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I CLAIMS TRIBUNAL

دیوان داوری دعاوی ایران - ایالات متحده

ORIGINAL DOCUMENTS IN SAFE

Case No. 940 Date of filing: 31 OCT 1989

** AWARD - Type of Award Final

- Date of Award 31 OCT 1989

10 pages in English 12 pages in Farsi

** DECISION - Date of Decision _____

_____ pages in English _____ pages in Farsi

** CONCURRING OPINION of _____

- Date _____

_____ pages in English _____ pages in Farsi

** SEPARATE OPINION of _____

- Date _____

_____ pages in English _____ pages in Farsi

** DISSENTING OPINION of _____

- Date _____

_____ pages in English _____ pages in Farsi

** OTHER; Nature of document: _____

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- Date _____

_____ pages in English _____ pages in Farsi

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IRAN-UNITED STATES CLAIMS TRIBUNAL

دیوان داوری دعاوی ایران - ایالات متحده

DUPLICATE ORIGINAL
«نسخه برابر اصل»

CASE NO. 940
CHAMBER TWO
AWARD NO. 444-940-2

BENNY DIBA and WILFRED J. GAULIN,
Claimants,

and

THE ISLAMIC REPUBLIC OF IRAN,
THE IRANIAN MINISTRY OF HOUSING
AND URBAN DEVELOPMENT,
Respondents.

IRAN-UNITED STATES CLAIMS TRIBUNAL
دیوان داوری دعاوی ایران - ایالات متحده
FILED ثبت شد
DATE 31 OCT 1989
تاریخ ۱۳۶۸/۸/۹

AWARD

Appearances:

For the Claimants:
Mr. Lyman D. Bedford,
Representative
Mr. Edward J. Quinn, Jr.,
Representative
Mr. Benny F. Diba,
Claimant
Mr. Wilfred J. Gaulin,
Claimant
Mr. John Bartlett,
Former Representative
Mr. David Renshaw,
Witness
Mr. Jeffrey Martin,
Witness

For the Respondents: Mr. Mohammad K. Eshragh,
Agent of the Islamic Republic of Iran
Mr. Ali N. Nobari,
Deputy Agent of the Islamic Republic of Iran
Mr. Seifollah Mohammadi,
Legal Adviser
Mr. Karamali Kamayestani,
Legal Assistant to the Agent
Mr. Zabihollah Alavi Harati,
Attorney for the Ministry of Housing and Urban Development
Mr. Iraj Amiri,
Representative of the Ministry of Housing and Urban Development

Also present: Mr. Timothy Ramish,
Agent of the United States of America

I. INTRODUCTION

1. Hover Naft International Construction Company, a California corporation ("Hover Naft California"), and two of its shareholders, Wilfred Gaulin and Benny Diba ("the Claimants"), filed a claim against the Islamic Republic of Iran ("Iran") and the Ministry of Housing and Urban Development ("MHUD"), the successor of the Khuzestan Urban Development Organization ("KUDO"), claiming, as finally pleaded, a total of US $23,159,433 for the expropriation of the assets of Hover Naft International Construction Company, an Iranian company ("Hover Naft Iran"). In the alternative, the Claimants claim a total of US $23,991,232 for damages from the breach of a contract to construct houses and US $3,792,786 for conversion of property. Finally, Mr. Gaulin claims US $17,418 for personal property allegedly taken by Iran.

2. On 20 February 1986, the Claimants withdrew Hover Naft California as Claimant in this Case. Hover Naft California is therefore no longer a party to this proceeding.

3. The Respondents have raised five counterclaims with a total amount of Rials 1,137,527,006.99.

4. A Hearing was held on 23 May 1989.

II. FACTS

5. On 10 May 1978, KUDO and Hover Naft Iran executed contract number 2557 for the engineering and construction of 500 prefabricated houses and site development in Jarrahi New Town, Iran. The turnkey contract consisted of both an off-shore agreement (with a total lump sum price of Rials 1,971,994,763) for the engineering, transportation and fabrication of the houses and other facilities, as well as an on-shore agreement (with a total lump sum price of Rials 1,858,776,870) for site preparation and construction. For the purposes of the off-shore contract, Hover

Naft California was created under the laws of California on 3 October 1978. The on-shore portion of the contract was to be executed by Hover Naft Iran. The Claimants allege that Hover Naft Iran had completed 80% of the site work by 27 November 1978, the date on which Hover Naft Iran, in a letter to the office of the Chairman and Managing Director of KUDO, invoked the force majeure clause of contract 2557. The Claimants assert that Hover Naft Iran's claims arose in the summer of 1979, when it became clear that work under the contracts could not be resumed. The Claimants purport to bring an indirect claim on behalf of Hover Naft Iran, alleging that they together hold 510 shares of 1000 issued for that company.

