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Case No. 193

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IRAN UNITED STATES CLAIMS TRIBUNAL	دادگاه داوری دعاوی ایران - ایالات متحدہ	
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CASE NO. 193

CHAMBER THREE

AWARD NO. ITL 68-193-3

DUPLICATE
ORIGINAL
«نسخه برابر اصل»

REZA SAID MALEK,
Claimant,

and

THE GOVERNMENT OF THE
ISLAMIC REPUBLIC OF IRAN,
Respondent.

INTERLOCUTORY AWARD

I. PROCEDURAL HISTORY

1. On 6 January 1982 REZA SAID MALEK submitted a Statement of Claim against THE ISLAMIC REPUBLIC OF IRAN ("Iran") claiming U.S.\$3,576,670.00 for the alleged expropriation of his parental home and real property in Shemiran, Iran, and shares in two Iranian banks. On 30 September 1982 Iran filed a Statement of Defense in this Case.

2. In his Statement of Claim the Claimant contends that he is a United States national. The Respondent asserts in its Statement of Defense that the Claimant is a national of Iran under Iranian law by virtue of his birth in Iran of an Iranian father and therefore may not assert a claim against Iran before this Tribunal.

3. On 6 April 1984 the Full Tribunal issued a Decision in Case No. A18, Decision No. DEC 32-A18-FT, in which it determined "that it has jurisdiction over claims against Iran by dual Iran-United States nationals when the dominant and effective nationality of the Claimant during the relevant period from the date the claim arose until 19 January 1981 was that of the United States."

4. On 28 June 1985 the Tribunal issued an Order requiring the Claimant to file "all written evidence" he wished the Tribunal to consider in determining his dominant and effective nationality. On 23 August 1985 the Claimant submitted a Memorial on the issue of his nationality in response to this Order. The Tribunal thereafter invited the Respondent to file "all evidence that it wishes the Tribunal to consider on the issue of the Claimant's nationality" in this Case. After granting three extensions of the original deadline, the Tribunal on 6 February 1987 denied Iran's fourth request for extension and informed the Parties that the Tribunal intended to proceed with its deliberations on the issues of jurisdiction in this Case as soon as its schedule permitted

on the basis of the evidence then before the Tribunal, pursuant to Article 28, paragraph 3 of the Tribunal Rules.

5. On 5 April 1988 the Respondent filed a Memorial on the issue of the Claimant's dominant and effective nationality. In this recent submission the Respondent argues that the claim is outside the scope of the Tribunal's jurisdiction because it arose, as alleged in the Statement of Claim, on 28 February 1981, subsequent to the entering into force of the Algiers Accords. In addition, the Respondent contends that, even if the Tribunal were to disregard the allegation in the Statement of Claim, an expropriation of the Claimant's bank shares and real property occurred, if at all, in June and July 1979, respectively, upon the enactment of the "Law of Nationalization of Banks" and the "Act Concerning Cancellation of Ownership of Unutilized Urban Lands and Manner of their Development." Since this date is prior to the Claimant's alleged naturalization as a United States citizen, such a determination would also place the claim outside the Tribunal's jurisdiction.

6. On 25 April 1988 the Claimant filed comments to the Respondent's recent submission objecting to the timing of this filing.

II. FACTUAL BACKGROUND

7. Reza Said Malek was born of Iranian parents in Tehran, Iran on 22 August 1940 and was issued birth certificate No. 78. He allegedly resided in Iran until the age of 17 at which time he departed to commence his college education in England. He alleges that in 1964 he received an M.D. degree from Enfield College and subsequently did an internship and several residency programs in hospitals in Sussex and London.

8. In December of 1966, at the age of 26, the Claimant states that he relocated to the United States to accept a position as a resident in urology at the Mayo Foundation and Graduate School of Medicine ("Mayo Clinic") in Rochester, Minnesota. The Claimant was a resident at the Mayo Clinic until June of 1971 when he left to do a one-year research fellowship in North Carolina. In June of 1972, the Claimant returned to the Mayo Clinic and joined the medical staff.

