[redacted] TES CLAIMS TRIBUNAL

دیوان داوری دعاوی ایران - ایالات متحده

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ORIGINAL DOCUMENTS IN SAFE

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** AWARD - Type of Award _____
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** DISSENTING OPINION of Mr P. Ansari

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DUPLICATE ORIGINAL

«نسخه برابر اصل»

In the Name of God

43

CASE NO. 193
CHAMBER THREE
AWARD NO. ITL68-193-3

REZA SAID MALEK,
Claimant,

and

THE GOVERNMENT OF THE
ISLAMIC REPUBLIC OF IRAN,
Respondent.

DISSENTING OPINION OF JUDGE PARVIZ ANSARI

Introduction

1. The injudicious award rendered by a majority of the Full Tribunal in Case No. A 18, which was not only strongly objected to by the Iranian arbitrators[1] but also criticized and denounced in international learned and academic circles[2], constituted an improper first step in terms of

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[1]Dissenting Opinion of Iranian Arbitrators in Case No. A 18, Decision No. DEC 32-A18-FT (10 September 1984), reprinted in 5 Iran-U.S. C.T.R. 275.

[2]See, e.g., Professor François Rigaux's lecture, "Admissibility of Claims brought by Dual Nationals before International Tribunals, and a Scholarly Criticism of the Decision by the Iran-United States Claims Tribunal on this (Footnote Continued)

inter-governmental relations, and a ruinous source vis-à-vis the legal relations between nationals and their governments before an international tribunal. The ensuing justified and effective protest by the Government of the Islamic Republic of Iran[3] made the Tribunal aware of the undesirable consequences of this injudicious award, to which that Government had never agreed in entering into and adhering to the Algiers Declarations[4]. This inter-governmental Tribunal's acceptance of such barred claims, which are still regarded as inadmissible at the international judicial level according to customary international law, the practice of States, and the opinions of legal scholars, has confronted this Tribunal with mutually contradictory problems and difficulties, in respect of both the jurisdictional and substantive issues involved in the claim[5].

(Footnote Continued)
Subject," in The Hague Academy of International Law, 29 May 1984; Professor Brigitte Stern, Les questions de nationalité des personnes physiques et de nationalité et contrôle des personnes morales devant le Tribunal des différends Irano-Américans, 1984 Annuaire Français de Droit International 425, 438-40; Professor Philip Cahier, Cours général de droit international public, (19 July - 16 Aug. 1985) -- Recueil des Cours -- (1985).

[3]Declarations dated 24 April and 6 May 1984 of the Government of the Islamic Republic of Iran, reprinted in 5 Iran-U.S. C.T.R. 428.

[4]Memorial of the Islamic Republic of Iran (21 October 1983), at 113.

[5]It should be noted that even the position of the United States Government has to date always been one of disapproving and rejecting dual nationality. For instance, by a note dated 23 February 1978, in reply to an inquiry by the Embassy of Canada, the U.S. State Department stated that "[t]he United States does not approve of dual nationality ..." M.L. Nash, Digest of United States Practice in International Law 1978, at 248. By the same token, in connection with the Soviet Citizenship Law which entered into force on 1 July 1979, the State Department distributed a statement in which it maintained that "[t]he United States Government is opposed to dual nationality as a matter of policy." Nash, Digest of United States Practice in International Law 1979, at 271. The new Restatement maintains that "[t]he
(Footnote Continued)

2. The dual national claims currently undergoing the "first stages" of the adjudicative proceedings -- viz., determination of dominant and effective nationality -- have demonstrated to the Tribunal that determining such nationality in order to establish its jurisdiction, would lead the Tribunal into areas and directions whose issues bear no resemblance to the other jurisdictional issues raised in the claims before this Tribunal. The jurisdictional issue involving the dual nationals, relating to the determination of their dominant and effective nationality, is that of evaluating a two-fold and double-faceted -- and at times a multifold and multi-faceted -- life within several societies.

3. The criteria given for evaluating such a double-faceted life, eg., habitual residence, center of interests, family ties, participation in public life, etc., prima facie appear to constitute tangible and workable criteria. In truth, however, their evaluation rests solely upon the subjective view of the individual weighing them, and upon how he construes them. It is incorrect to evaluate someone's life on the basis of criteria that are themselves weighed by someone else's idiosyncratic and subjective criteria -- in the present instance, those of the arbitrator adjudicating the claim.

