DECISIONS AND AWARDS

JAHANGIR MOHTADI AND JILA MOHTADI, *Claimants*

v.

THE GOVERNMENT OF THE ISLAMIC REPUBLIC OF IRAN, *Respondent*

(Case No. 271)

AWARD NO. 573-271-3

DISSENTING OPINION OF MOHSEN AGHAHOSSEINI [1]

In order to attain its objective of rewarding the Claimant with a substantial sum of money, the majority in the present Case has had to defy both the law of this Tribunal and a number of well-established facts. It has done so, and with no qualms. In this Dissenting Opinion, I propose to deal with some of the more important instances of this, so as to show the gravity of the injustice to which the Respondent is thereby subjected.

I. THE CAVEAT

In its leading decision in Case No. A18, the full panel of this Tribunal held that:

> [I]t 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.[2]

To this, however, the Tribunal added an important Caveat:

> In cases where the Tribunal finds jurisdiction based upon a dominant and effective nationality of the claimant, the other nationality may remain relevant to the merits of the claim.[3]

In a host of cases subsequently decided, the Chambers of the Tribunal further explained the meaning, and determined the scope of the application, of the Caveat. Its prime application, one is told time and time again, is where the claimant acquires rights, or continues to enjoy benefits, not available to

[1 Signed 25 February 1997; filed 25 February 1997. This award is reprinted at 32 IRAN-U.S. C.T.R. 124.]

2 Case No. A18, *Islamic Republic of Iran* v. *United States of America*, Decision No. DEC 32-A18-FT, at 25 (6 Apr. 1984), *reprinted in* 5 IRAN-U.S. C.T.R. 251, 265.

3 *Id.*, at 265-6.

him through his dominant nationality. A claimant, for instance, whose dominant nationality is determined to be American may thus not resort to this Tribunal to enforce rights which he could not have obtained as an American.

Here is but one example:

> This jurisdictional determination of the Claimants' dominant and effective nationality remains subject to the caveat added by the Full Tribunal in its decision in Case No. A18 . . . that "the other nationality may remain relevant to the merits of the Claim." The Tribunal will therefore in the future proceedings examine all circumstances of this Case also in light of this caveat, and will, for example, consider *whether the Claimants used their Iranian nationality to secure benefits available under Iranian law exclusively to Iranian nationals*. . . .[4]

A more recent reference to this will be found in *Saghi* Case, where it was stated that:

> The caveat is evidently intended to apply to claims by dual nationals for benefits limited by relevant and applicable Iranian law to persons who were nationals solely of Iran.[5]

Of those "benefits limited by relevant and applicable Iranian law to persons who were nationals solely of Iran", one has already been identified by the Tribunal: the right to acquire or retain immoveable property in Iran. This was the ruling in *Karubian*,[6] in which Chamber Two of the Tribunal, having reviewed all the pertinent laws of Iran, concluded that:

> The foregoing legislation indicates that, except for certain circumstances which do not exist in the present Case, the right to acquire real property in Iran by contract is reserved by relevant Iranian law to Iranian nationals. Accordingly, the Tribunal finds that the Claimant could only have acquired the properties in question as an Iranian national.[7]

Such, then, is the clear law of this forum on the subject. Where, in a case against Iran, a national of both Iran and the United States is able to prove that his dominant nationality at all relevant times was that of the United States, the Tribunal is jurisdictionally competent to hear his complaint. Yet the Tribunal

[4] *Edgar Protiva, et al.* v. *Government of the Islamic Republic of Iran*, Interlocutory Award No. ITL 73-316-2, para. 18 (12 Oct. 1989), *reprinted in* 23 IRAN-U.S. C.T.R. 259, 263 (emphasis added). *See also Faith Lita Khosrowshahi, et al.* v. *Government of the Islamic Republic of Iran, et al.* Interlocutory Award No. ITL 76-178-2, para. 16 (22 Jan. 1990), *reprinted in* 24 IRAN-U.S. C.T.R. 40, 45.

[5] *James M. Saghi, et al.* v. *Islamic Republic of Iran*, Award No. 544-298-2, para. 54 (22 Jan. 1993), *reprinted in* 29 IRAN-U.S. C.T.R. 20, 38.

