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** AWARD - Type of Award _____
- Date of Award _____
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** DECISION - Date of Decision _____
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** CONCURRING OPINION of _____
- Date _____
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** SEPARATE OPINION of Mr K Hallilian
- Date 30 Jan 90
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** DISSENTING OPINION of _____
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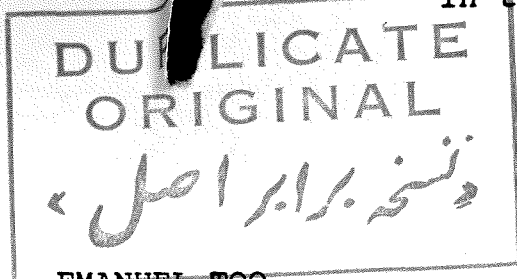
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IRAN-UNITED STATES CLAIMS TRIBUNAL
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دیوان داری دعاوی ایران - ایالات متحدہ

In the Name of God



CASE No. 880

CHAMBER TWO

AWARD No. 460-880-2

EMANUEL TOO,

Claimant,

and

GREATER MODESTO INSURANCE
 ASSOCIATES, and THE UNITED
 STATES OF AMERICA,

Respondents.

IRAN-UNITED STATES CLAIMS TRIBUNAL	دیوان داری دعاوی ایران - ایالات متحدہ
FILED	ثبت شد
DATE	30 JAN 1990
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	ثبت شده است

SEPARATE OPINION OF SEYED KHALIL KHALILIAN

1. Mr. Emanuel Too was the owner of an Iran-Europe shipping company named "Sammy Joseph Co., Ltd." In early 1979, he moved to the United States and bought a house in California. Later, he registered "Sammy Joseph Inc." in the United States, in which company he was himself the sole shareholder. On 22 May 1979, he purchased a motel-restaurant in Turlock, California, and in that same year he imported into the United States eight of the trucks engaged in his Iran-Europe shipping company.

2. The Claimant has asserted that he was engaged in commercial activities with Swiss companies and travelled frequently to Switzerland. He held a commercial visa for

the United States, which was valid until 1982. Mr. Too was actively engaged in commercial matters in the United States, and according to the Case file, on certain occasions he gave substantial assistance to United States charitable institutions. Notwithstanding this, Mr. Too has lodged a vehement complaint before this Tribunal against harassment by United States nationals. Following the events at the U.S. Embassy in Iran in November 1979, he too was not safe from the wave of anti-Iranian sentiments. Among other things, his house and restaurant were burglarized, and one of his trucks was burned. He asserts that the local police and judicial authorities failed to give him the necessary assistance. Mr. Too also asserts that following upon these wrongs, his wife became paralyzed due to emotional stress. In early 1980, he leased the motel and restaurant and left the United States in order to seek treatment for his wife and to negotiate with a Swiss company. However, the U.S. authorities refused to readmit him to the United States. On 16 March 1980, his restaurant was burned down. Mr. Too alleges that due to his absence from the United States, his home, restaurant, motel, liquor license and trucks were all put on auction and sold for a negligible price, and that when he finally succeeded in obtaining a three-month tourist visa from the U.S. Embassy in December 1980 (owing to the fact that he was a Christian), and returned to the United States, he learned that he had been stripped of all his property.

3. The Tribunal has dismissed all of the Claimant's claims in this Case, and the main reason that can be given for his unsuccessful suit is that those claims failed for lack of proof. Nonetheless, fairness requires consideration of the fact that notwithstanding all its deficiencies and shortcomings, this Case does have a number of strong points where the Tribunal could have shown greater leniency in weighing the evidence in support of the claim. Unfortunately, however, no such leniency was exercised

with respect to this Iranian claimant, and this is what has led me to set forth the present Separate Opinion.

4. In this Opinion, I will take up the following points:

- The claim that the United States acted illegally in cancelling the Claimant's visa;
- The United States' failure to exercise protection;
- The Claim regarding the truck that was auctioned off in Arizona;
- The auctioning off of the Claimant's property; and
- The amendment to the Statement of Claim.