4. The significance of this statement is more obvious where an individual's political-legal-spiritual ties to his government are involved. Such special ties -- by which is

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(Footnote Continued)
United States does not favor dual nationality because of the problems it may cause." Rest. 3rd, Restatement of the Foreign Relations Law of the United States §212, Reporters' Note 3; or "... the Department of State has sometimes, especially in politically sensitive situations, taken the position that it will not provide protection for a United States national vis-à-vis a state of which he or she is also a national, even where that state insists upon regarding the person as its national despite renunciation of its nationality." Ibid.

meant one's nationality -- are neither separable or differentiable, nor susceptible of being weighed or assessed. Once they come into existence, and so long as they continue to exist, those ties neither increase nor diminish; nor do they become ineffective. Thus, the mere existence of such ties gives rise to a whole set of reciprocal rights and duties between a national and his government, which can be neither evaluated with the given criteria, nor set aside at the international judicial level. As a result, no government may be held liable vis-à-vis its own nationals before international fora, unless it has, pursuant to special agreements, expressly relinquished this important right and deviated from this legal principle.

The Claimant and the issue of his nationalities

5. The events in the Claimant's life are reflected in the present Interlocutory Award, and so there will be no need to reiterate them here in full. Claimant was born in Tehran on 22 August 1940 of Iranian parents, and he was issued identity card no. 78. In 1958, upon completion of his primary and secondary education, he left Iran at the age of 17 to take up his higher education in England, where his sister had been studying. He pursued his studies in England until December 1966, after which he relocated to the United States in order to complete his studies in his field of specialization. There, after completing his further studies, he joined the medical staff of the Mayo Clinic. In August 1972, before the St. Paul, Minnesota District Court, he declared his intention to acquire United States citizenship[6]. On 9 February 1979[7], he married an Iranian

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[6]Needless to say, an alien's declaration of intention to become a U.S. citizen does not affect his original nationality, and he remains an alien until his naturalization is completed (The Lynghaug (1941, DC Pa) 42 F.Supp. 713). See 8 U.S.C.S.
(Footnote Continued)

woman who, the Claimant alleges, had lived in the United States since 1976 and subsequently acquired United States citizenship. The Claimant filed his application for naturalization on 21 January 1980. The Claimant alleges, though without offering any proof, that he deferred filing the application "for a few months" out of fear that in doing so he might jeopardize the position of his brother, Issa Malek, who was then the Iranian ambassador to Sweden (see para. 8, infra). The Claimant finally acquired United States citizenship on 5 November 1980. According to the Claimant, he made two trips to Iran between his initial entry in the United States (January 1967) and the time that he acquired his U.S. permanent resident status (1972): from 28 September to 15 November 1968, and from 9 July to 1 October 1970, both times for the purpose of visiting relatives. Between 1972 and 1980 (when he became a U.S. citizen), the Claimant made two more visits to Iran: from 28 June to 28 August 1976, and from 1 September to 2 October 1978. On these two occasions, the Claimant travelled at the invitation and expense of three Iranian medical institutions.

6. From the foregoing, it is patent that until 5 November 1980, the Claimant's sole nationality was that of Iran, and that he must have used his Iranian passport on all his trips, whether to Iran or elsewhere. Thus the Claimant can be regarded as a dual national only as from 5 November 1980, when he was naturalized as a United States citizen.

7. The duration of the Claimant's possession of United States nationality, from the date when he was naturalized until the date on which the Algiers Declarations entered into force (19 January 1981) was a mere two months and several days,

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(Footnote Continued)
§1445, n2 (Aliens and Nationality 1987).

[7] In Exhibit C to Doc. 26, the marriage is stated as having taken place in February 1980.

whereas he had held his original (i.e., Iranian) nationality for a full forty years, as at the date of the Algiers Declarations. Moreover, the Claimant has never relinquished his original nationality, nor taken any steps to do so.

