 November 1980 when she was crushed by a truck in the road bordering the Malek family compound. Mr. Vossough's Hearing testimony linked his recollection of subsequent events to his mother's death and the attendant periods of mourning. Mr. Vossough stated that his mother was living with her sister in the parental home on the date of her death, and that Mrs. Malek continued to reside in the parental home on 25 November 1980, some days after Ashura (18 November). He testified that he was able to confirm that Mrs. Malek was occupying the parental home on 25 November 1980 because the traditional observances that are

held on the eighth day of mourning under the Islamic faith were held there on that day. He further testified that by the fortieth day of mourning, also an important date under the Islamic tradition, which in this case would have been 27 December 1980, Mrs. Malek had been evicted from the parental home and had moved to the house of her daughter, Saideh, in the compound, and that the ceremonies related to the fortieth day were observed there. This testimony, connected as it was with the date of a serious traffic accident and to that extent subject to verification, was given in a forthright manner, and there is nothing in the record to cast doubt upon it.

14. Claimant also offers the affidavit of Mr. Khalil Boini with respect to the circumstances existing in the Malek family compound in late 1980. According to Mr. Boini, he had been a patient of Dr. Said Malek, Claimant's father, for many years. He recalls conversations with the Maleks on behalf of a potential buyer who had expressed an interest in purchasing property in the compound. Mr. Boini also refers in his affidavit to the story that appeared in a Tehran newspaper on 6 October 1980 concerning the official incursion into the Issa Malek house. He avers that he "witnessed in the first week of December 1980 the seizure of Dr. Reza Malek's parental home . . ." and that he "observed that this house later in the month of December was turned into offices for the detention center."

15. Respondent has contended that neither the affidavit of a claimant's mother nor an affidavit of a cousin of a claimant should be given any consideration by the Tribunal. However, while family relationships and ties of friendship are factors to be considered in weighing the probative value of testimony, it goes entirely too far to suggest that no weight can be given to the testimony of relations and friends. The present Case is a dramatic illustration of where such a rigid approach would lead. Here, the claim relates to properties within a family compound. The parental home which was located at the central point of the compound is one of the subjects of the claim. It is difficult to imagine anyone better qualified to testify from personal experience of the events than Mrs. Roghieh Malek, who lived in

the compound throughout the period in question. To suggest that her evidence must be disregarded borders on the absurd. The same can be said of Mr. Vossough, whose mother lived in the parental home and who personally observed the changes in the compound during the crucial period. If a degree of skepticism is in order concerning the attitudes of close relatives and friends, such skepticism would ordinarily come into play where testimony offered by the other party directly contradicts the testimony of the "interested" witness.² In this Case Respondent has provided no testimony that clashes with the testimony of Mrs. Malek, Mr. Vossough and Mr. Boini.

16. The assiduous refusal of Respondent and its affiants to address the issue of the parental home is especially striking with reference to the affidavit of Mr. Abbas Aalor, who resided in the Malek compound throughout the relevant period, initially as a caretaker employed by the Malek family and later as a

² A classic example of this well accepted principle appears in William A. Parker (U.S.A.) v. Mexico (31 March 1926), decided by the U.S.-Mexico Claims Commission, where the respondent government questioned the value of certain affidavits proffered by claimant on the issue of jurisdiction. The Commission addressed the point as follows:

"The nationality of the claim is challenged on account of insufficiency of the proof offered in support of the American nationality of the claimant (a) because it is only supported by the affidavits of three witnesses one of whom is the claimant, the second a brother of claimant and the third a friend of long standing who could not have positive information with respect to the fact of his birth . . .

Under these provisions of the Treaty and the rules of this Commission, the affidavits of the claimant himself, his brother and his friend, are clearly admissible in evidence in this case. Their evidential value -- the weight to be given them -- is for the Commission to determine IV Rep. Int'l Arb. A. 4, 37.