6. The Respondents allege that virtually no performance had been undertaken by Hover Naft Iran and that, in fact, both Hover Naft concerns were grossly under-capitalized to carry out their obligations under the contract. In this connection the Respondents have put forward several counterclaims for damages arising from breach of contract, for lost rent receipts, for advance payments made by KUDO to Hover Naft Iran, for social security contributions, and for an amount allegedly owed by the Claimants on a performance guarantee.

7. Mr. Gaulin has made a claim for the loss of household goods. Mr. Gaulin contends that his property was dispersed and lost when Revolutionary Guards refused access to Gaulin's friends, who intended to ship the goods.

III. JURISDICTION

a) Jurisdiction over the expropriation claim

8. The Tribunal has previously held that it has jurisdiction over an indirect claim through an Iranian corporation if the "ownership interest" of U.S. nationals was "sufficient at the time the claim arose to control" the latter corporation. See Sedco, Inc. et al. and National Iranian Oil Company et al., Award No. ITL 55-129-3 (24 Oct. 1985), reprinted in 9 Iran-U.S. C.T.R. 248. The Claimants allege that they are eligible to

bring this claim, as together they hold 510 shares of the 1000 issued for Hover Naft Iran.

9. Although the Respondents dispute the number of shares held by Mr. Diba and Mr. Gaulin respectively, the Tribunal does not need to reach a decision on the exact number of shares in view of its decision, infra, on jurisdiction.

10. The Respondents argue inter alia that because Mr. Diba is a national of Iran under Iranian law, he may not present a claim before the Tribunal. Mr. Diba contends that he is a United States national by virtue of his naturalization on 13 October 1959.

11. In view of these contentions, the Tribunal must first examine the nationality of Mr. Diba by applying the criteria given in the Full Tribunal's decision issued in Case No. A18, Decision No. DEC 32-A18-FT (6 Apr. 1984), reprinted in 5 Iran-U.S. C.T.R. 251. As defined in that Decision, a dual Iran-U.S. national is considered a U.S. national for the purposes of the Claims Settlement Declaration if 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. In order to make such a determination, the Tribunal must consider the entire life of the Claimants, from birth, and all relevant factors which evidence the reality and the sincerity of the choice of national allegiance they claim to have made. These factors include Claimants' habitual residence, center of interests, family ties, participation in public life, and other evidence of attachment. See also Reza Said Malek and Islamic Republic of Iran, Award No. ITL 68-193-3 (23 June 1988).

12. In this regard, the Tribunal will first determine whether Mr. Diba was, from the time the Claim arose until 19 January 1981, a national of the United States, or of Iran, or of both countries. If the Tribunal concludes that Mr. Diba holds both nationalities, it will have to determine which one is "dominant and effective" during the relevant time and, consequently must

prevail for purposes of jurisdiction over the present proceedings. In its decision in Case No. A18 the Tribunal noted that the determination of a claimant's dominant and effective nationality requires consideration of "all relevant factors, including habitual residence, center of interests, family ties, participation in public life and other evidence of attachment." 5 Iran-U.S. C.T.R. at 265.

13. It is undisputed that Mr. Diba is an Iranian national by birth. It has not been contended that he ever applied, pursuant to Iranian law, to relinquish his Iranian nationality or that he otherwise lost that nationality. At the same time, Mr. Diba has shown to the Tribunal's satisfaction that he is a United States national. As evidenced by his certificate of naturalization No. 812087 and United States passports, he obtained his United States nationality on 13 October 1959 and has not subsequently renounced it. The pertinent issue thus becomes one of determining, in accordance with the various criteria set forth in the A18 Decision, the dominant and effective nationality of the Claimant at the relevant time.

14. Mr. Benny F. Diba was born in Tehran, Iran, on 4 February 1929. He went to school in Iran and finished Alborz High School in 1948. Mr. Diba moved to the United States on 1 July 1950.

15. In November 1953, Mr. Diba married Beatrice Garbedian, an American citizen by birth. There were two sons born to this marriage. The Claimant asserts that both sons are citizens of the United States and have always resided there.

16. After graduation from San Francisco State College in 1957, Mr. Diba was employed by several United States corporations, up to 1967. In that year Mr. Diba divorced his wife and after a 17 year stay in the United States returned to Iran.

17. In that same year he married Badri Massoumeh, an Iranian national by birth. To this marriage too, two sons were born, in Iran. They were both issued with Iranian birth certificates and identification numbers, and were both registered with the

American Consulate in Tehran as U.S. citizens. Mrs. Badri M. Diba became a citizen of the United States on 4 September 1982.

18. Back in Iran, Mr. Diba began work as a managing director for a number of insurance companies, including Chargh Insurance Company and the Syndicate of Iranian Insurance Companies in Iran. During this period Mr. Diba became involved with a large network of diversified business interests in Iran. He acted as the representative of a number of companies including Lavino Shipping Freight Forwarding, the Delaware River Port Authority, and Porta Kamp, U.S.A., and participated in a number of multinational business ventures, several of which, including Hover Naft Iran, conducted business in Iran. During these years Mr. Diba, by his own admission, owned substantial real and business property in Iran.