A. The claim that the United States acted illegally in cancelling the Claimant's visa

5. Invoking K. Haji-Bagherpour and United States of America, Award No. 23-428-2, the Tribunal argues in paragraph 19 that the suspension of the Claimant's visa was a measure taken by the United States in response to Iran's seizure of the hostages, and thus that pursuant to Paragraph 11 of the General Declaration, the Tribunal lacks jurisdiction over said action. This is a debatable point, and in my opinion, the Tribunal could have found that grounds did exist for holding the United States responsible, if it had considered the Claimant's plaint realistically. The United States alleges that the Claimant's visa was invalidated pursuant to the Executive Order dated 17 April 1980 by the President of the United States, and it has appended the said Order to its Memorial. However, nothing in this Order relates to suspension of the visas of Iranian nationals. At the Hearing

conference, the United States Government's representative stated that the Order invalidating visas, which has been invoked in this Case, is unrelated to the Executive Order of 17 April 1980 which has been filed in the instant Case. He added that upon telephoning the [United States] Embassy, he learned that United States Embassies had been sent a telex stating that visas issued in Iran to Iranians were invalid. To become valid, such visas had to be revalidated outside of Iran. According to the United States' representative, the purpose of revalidating the visas was to prevent the entry into the United States of persons who might have made unauthorized stamps in their passports with the visa plates, following the occupation of the Embassy.

6. In response to my question as to whether he had the said Order in his possession, the United States' representative stated at the Hearing that he did not, and that the Embassy staff could merely recall something of the sort. Therefore, it is to be noted that so far as the evidence in the present Case is concerned, the Claimant was illegally and improperly deprived of his right to return to the United States and supervise his property. Furthermore, even assuming that such an Order actually existed (which has not been proved), it would certainly not have covered persons such as Mr. Too, because he obtained his visa long before the seizure of the hostages, and it would thus be totally out of the question to suppose that his visa was issued through improper use of the visa stamp obtained at the Embassy. After all, Mr. Too had lived and worked in the United States for a substantial period on the strength of that same visa. In paragraph 10, the Tribunal states that the United States alleges that Mr. Too was not categorically prevented from travelling to the United States. However, what bar can be more categorical than that the Claimant was not permitted to enter the United States until late in

1980, even though he held a valid visa and had travelled back and forth repeatedly? The fact that he was granted a three-month tourist visa in 1980 is in itself evidence that the United States categorically barred the Claimant from entering that country on his commercial visa, a visa that was valid until 1982.

7. In my opinion, there can be no doubt that most of the injuries suffered by the Claimant in connection with the lost truck and the auction of his property arose from his absence from the United States, and further that the United States Government acted improperly in barring him from that country, thereby causing Mr. Too to be deprived of his property. However, the Award has been unfair in its presentation of this fact.

B. The United States' failure to protect the Claimant

8. In paragraph 22 of the Award, the Tribunal holds that the State cannot guarantee the safety or property of foreign nationals. The Case file indicates that Mr. Too suffered harassment as a result of anti-Iranian sentiments in the United States, and that he repeatedly resorted to, and sought help from, the police. He states that on one such occasion when he had recourse to the police, he was told that "only God can help you." Mr. Too had hired a private guard to watch his property, but despite this fact, his carpets, household furnishings, and restaurant appliances were all stolen.

9. In connection with the arson, the local Turlock newspaper reported that:

The truck was one of three parked on a vacant lot near the Pixie Restaurant. All three bore signs indicating they were from Iran, leading investigators to believe the fire may have stemmed from anti-Iranian sentiments over the siege of the U.S. Embassy in Tehran. Doc. No. 1, Exhibit 1.

The reports of the United States authorities regarding the arson are somewhat questionable. In those reports, an attempt has been made to show that the arson was perpetrated by an Iranian named Abdi, who had worked for Mr. Too and was owed one month's wages. According to the evidence in the Case file, however, Abdi did not work for the Claimant. Rather, he was one of Mr. Too's tenants, and had rented his motel and restaurant and signed a number of commercial instruments setting forth his debts to Mr. Too. Apart from this, the principal witness for the scenario which the Turlock Fire Department officials attempted to suggest was a woman named Nancy, who was Mr. Too's cashier and about whom Mr. Too had filed a complaint with the police, charging her with embezzlement. What is still more remarkable is that according to the report by the Chief of the Turlock Fire Department, which constitutes one of the Respondent's major pieces of evidence, the arson took place on 13 March 1980, whereas according to the police report, it occurred on 16 March 1980.

10. At any event, the foregoing matters raise serious doubts as to the probity of the California State officials, in connection with the arson at Mr. Too's motel-restaurant. Despite this, the Tribunal has correctly concluded that even in such circumstances, and despite the Treaty of Amity -- which the United States holds to be in force -- the State cannot be held responsible for injuries to the property of foreign nationals.

11. In paragraph 23 of the Award the Tribunal adds, after reaching its finding, that the Claimant has failed to prove that the local authorities did not exercise due diligence in connection with the arson at the restaurant. In view of the brief account given above, there are serious doubts as to the conduct and probity of the police and the Fire Department. Nonetheless, such circumstances cannot, as was stated above, constitute grounds for State

responsibility. In that same paragraph, the Tribunal repeats the words of the Chief of the Fire Department, who stated that the investigations into the fire had been among the most thorough of any [he had seen] over the past 19 years! It so happens, as noted above, that there are serious doubts surrounding the report and investigation by the Fire Department. The Chief of the Fire Department has related the events of Saturday night, 12 March 1980, and the morning of 13 March 1980, precisely and moment by moment, as having occurred on the night before the arson, whereas the fire took place three days later.