The Commission held that it had jurisdiction based on these affidavits and the failure of the Mexican government to offer any rebuttal evidence. Id. at 38. See also: Kenneth P. Yeager and Islamic Republic of Iran, Award No. 324-10199-1, para. 41 (2 Nov. 1987), reprinted in 17 Iran-U.S. C.T.R. 92, 103 (claimant's own affidavit could be relied upon where credible in light of the other circumstances).

cook/janitor employed by the Government at the tribunal/detention center established in the compound. Mr. Aalor states in his affidavit, offered in evidence by Respondent, that "precisely on 27th or 28th February 1981, the Officials [of the Public Prosecutor's office] came and stationed themselves in the residence of Mr. Issa Said Malek." In a reference to Claimant's wooded land, Mr. Aalor states that "it remains intact . . . without anyone taking possession of it." Although he also refers specifically to the plots within the compound owned by Claimant's sister and by his brother-in-law, there is no reference whatever in Mr. Aalor's affidavit to the parental home or to the eviction of Mrs. Malek, his employer for over six years. This omission in reference to a principal element of this Claim that was squarely within the scope of the witness's knowledge is, at the least, perplexing. Although Respondent stated that Mr. Aalor was available to testify at the Hearing, Respondent elected not to present him to testify.³

17. Claimant's evidence, which is based on the personal knowledge of individuals who were in a position to have first hand information, clearly made out a prima facie case of taking of the parental home in December 1980 and placed a corresponding burden upon Respondent to come forward with proof addressing the facts presented by Claimant. This Respondent notably failed to do.⁴

³ At the Hearing, Respondent did present the testimony of Mr. Mostafa Katiraie, a witness whose first acquaintance with the Malek compound was in 1990 or 1991 when Respondent asked him to inspect the buildings in the compound and describe their then condition. This testimony was of no relevance to the issues in this Case. One cannot help but wonder why Respondent elected to put Mr. Katiraie on the witness stand but not to call Mr. Aalor.

⁴ Respondent's failure is all the more striking when one considers that what is involved here is real estate in one of the most expensive areas of Tehran and an Iranian tribunal of some importance within the country's criminal justice system that was in charge of legal proceedings that would have been meticulously recorded. This is in marked contrast to the situation of Claimant who was without access to any of the personnel and documentation of the tribunal/detention center and whose case initially had to be based upon guarded international telephone calls that took place at a time of fervent post-revolutionary activity in Iran.

18. Although Respondent maintains that the tribunal/detention center commenced operations in the former Issa Malek house on 28 February 1981, this timing is unsupported by documentary evidence. Since official institutions are not normally authorized, budgeted, constructed and placed in operation without any paperwork, it is worth reflecting upon the fact that Respondent failed to provide any documentation whatsoever concerning the facility. It seems evident that Respondent was in a position to resolve the matter conclusively by the submission of a full panoply of contemporaneous written proof. Instead, it merely rested upon the assertion that the testimony of Claimant's witnesses giving first-hand accounts was not deserving of belief. One looks in vain, however, for a straight-forward denial that the parental home was taken over by the Government during the jurisdictional period.

19. Respondent bases its version of events within the Malek family compound in 1980-81 upon the statements of two affiants, one of whom testified at the Hearing.⁵ None of Respondent's witnesses who testified at the Hearing had any knowledge of the Malek compound until after the relevant jurisdictional period, and none of Respondent's witnesses took issue with the facts testified to by Mrs. Malek, Mr. Vossough and Mr. Boini concerning the parental home.

⁵ These two were Mr. Hassan Babaie Saleh, an official of the Iranian State Prisons Organization, and Mr. Aalor, referred to above. Mr. Babaie Saleh testified at the Hearing. A third affiant and a witness at the Hearing, Mr. Mostafa Katiraie, was completely unfamiliar with any of the relevant events since his knowledge of the compound was limited to an inspection of it in 1990 or 1991. In addition, Mr. Jafer Vaez-Zadeh testified at the Hearing upon the authenticity of the 16 April 1983 notarial letter which states that Claimant's wooded land "has been in the possession of . . . Islamic Republic ever since [Nov.-Dec. 1980]" (the "Notarial letter"). The views expressed herein are not based in any way upon the Notarial letter. That document refers to the wooded land and not to the parental home. If the letter is indeed spurious, it does not appear that Claimant or his counsel was instrumental in its preparation. At the Hearing, Respondent's counsel stated that "Respondent has to stress [the Notarial letter] is a forgery. It's proven. Examine it. But Respondent has never said that he [Reza Malek] himself has forged it or used it; [Respondent] does not say the Doctor forged it."