19. Mr. Diba alleges that during the time he actually resided in Iran, between 1967 and 1979, he spent only 30% of his time in Iran, approximately 50% of his time in the United States and the remaining 20% of the time was spent in Europe and the Far East.

20. Mr. Diba also maintains that during the same time he was actively involved in two companies doing business in the United States, Benny Diba Associates and DIM, Inc.

21. On 14 November 1978, Mr. Diba left Iran and went to Europe. On 2 August 1979 he arrived in the United States. Since then, Mr. Diba has resided and worked in the United States.

22. At the Hearing Mr. Diba submitted a document showing entry and departure stamps in his Iranian and United States passports between 1971 and 1987.

23. The Tribunal must now proceed to apply the standard set forth in the A18 Decision to the facts before it. The record shows that between 1950 and 1967 Mr. Diba became integrated into American society so that by 1967 his dominant and effective nationality was probably that of the United States, although the Tribunal does not have to reach a decision on this question.

24. However, in 1967 Mr. Diba divorced his American wife and returned to Iran where he married an Iranian citizen. He became actively involved in different businesses in Iran and lived in Iran for the following 11 years. Mr. Diba's passport entries do not support his contention that he spent approximately 50% of his time during the years 1967-1979 in the United States. On the contrary, they indicate that, although Mr. Diba travelled extensively, he spent at most a few months during this period in the United States. Mr. Diba alleges that these entries are misleading, as his passport was frequently not stamped when he entered the United States. The Tribunal also notes that Mr. Diba has failed to document the extent of the business interests he claims to have maintained in the United States during those years. After weighing all the evidence before it, the Tribunal finds that Mr. Diba's business activities and family life were so dominantly centered in Iran from 1967 to 1979 as to compel it to hold that his dominant and effective nationality at the time the Claim arose, whether on 27 November 1978 or in the summer of 1979, was that of Iran.

25. The Tribunal thus concludes that Mr. Diba has failed to establish that his dominant and effective nationality during all of the relevant period was that of the United States. Therefore, the Tribunal does not have jurisdiction over claims brought by Mr. Diba against Iran.

26. It has not been asserted that Mr. Gaulin alone controlled Hover Naft Iran. Noting that the Claimants were the only shareholders alleged to be U.S. nationals, it is clear that at the time the Claim arose Hover Naft Iran was not controlled by U.S. nationals. Consequently, the requirement of Article VII, paragraph 2, of the Claims Settlement Declaration has not been met. In light of this finding, the Tribunal need not address other jurisdictional issues raised by the Respondents. The indirect Claim of Messrs. Diba and Gaulin is dismissed for lack of jurisdiction.

27. As a consequence of its conclusion that the Claim must be dismissed for lack of jurisdiction, it follows in accordance with the established Tribunal practice that the Counterclaims

must likewise be dismissed. See e.g., Reliance Group, Inc. and National Iranian Oil Company, Award No. 15-90-2 (8 Dec. 1982), reprinted in 1 Iran-U.S. C.T.R. 384.

b) Jurisdiction over Mr. Gaulin's Claim

28. The Tribunal is satisfied that Mr. Gaulin is a United States citizen and that his direct claim for loss of his personal property was outstanding on 19 January 1981. The Islamic Republic of Iran is a proper Respondent. This Claim is therefore within the Tribunal's jurisdiction.

IV. MERITS OF MR. GAULIN'S CLAIM

29. In his Statement of Claim, Mr. Gaulin submitted a list indicating all the goods, and their worth, allegedly taken by the Government of Iran. Mr. Gaulin, however, has failed to substantiate his Claim. While he asserts that late in January 1979 Revolutionary Guards unlawfully prevented his friends from recovering his goods, no evidence to that effect was introduced. Although he once indicated that he would submit an affidavit of a Mr. Brighton, which would provide substantial details relating to this Claim, no such affidavit was ever received by the Tribunal. Mr. Gaulin has also failed to submit any evidence relating to the existence of the goods per se. On this record, the Tribunal cannot establish whether Mr. Gaulin's goods were in fact taken, and whether the taking was attributable to the Government of Iran. The Claim of Mr. Gaulin must be dismissed for lack of proof.

V. COSTS

30. Both Parties have made a request for costs in this arbitration. The Tribunal rules that each Party shall bear its own costs of arbitration.

VI. AWARD

31. For the foregoing reasons,

THE TRIBUNAL AWARDS AS FOLLOWS:

(i) The indirect Claim of Messrs. Diba and Gaulin through Hover Naft Iran is dismissed for lack of jurisdiction;

(ii) The Counterclaims of the Respondents are dismissed for lack of jurisdiction;

(iii) The direct Claim of Mr. Gaulin is dismissed for lack of proof;

(iv) Each Party shall bear its own costs of arbitration.

Dated, The Hague
31 October 1989

Robert Briner
Chairman
Chamber Two

In the name of God

George H. Aldrich

Seyed K. Khalilian