12. In that same paragraph, the Tribunal states that the Claimant admits that the local police authorities investigated whenever he made a complaint, whereas what Mr. Too actually said was:

In several cases I along with the eyewitnesses, called on governmental authorities including justice department and Police asking them to help me stating that my only sin was investment in the United States. But it was of no avail except certain communications. Now I have come to know that they only intended to discourage and tire me. Document 75, para. 10.

In another paragraph of his Memorial, he quotes a friend, who had gone to the United States in order to assist him during the period when he did not have permission to enter the United States, as saying that the police were against Mr. Too. Given that the burglaries of Mr. Too's home and restaurant, the arson of his truck, and then the arson of his restaurant and motel, all arose from anti-Iranian sentiments, there would not seem to be any doubt that the non-cooperation of the United States police stemmed from this very same reason as well.

C. The Claim regarding the truck that was auctioned off in Arizona

13. In paragraph 8 of the Award, it is stated that another of the Claimant's occupations was the importation and sale of cold-storage vans. Apparently, Mr. Too had an international shipping company in Europe, and after deciding to move to the United States he brought eight of his trucks there in order to continue with these same activities. One of the trucks was found in the State of Arizona, although the Claimant did not explain to the Tribunal why it had been abandoned in such a place. At any event, however, the Arizona State authorities recovered the truck and then, after holding it for eight months without informing the owner, they abruptly gave a five-day notice of auction and then sold it for \$5.00. In commenting on these events, the Award states in paragraph 8 that in early December 1979, the Arizona Dept. of Motor Vehicles sent communications to Mr. Too's address. However, in my opinion, the United States authorities acted improperly, and even committed a flagrant injustice, with respect to their duty of protecting the property of Mr. Too as an Iranian national residing on United States soil, because firstly, the Arizona State police authorities allege that they found the truck in December 1979, and according to the Case file, Mr. Too was sent only one letter, dated August 1980 at that -- i.e., eight months after the truck was found. Secondly, the letter was incorrectly addressed. The letter was sent to an address which included neither a street name nor a house number. The address on the Arizona police letter reads, "Sammy Joseph, Turlock, CA 95380," whereas Mr. Too's correct address was:

Sammy Joseph Inc.
1350 N. Golden State, Turlock, CA 95380,
& 2632 Lester Rd., Turlock, CA

14. Of course, the Tribunal was also confronted with the question of what action, if any, Mr. Too himself took during this months-long period, in order to find his truck. Nonetheless, the Respondent has no doubt whatsoever that the truck belonged to the Claimant, and it was taken over by the Arizona State authorities as abandoned property. The issue of State protection of the property of foreign nationals within United States territory now arises; it must be seen whether or not the United States Government was in violation of the Treaty of Amity -- which, it has always held, both that Government and the Government of Iran were required to enforce -- in respect of its protection of this Iranian claimant's property. One of the Claimant's claims relates to this same truck, which the Arizona police found and sold at auction for \$5.00. This truck was one of eight trucks which the Claimant had shipped from Europe to the United States, and for which he paid a large sum of money for the relevant shipping and customs costs.

15. In paragraph 29 of the Award, the Tribunal states that the Claimant has not shown that the Arizona Highway Patrol authorities acted in violation of the regulations, and it concludes by implying that the truck was of no value. At the Hearing conference, the Claimant showed a picture of the truck; he had also previously placed in evidence the pertinent shipping papers and customs payment records. This evidence indicates that contrary to the suggestions made in the Award, this truck was worth as much as an average truck [of that sort]. While Mr. Too was being prevented from entering the United States due to the illegal action taken by the United States Consulate in Zurich in invalidating his visa, the Arizona police sent him a letter stating that his truck had been found -- a letter which was, however, improperly addressed, since it bore neither his street name nor the house number. As a result, the Claimant never learned of the contents of

that letter. Subsequently, the truck was sold off at an auction for the astonishing price of \$5.00. In addition to the evidence in this Case which proves that the truck had a normal value, the double standard applied by this Tribunal in its treatment of Iranian and United States claimants is astonishing. Whereas in one place this Tribunal has gone to such lengths to be generous that in one Case it has awarded against the Iranian Government for payment of \$800 in compensation, merely on the strength of an American claimant's verbal assertion (unsupported by any evidence whatsoever) that he had had a wristwatch which the authorities at the Mehrabad Airport in Tehran took from him when he left Iran,¹ here, quite the contrary, seemingly since it seems that it is the Iranian Claimant's foot that is involved, the Tribunal accepts the American Respondent's word for it that an 18-wheeler trailer van -- as described by the Claimant himself, together with a photograph and documentary evidence presented by him to the Tribunal -- was worth no more than \$5.00.