9. From the date of his appointment to the staff of the Mayo Clinic in June of 1972, the Claimant alleges that he has continued his employment with the Mayo Clinic in various positions and now is a senior member of the Clinic's Department of Urology. During his connection with the Clinic, he has obtained fellowships and memberships in numerous American medical associations, including the American College of Surgeons, the American Academy of Pediatrics, and the American Urological Association. On the basis of his medical expertise, the Claimant was included in the Marquis publication of Who's Who in the Midwest in 1980 and he has published many articles in medical journals and given numerous lectures throughout the United States.

10. The Claimant alleges that since 1966 he has purchased two homes in Rochester, Minnesota, where he currently lives. In February 1979, he married an Iranian born wife, who, according to the Claimant, lived in the United States since 1976 and has since become a naturalized United States citizen. He has one child born in Rochester. During this time, he has held bank accounts in the First Bank of Rochester and the Marquette Bank of Rochester, Minnesota.

11. According to the Claimant, on 6 July 1972 he had his status in the United States altered by the United States Immigration and Naturalization Service from that of a student to that of a legal permanent resident. On 30 August 1972 he appeared before a United States District Court to

declare his intention "in good faith to become a citizen of the United States." On 21 January 1980 the Claimant petitioned for naturalization and on 5 November 1980 he was duly naturalized a United States citizen.

12. The Claimant alleges that, since becoming a resident in 1972, he has paid taxes to the United States and since becoming a citizen he has voted in the scheduled elections. Also since 1972, he has returned to Iran on only two occasions, each of which was at the invitation of Iran by reason of the Claimant's medical expertise. Between 28 June and 28 August 1976 the Claimant returned to Tehran at the invitation and expense of the Reza Pahlavi Medical Center, and from 1 September until 2 October 1978, the Claimant returned to Tehran at the invitation and expense of the National University of Iran and the Imperial Medical Center. He contends that he received offers of employment from Iranian medical institutions but refused all of them.

III. THE TRIBUNAL'S DETERMINATION

A. General Considerations

13. The issue that the Tribunal has to decide relates to its jurisdiction over this case in relation to the nationality of the Claimant. The Claimant contends that he is a United States national, while, according to the Respondent, he is an Iranian national. If the Tribunal arrives at the conclusion that the Claimant effectively holds those two nationalities, it will have to determine which one is "dominant and effective" and, consequently, must prevail for the present proceedings, in conformity with the Decision taken by the Full Tribunal in Case No. A18.

14. In Case No. A18, the Full Tribunal determined that it has jurisdiction over claims brought by Iran-United States

nationals only when the "dominant and effective nationality" of the Claimant is that of the United States "during the relevant period from the date the claim arose until 19 January 1981". These two dates are determinative of the jurisdiction of the Tribunal, since, pursuant to Article VII, paragraph 2 of the Claims Settlement Declaration:

"Claims of nationals" of Iran or the United States, as the case may be, means claims owned continuously from the date on which the claim arose to the date on which the Agreement enters into force (i.e. 19 January 1981), by nationals of that state ...

Although this period of time is crucial for the determination of the Tribunal's jurisdiction, it is not the only one to be considered in order to determine if the United States (or Iranian as the case may be) nationality of a Claimant is his "dominant and effective nationality" at the relevant time. Obviously, to establish what is the dominant and effective nationality at the date the claim arose, it is necessary to scrutinize the events of the Claimant's life preceding this date. Indeed, the entire life of the Claimant, from birth, and all the factors which, during this span of time, evidence the reality and the sincerity of the choice of national allegiance he claims to have made, are relevant. It is to these factors that the Full Tribunal alluded in its Decision in Case No. A18 when it decided that the Tribunal would have to "consider all relevant factors, including habitual residence, center of interests, family ties, participation in public life and other evidence of attachment." (Decision No. DEC 32-A18-FT, at 25.)

15. Among all the relevant factors, the date of acquisition of the alleged dominant and effective nationality certainly deserves special attention, particularly if it demonstrates that this nationality was obtained at a time when the Claimant could foresee that its acquisition could better

position him to assert a claim for his property. Delay in applying for and obtaining such nationality, however, can be explained by the circumstances of the case. Here, for example, the evidence shows that Claimant's decision to maintain his residence, as well as his family, professional and economic life in his adopted country was taken years before by the Claimant, without any intent later to return to the other country of which he was also a national.