[6] *Rouhollah Karubian* v. *Government of the Islamic Republic of Iran*, Award No. 569-419-2 (6 Mar. 1996), *reprinted in* 32 IRAN-U.S. C.T.R. 3.

[7] *Id.*, para. 159.

will not proceed further if it is shown that what is complained of is the asserted interference with the claimant's right of ownership of real property in Iran – a right which, by the relevant laws of Iran, is reserved for the nationals of Iran.

Turning now to the Case at hand, what was before the Tribunal was an assertion by such a dual national that two pieces of land in Iran, purchased by him some years before his naturalization as a United States' citizen in 1978, were expropriated by Iran after his naturalization. Having first determined that the Claimant's dominant nationality during the relevant times was that of the United States, it was incumbent upon the Tribunal to immediately turn to that threshold issue of the admissibility of the claim on the merits and, on the basis of its clear precedent, reject the complaint. The Claimant had acquired the benefit – the ownership of land in Iran – exclusively by virtue of his Iranian nationality. He could not now rely on his United States' nationality to seek redress for the alleged breach of that right.

But the majority refuses to do so. *First*, it declines to consider the Claimant's use of his nationality – which point belongs to the admissibility of a claim on the merits – as a preliminary issue. Instead, it takes the very strange course of examining, and pronouncing itself upon, every issue related to the merits proper of the claim before turning to the enquiry mandated by the Caveat.

Now this is an error in law, likely to result in gross injustices. In order to appreciate the preliminary nature of the inquiry under the Caveat, and the reason why it should be undertaken prior to the examination of the merits proper of a case, one need only recall the fact that when a claim is rejected by an international forum due solely to the claimant's improper use of his nationality, the claimant is not then necessarily prevented from raising his claim before other fora competent to hear his complaint. Indeed, the claimant in such a case may still refer his claim to a national forum, before which his reliance on a given nationality – proper or improper – may well be of no relevance.[8]

And yet the course of action adopted by the majority is capable of leading, where the claim is judged to be inadmissible because of the operation of the Caveat, to a situation in which a forum competent to hear the merits finds that another forum has already pronounced itself on the subject; and that, obviously enough, cannot be right. It cannot be right for a forum dealing with the issue of whether or not a claim is admissible to pass judgement on the merits of that claim.[9]

[8] It is true of course that the exercise of this right is, as far as the claimants before this Tribunal are concerned, severely curtailed. But that is the result of certain provisions in the Algerian Declarations, and hence wholly irrelevant to the point under discussion.

[9] The International Court of Justice, too, has noted the antecedent character of the inquiry under discussion:

Next, even when the majority, belatedly and after a tour of all the issues belonging to the merits of the claim, reverts to the Caveat, it refuses to apply it in the Case. The precedent of the Tribunal on the subject is, as suggested before, too clear for the majority to ignore. What it does, instead, is to try to distinguish the present Case on the basis of a most unsatisfactory argument.

When read together, says the majority, Articles 988 and 989 of the Civil Code of Iran permit an Iranian national who in violation of the law acquires a second nationality to retain for a period of one year any real property he owns in Iran. And since the measures for which the present claim is pursued were adopted by the Respondent State in less than a year after the Claimant's acquisition of the United States' nationality, the question of the Caveat need not be addressed here. In other words, since the Claimant was entitled, according to the majority, to legitimately continue to own his real property in Iran within that one-year grace period, the issue of whether or not he improperly used his nationality of origin does not fall for decision.

This argument is based not only on a misinterpretation of the pertinent laws of Iran, but on a misrepresentation of the facts of the Case. The first will be dealt with here, and the second in the next section of this Dissent, where factual issues are addressed.

Under Article 988 of the Civil Code:

> Iranian nationals may not abandon their nationality except on the following conditions:
>
> 1- They should have reached the age of twenty-five.
>
> 2- The Council of Ministers allow them to abandon their nationality.
>
> 3- They undertake in advance to transfer in one way or another to Iranian nationals, within one year from the date of abandoning their nationality, their rights to immovable property they own in Iran or may come to own by inheritance, even if Iranian law permits their ownership by foreign nationals. . . .

The Article, it will be readily seen, lays down the conditions which must be met by any Iranian who wishes to *lawfully* abandon his Iranian nationality.