D. The auctioning off of the Claimant's property

16. With regard to the auctioning off of the motel-restaurant, the Award states that this act was not attributable to the Government, and was instead taken by the mortgagees. The United States Government certainly cannot be held responsible for this auction, but at the same time, there can be no doubt that the United States Government's illegal refusal to let Mr. Too return and supervise his property caused him to incur the injuries arising from the auction, as well as other onerous losses. Mr. Too seems to have been a successful businessman

¹ See Daley and Iran, Award No. 360-10514-1, reprinted in 18 Iran-U.S. C.T.R. 232, at 242.

throughout his life. At the Hearing conference, he stated that if he had been able to be in the United States, he would surely not have lost the savings which he had accumulated over 35 years of his life, in a period of less than one year. Paragraphs 24-27 of the Award relate to the auction of the liquor license by the Internal Revenue Service (IRS). The Claimant has asserted that a Mr. Cash, of the United States IRS, seized his liquor license and auctioned it off among his friends. I concur in the majority's finding that:

... a State is not responsible for loss of property or for other economic disadvantage resulting from bona fide general taxation or any other action that is commonly accepted as within the police power of States... (para. 26)

However, the evidence filed by the Respondent gives rise to doubts as to the good faith of Mr. Cash and the IRS.

17. The taxes claimed consist of four items relating to three-month periods, the last of which ended on 31 March 1980. One of those items was levied in 1979, but the remaining four were suddenly levied on 24 November 1980. Then, immediately thereafter on the following day, i.e., 25 November, a notification was sent, to be received by the tax debtor. Immediately thereupon, on 8 December 1980, Mr. Cash notified Mr. Too, who was in Switzerland, that his liquor license had been seized and would shortly be auctioned, and that if he had any objections thereto, he must state them within five days. In actuality, Mr. Cash seized the liquor license a mere 14 days after levying the taxes, and he allowed Mr. Too (who was in Switzerland) only five days, following the date on which the letter was issued, within which to state any objections he might have. Yet, it is common knowledge that it would have taken at least one week for the letter to reach Mr. Too in Switzerland.

18. Although the Award states in paragraph 27 that the letter was sent both to Mr. Too in Zurich and to his attorney in the United States, this is not correct; no letter was ever sent to Mr. Too's attorney. At any event, Mr. Too's license, which he states had a current value of \$300,000, was put on auction by Mr. Cash, an IRS official, and sold for less than \$20,000!

5. The amendment to the Statement of Claim

19. Finally, it is worth mentioning one point in connection with the amended Statement of Claim. In paragraph 13 of the Award, citing International School Services Inc. and The Islamic Republic of Iran, Award No. ITL 57-123-1, reprinted in 10 Iran-U.S. C.T.R. 12, the Tribunal states, regarding the amended Statement of Claim, that the Tribunal has previously held that under Article 20 of the Tribunal Rules, a party who seeks to amend his claim is afforded wide latitude to do so.

20. After stating the above, the Tribunal holds that in light of the Award's finding in this Case, it sees no further need to reach the issue of whether it regards the Claimant's amended Statement of Claim as a new and therefore inadmissible claim, or as a permissible amendment. The fact is that the Tribunal does not grant the parties to a claim anything like the wide latitude alleged in the Award, to amend their Statements of Claim. In its Award in Cal-Maine, the Tribunal rejected the amended claim, even on the grounds of likely prejudice to the other party:

A claim for accounts receivable was not raised at the 7 February 1983 Pre-Hearing Conference and was not in any of Cal-Maine's pleadings until its Memorial of 14 July 1983. It did not seek a formal amendment of its claim. Even assuming that the claim for accounts receivable could be deemed a request for amendment,

in this case, the delay in asserting such a claim and the likely prejudice to Respondents of such a delay would preclude the acceptance of such an amendment under Article 20 of the Tribunal Rules. In view of this fact and the fact that no such amendment was proposed, the Tribunal does not consider Cal-Maine's claim for accounts receivable. (Cal-Maine Foods, Inc. and Iran, Award No. 133-340-3, reprinted in 6 Iran-U.S. C.T.R. 60.)

Dated The Hague,

10 Bahman 1368/30 January 1990



Seyed Khalil Khalilian