Evaluation of Claimant's acquired nationality

8. The majority's main argument in determining the Claimant's dominant nationality appears in para. 25 of the Interlocutory Award, and pivots around his declaration of intention, filed in 1972, to become a United States citizen. The Claimant, who is portrayed as a shining example of the "brain drain," could have filed his application for United States citizenship with the relevant U.S. authorities as early as late 1977, i.e., five years after he was granted U.S. permanent resident status, and yet he chose not to file such a request until January 1980. This delay of several years -- rather than a few months, as alleged by the Claimant (para. 5, supra) -- was not due to a fear of jeopardizing his brother's position following the Revolution; instead, it was motivated by other considerations. The most logical reason that springs to mind is that he made a trip to Iran in 1978, a year after he became eligible for U.S. citizenship, in response to an invitation to teach and work at two medical institutions in Iran. The least effect that this trip -- his second at the invitation of the Iranian authorities -- could have had, was to shake or make him defer his decision to become a United States citizen. For if the Claimant had really made a firm determination to obtain U.S. nationality, he could have done so long before January 1980[8].

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[8] As a precedent, See Leila Danesh Arfa Mahmoud and The Islamic Republic of Iran, Award No. 204-237-2 (27 November 1985), reprinted in 9 Iran-U.S. C.T.R.350.

9. Taken altogether, there are a number of reasons why the Claimant's dominant and effective nationality is his original Iranian nationality.

As reflected in the evidence, these reasons are as follows:

a) the Claimant did not attempt to relinquish his Iranian nationality;

b) he married an Iranian woman in 1979;

c) he visited Iran at the invitation of the Iranian authorities for the purpose of teaching, working, or obtaining a higher professional position and status;

d) he postponed filing his naturalization application for several years.

In the light of the forty years over which the Claimant has solely held his original Iranian nationality, the above reasons and certain other circumstances (para. 10, infra) leave no room for the position that his acquired United States nationality, of a mere two months and several days' duration, was his dominant nationality.

The date on which the claim arose

10. In his Statement of Claim submitted to the Tribunal and personally signed by him, the Claimant specifies 28 February 1981 (9 Esfand 1359) as the date on which the claim arose, on the grounds of the alleged expropriation of his property (Document no.1, p.2 of the English version, p.3 of the Persian); he likewise demands interest allegedly accruing thereon from 28 February 1981 (Doc. no.1, p.4 of the English version, p.8 of the Persian). The date specified by the Claimant per se excludes his claim from the jurisdiction of

this Tribunal, without there even being any need for a reply on the part of the Respondent, by virtue of the fact that the claim arose at a date subsequent to that of the Algiers Declarations[9]. Having noted the fundamental impediment posed by the date on which the claim arose, the Claimant's attorney, by a letter submitted in objection to the Respondent's request for an extension, changed this specific date (28 February 1981/9 Esfand 1359) to a vague and dubious date somewhere between 5 November 1980 and 19 January 1981 -- i.e., the relevant period between his acquisition of United States citizenship and the date of the Algiers Declarations.

Irrespective of whether or not this material change of dates constitutes an amendment in accordance with Article 20 of the Tribunal Rules, it was advanced for the sole purpose of allowing the claim to fall within the Claims Settlement Declaration's provisions relating to time.

Moreover, the "Law of Nationalization of Banks" and the "Act Concerning Cancellation of Ownership of Unutilized Urban Lands and Manner of Their Development" were enacted by the legislative authorities of the Islamic Republic of Iran on 11 June 1979 (21.3.1358) and 2 July 1979 (11.4.1358), respectively. Both of these dates precede the date on which the Claimant acquired his United States nationality (5 November 1980) by a year and several months.

11. Although the Tribunal's Interlocutory Award defers to a later date discussion of the date on which the claim arose, it can be deduced from the preceding discussion of the issue of the Claimant's dominant and effective nationality, that his application for United States naturalization, which was

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[9] See Hooshang Kahen and The Government of the Islamic Republic of Iran, Award No. 365-315-2 (24 May 1988).

submitted to the United States authorities on 21 January 1980, was made several months after the two abovementioned laws were enacted. Moreover, that act on his part was designed solely to benefit from United States citizenship and its resulting diplomatic protection, in order to bring a claim or to benefit from the privileges afforded by any potential claims settlement arrangement between the two Governments. Thus, the Claimant's acquisition of United States nationality, particularly in 1980, can by no means be considered a straight-forward and unclouded process.

Conclusion

12. From the foregoing, it is clear that:

a) As an Iranian national, the Claimant cannot bring claim against his Government before international fora on his own part; nor can any government bring claim before such a forum on his behalf.

b) The Claimant's Iranian nationality prevails over his acquired nationality; and in this respect too, the Tribunal lacks jurisdiction over his claim.

The Hague,
23 June 1988/ 2/ 4/ 1367

Parviz Ansari