(Footnote continued from p. 5)

On all these matters, the Court has studied the written pleadings and oral arguments of the Parties, and has also given consideration to the question of the order in which the various issues would fall to be dealt with. In this connection, there was one matter that appertained to the merits of the case but which had an antecedent character, namely the question of the Applicant's standing in the present phase of the proceedings, – not, that is to say, of their standing before the Court itself, which was the subject of the Court's decision in 1962, but the question, as a matter of the merits of the case, of their legal right or interest regarding the subject-matter of their claim. . . . *South West Africa, Second Phase, Judgement*, I.C.J. Reports (1966) 6, 18.

These are three. He must have attained the age of twenty-five, received the consent of the Council of Ministers, and given an undertaking in advance to transfer to Iranian nationals his immovable property in Iran within one year from the date of abandoning the Iranian nationality. The Article then goes on to provide that if these prerequisites are properly met by the national, he will no longer be regarded as an Iranian; his acquired foreign nationality will be recognized by Iran; and the one-year grace period for disposing of the immovable property, undertaken by the national, will be respected.

It will be further observed from the provisions of the said Article *that*, with regard to the ownership of immovable property in Iran, the case of an Iranian national who with full observance of the law abandons his nationality may be more restricted than that of a foreign national (there will be no such right for the former "even if Iranian law permits [such] ownership by foreign nationals"); and *that* the national may continue to enjoy ownership of his property for one year only if he fulfills the necessary conditions referred to in the Article, including the making of a specific commitment to dispose of his property within that period. The one-year period is, in other words, clearly an incentive for compliance with the law.[10]

There is then Article 989, which deals exclusively with an utterly different – indeed the very opposite – case of an Iranian national who acquires a new nationality in defiance of the requirements set by the law. Here, the national's acts of abandoning his Iranian nationality and acquiring a new one will *not* be recognized by Iran ("he shall be regarded as an Iranian subject" and "the acquired nationality shall be regarded as void"). His immovable property, however, will nevertheless be sold under the supervision of the public prosecutor of the place:

> Any Iranian national who has acquired foreign nationality after the solar year 1280 A.H. (1901-2) without observing the law's requirements shall have his foreign nationality declared null and void and shall be regarded as an Iranian subject. At the same time, however, his immovable property shall be sold under the supervision of the Public Prosecutor of the place and the proceeds shall be paid to him after the deduction of the expenses of the sale. . . .

Such being the simple and unambiguous terms of the said two Articles – the first dealing with a lawful act and its consequences and the second with an unlawful act and its wholly different consequences – there can be no justification, none whatsoever, for any attempt at importing the one-year grace period provided under Article 988 into Article 989, in which there is no

[10] An example of such incentive can be found in many taxation laws which provide for reduced tax rates when a tax payer chooses to pay his dues prior to a given date.

mention of such period. In the case covered by Article 988, the national undertakes, in conformity with the law's requirements, to dispose of his property within one year, and the law naturally respects its promise not to interfere with the property throughout that period. In the case covered by Article 989, the national makes no such undertaking, despite the law's mandate.

It would, therefore, be a very strange law if it still provided the national with a similar respite. Indeed, once this notion of a one-year grace period is artificially introduced into Article 989, the very purpose of the two Articles would be entirely defeated. That purpose, invariably adopted by the law-makers all over the world, is to differentiate between a lawful and an unlawful act, to encourage the former and to discourage the latter, by providing different consequences for each. The proposed introduction of a grace period into Article 989 would mean this, that under the Iranian law, as reflected in Articles 988 and 989 of the Civil Code, a national of Iran who wishes to abandon his Iranian nationality in favor of a foreign nationality must fulfill certain conditions, in which case he would be allowed to retain his immovable property in Iran for a maximum of one year. However, if he refuses to do so, he would likewise be allowed to retain his property for the same length of time! Such a policy cannot lightly be attributed to any sane legislator.

Besides, a glance at the subjects with which Article 989 exclusively deals will at once demonstrate the untenability of the majority's interpretation of the Article. That Article, unlike Article 988, does not address the issue of the required undertaking by the national to dispose of his real property in Iran, so as to allow one to speculate about the existence in there of a grace period. What Article 989 speaks of is the law's refusal to recognize the subject's acts of abandoning his Iranian nationality and acquiring a foreign nationality, together with the duty of the local public prosecutor to sell the national's immovable property.