20. The Award properly attempts to weigh the evidence on both sides and the possible motivations of those who gave it.⁶ In so doing the Award emphasizes the confusion created by Claimant's initial filing which stated that the parental home and his wooded land were taken on 28 February 1981, and it views with reserve Claimant's explanation of that initial "mistake." In my view, that explanation, particularly Claimant's Hearing testimony covering the circumstances under which he prepared his Statement of Claim and the circumlocutions employed in telephone conversations between Iran and the United States in those times, was believable. When the security of family members is thought to be at stake, meticulous efforts to document property claims from abroad are not necessarily to be expected. Indeed, the Tribunal has traditionally been mindful of the obstacles faced by a claimant as a result of the Revolution or its aftermath. See, e.g. Leonard and Mavis Daley and Islamic Republic of Iran, Award No. 360-10514-1 (20 Apr. 1988), reprinted in 18 Iran-U.S.C.T.R. 232, 242; W. Jack Buckamier and Islamic Republic of Iran, Award No. 528-941-3 at p. 33 (6 March 1992), reprinted in ___ Iran-U.S. C.T.R. ____.

21. On the other hand, the Award, which expresses so much doubt with respect to Claimant's proof, makes only a passing reference to the glaring problems with Respondent's evidence (or, more accurately, the lack thereof) concerning the sequence of events in the Malek family compound. For example, the Award ignores the following:

⁶ In so doing, however, the Award seems to overlook the beam in Respondent's eye while searching for motes in the Claimant's. For example, the Award finds fault with Mr. Vossough's testimony because, though his affidavit stated that his parents were close to Claimant's parents and his mother had lived with Mrs. Malek in the parental home, it did not state that he was Claimant's cousin. However, the precise nature of their blood relationship was not extracted from the witness by cross-examination; it was stated in Claimant's witness list and in the natural course of Vossough's direct oral testimony at the Hearing. It is difficult for me to understand what the Award sees in this point that would discredit Mr. Vossough. It does, however, suggest that the Award finds it necessary to grasp at straws in its attempt to do so.

- a. Respondent has produced no documentation or testimony concerning:
- i. the conversion, after 6 October 1980, of the Issa Malek house into a tribunal/detention center, including construction of cells for prisoners, hearing rooms, etc.;
 - ii. the various official decrees, orders, contracts, invoices, etc. that would necessarily have been involved in the establishment and operation of such a facility and its associated offices, which would have established the timing thereof;
 - iii. the eviction of Mrs. Malek from the parental home (nowhere denied by Respondent);⁷ and
 - iv. the conversion of the parental home into government offices (likewise not denied by Respondent).
- b. Instead of producing at the Hearing any witness (such as Mr. Aalor) with knowledge of the events in the compound during the critical period, Respondent called Mr. Saleh, a prisons functionary who admitted that he had no knowledge of the pre-February 1981 events in the compound and whose testimony was that he was transferred to the tribunal/detention center in the former Issa Malek house toward the end of February 1981 -- testimony that says nothing about the dates of taking of either the Issa Malek house or the parental home.
- c. The affidavit of Mr. Aalor couples selective amnesia with astonishing specific recall. Mr. Aalor, who was employed in the Malek family compound during the

⁷ Respondent, repeatedly and emphatically, states that Claimant's title to the wooded land is undisturbed and that he can take possession of it whenever he wishes. No such statement, however, is made with respect to his or his siblings' interests in the parental home.

entire period from October 1980 (and before) to the Hearing date, states flatly in his affidavit that "precisely on 27th or 28th February 1981, the Officials came and stationed themselves in the residence of [Issa Malek]." While the Award finds it difficult to believe that Claimant's witnesses could have remembered with any degree of accuracy even three years later the general timing of the taking of the parental home,⁸ it is more appropriate to wonder how and why the caretaker/cook could have remembered in 1990⁹ the 1981 dates he recites with such precision. Even more to the point, why does he avoid mention of the parental home and the eviction of Mrs. Malek?

22. In my view, the Tribunal should have sustained the claim as it related to Claimant's 2/7ths interest in the parental home. Claimant's evidence was more than sufficient to establish a governmental taking of that property during the jurisdictional period applicable to this Case. Iran's evidence to the contrary was not merely inadequate. It was non-existent.

Dated, The Hague
11 August 1992


Richard C. Allison

⁸ E.g., the Award expresses incredulity that a witness could remember "2 years and 8 months after the facts" that certain events occurred "in the first days of December 1980."

⁹ Although Mr. Aalor's affidavit is undated, its date of execution can be deduced from his statements as to his age and date of birth.