B. Dominant and effective nationality of the Claimant

16. It is undisputed that, under Article 976 of the Iranian Civil Code, the Claimant is an Iranian national by virtue of his birth place and the Iranian nationality of his father. It has not been contended that he ever applied pursuant to Iranian law to relinquish his Iranian nationality after his United States naturalization, or that he had otherwise lost this nationality. On the other hand, it is clear from the record that the Claimant is a United States national pursuant to United States law. As exhibited by the "Application for Verification of Information from Immigration and Naturalization Service Records," appended to the Claimant's Memorial, he was naturalized on 5 November 1980. The Claimant is therefore a dual national of Iran and the United States.

17. The pertinent issue thus becomes one of determining the dominant and effective nationality of the Claimant at the relevant period of time. As just noted, the Claimant was naturalized on 5 November 1980. Therefore, any claim which arose before this date would be outside the jurisdiction of the Tribunal, as well as any claim arising after 19 January 1981. These two dates delimit a very short span of time for a claim to be admissible.

18. The Statement of Claim, signed by the Claimant himself, alleges that the expropriation, which is the basis of the

claim, "took place on 28 February 1981." As the Respondent points out, left unamended, this allegation would place the claim outside the Tribunal's jurisdiction, whatever the dominant and effective nationality of the Claimant. However, on 30 August 1982, the Claimant submitted a letter to the Tribunal in which he stated that he wished "to elaborate on the statement made in ... [the] Statement of Claim" and that in due course he would prove that "the expropriation in question effectively took place between the dates of November 5, 1980 and January 19, 1981."

19. This letter can be considered as an amendment to the Statement of Claim. Such an amendment may be submitted, under Article 20 of the Tribunal Rules, "unless the arbitral tribunal considers it inappropriate to allow such amendment having regard to the delay in making it or prejudice to the other party or any other circumstances." Given the fact that the letter in question was filed eight months subsequent to the filing of the Statement of Claim and one month before the filing of the Statement of Defense, the Tribunal finds that there was no unreasonable delay in making this amendment and that the Respondent is not prejudiced by it. Furthermore, the Tribunal previously has interpreted this Rule as affording "wide latitude" to a party wishing to amend his claim and has noted that "the Tribunal's practice is in accord with this liberal approach." International School Services and Islamic Republic of Iran, Award No. ITL 57-123-1 (30 January 1986). A priori, such an amendment can therefore be considered as admissible.

20. The Tribunal notes, however, that the Claimant has not since then substantiated his allegation that the alleged expropriation took place between 5 November 1980 and 19 January 1981. Such a failure may be attributable to the fact that the Tribunal has directed the Parties to confine their subsequent submissions to the issue of dominant and effective nationality, although this issue, as previously

noted, has to be considered in relation to the date on which the claim arose.

21. The Respondent advances the argument that, if an expropriation actually occurred, this was by virtue of the enactment of the "Law of Nationalization of Banks" and of the "Act Concerning Cancellation of Ownership of Unutilized Urban Lands and Manner of their Development", enacted in June and July 1979, respectively. In such a case, indeed, the Tribunal would have no jurisdiction to consider the claim relating to the alleged expropriation, since the latter would have arisen prior to the date of the Claimant's naturalization, and thus would not have been continuously owned by a United States national since the date it arose as required by the Claims Settlement Declaration. This contention, however, was only presented by the Respondent in its latest submission, filed on 5 April 1988, several months after the time limit fixed by the Tribunal for the response of the Respondent on the issue of nationality. The Claimant has had no opportunity to discuss this argument and to submit any related evidence.

22. In view of this state of the file, the Tribunal finds that this issue has not yet been fully briefed by the Parties and, therefore, is not ripe to be decided. Consequently, the Tribunal joins to the merits the question of the determination of the date on which the claim arose, so that the Parties may have the opportunity to present all arguments and evidence they wish the Tribunal to consider on this issue. The Tribunal, however, reserves its right to decide upon its jurisdiction in relation to this date on the basis of the written evidence submitted by the Parties, if it deems it appropriate. In the present Interlocutory Award, it limits itself to the determination of the dominant and effective nationality of the Claimant, on the hypothesis that the claim arose between 5 November 1980 and 19 January 1981, as alleged by the Claimant in its letter of August

1982, without prejudice to its future decision on this point.

23. Turning now to the question so delimited, the Tribunal first notes that the Claimant's allegations about the main facts of his life and the evidence appended to his statement have not been seriously disputed by the Respondent. In the absence of contradictions within these allegations, and considering that there are no other reasons in this case to doubt their veracity, the Tribunal deems that it can safely rely on them.

24. Taking into consideration the various relevant factors mentioned above (see paras. 14 and 15 supra), the Tribunal observes that, according to his statements, the Claimant left Iran, where he was born and spent the first years of his life, in 1958, at the age of 17, and has never resided in this country since then. He took his college education and graduated in England. In 1966, at the age of 26, the Claimant left England, apparently without any intent to live there again, and since then has resided and worked in the United States, first as a medical resident and then as a member of the medical staff of the Mayo Clinic in Rochester, Minnesota. As soon as he was admitted as a legal permanent resident, in 1972, he officially declared his intention to become a citizen of the United States. Throughout his stay in the United States, the Claimant had only limited relations with Iran, making only a few short professional visits to Iran, at the invitation of the University and other medical centers. He married a wife of Iranian nationality, but who had already been resident in the United States for several years and subsequently was naturalized a United States citizen.

25. Although the Claimant never wholly severed his cultural and sentimental ties with country of his birth, as evidenced by his marriage and his visits to Iran, his conduct since the time he settled in the United States, in 1966,

demonstrates that he fully and deliberately integrated into United States society. It shows also that his acquisition of United States citizenship was the result of a firm decision officially expressed in 1972. It is true that, apparently, the Claimant could have applied for naturalization earlier than he did. This delay does not seem sufficient, however, to reverse the conclusion drawn from the facts previously mentioned. The Claimant's application for naturalization was made during the crisis between the two countries, one year before the conclusion of the Algiers Accords, at a time when it was impossible to foresee the legal opportunities that these Accords would open to United States nationals. Indeed, as a skilled physician, the Claimant is a prime example of what has been referred to as the "brain drain" from original countries to countries able to attract scientists and specialists by the professional opportunities they could offer to them.

26. For the reasons set forth above, the Tribunal finds that, as soon as it was acquired, the United States nationality of the Claimant must be considered as dominant and effective.

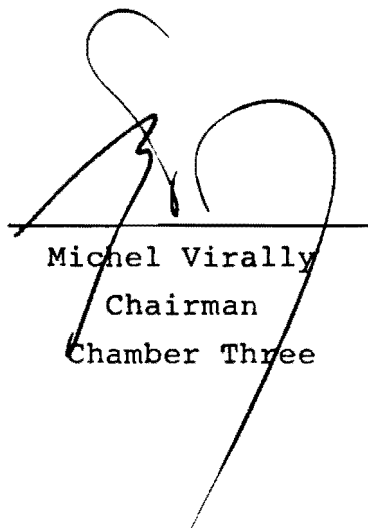
IV. AWARD

27. In view of the foregoing, the Tribunal awards as follows:

- a. The dominant and effective nationality of the Claimant REZA SAID MALEK was, for the purpose of this Tribunal's jurisdiction, that of the United States of America as from 5 November 1980 to 19 January 1981.
- b. The issue of the date or dates on which the claim arose is joined to the merits.

- c. The schedule for submission of Memorials and evidence on all remaining issues will be fixed by a separate order.

Dated, The Hague
23 June 1988

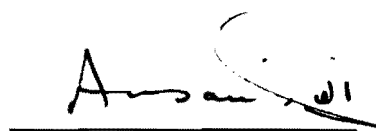


Michel Virally
Chairman
Chamber Three

In the Name of God



Richard C. Allison



Parviz Ansari Moin
Dissenting Opinion