The only way, therefore, that this notion of a one-year grace period can be introduced into Article 989 is by placing a time restriction on the prosecutor's duty to sell, so as to make the Article read: The national's acts of abandoning his Iranian nationality and acquiring a foreign nationality shall not be recognized, and yet his immovable property shall be sold by the local public prosecutor *after one year from the date the foreign nationality is acquired*. This is so, simply because once it is admitted, as it must, that the prosecutor's authority to sell is vested in him as from the date of the national's unlawful acquisition of a foreign nationality, the existence of any grace period may no longer be advocated. And yet the placing of such a restriction, under Article 989, on the prosecutor's duty to sell cannot, I suggest, be justified by any known canon of interpretation.

There is yet another equally strong reason why the one-year grace period may not be read into Article 989. It is to be found in Proviso "A" to Article 988, added in February 1970:

> Those who, in accordance with this Article, seek to abandon their Iranian nationality and to acquire a foreign nationality must, in addition to implementing the provisions of Clause 3 of this Article, leave Iran within three months from the date of the issuance of the certificate of abandonment of nationality. If they do not leave Iran within the said period, competent authorities shall issue order for their expulsion and the sale of their assets. . . .

The relevance of this to the present enquiry will not be missed. As already explained, Article 988 determines the requirements for a lawful abandonment of Iranian nationality, while Article 989 addresses itself to the consequences of a failure to meet those requirements; and the question before us is whether a one-year grace period, granted in a case in which the requirements *are met*, may be extended to a case in which those requirements *are not met*.

To this question, the Proviso provides a negative answer, as will now be explained. Adding a fourth requirement – the national having to leave Iran within three months – to the three requirements laid down in the text of Article 988, the Proviso proceeds to itself determine, as against leaving it to Article 989, the consequence of a failure: the issuance of an order by competent authorities for the expulsion of the national and the sale of his property. The reference to a single order, and the absence of any reference to a grace period, make it abundantly clear that both sanctions will be applied simultaneously and immediately upon the national's failure to leave the country. There is, in other words, no room in the Proviso for a piecemeal imposition of the sanctions: by an order for the immediate expulsion of the national, and by another, issued a year after, for the sale of his property.

If, then, the result of a failure to meet only one of the four requirements – to leave Iran within three months – is the issuance of an order for the immediate sale of the national's immovable property, the consequence of a failure to meet all of the law's other requirements cannot possibly be a permission granted to the national to retain his property for a year.

Indeed, the national who fails to leave Iran within three months after the issuance of "the certificate of abandonment of nationality" has already complied with the requirement to undertake to sell his property within one year; for, otherwise, "the certificate" would not have been issued to him in the first place. Yet the order for the immediate sale of his property will be issued if he nevertheless fails to leave Iran within three months. Hence, even where the national undertakes to, and is duly granted, a one-year respite, this will be withdrawn at once if he fails to meet a further requirement of the law: to leave

Iran within three months. He cannot possibly enjoy the respite, if he fails to meet the very requirement of undertaking to sell his property.

Interestingly enough, the majority seems to be itself fully aware of the fact that the one-year grace period, granted by Article 988 for those who observe the law, cannot be read into Article 989, which deals with those who *do not* observe the law. That is evidently why for arriving at a contrary conclusion the majority offers no reasoning – none whatsoever – of its own. What the majority does, instead, is to simply attribute its desired conclusion – the existence of a one-year grace period under Article 989 – to two other sources, namely, the submission by the representative of the Respondent, and a passage in an earlier Award issued Chamber Two of this Tribunal.[11] Neither provides any justification for the majority's misreading of the Iranian law in the present Case.

It must be noted, first, that what was at issue here was the correct interpretation of a piece of legislation before the Tribunal. And it can hardly be disputed that where it befalls on an adjudicating body to interpret the law at issue – as against where it is required to determine the pertinent facts – it is for that body alone to use its independent judgment and to satisfy itself of the correctness of the interpretation it is called upon to make. Such a body may not, in other words, pronounce itself on a point of law, and apply the law so pronounced, simply by relying on the position taken in that respect by this or that party to the dispute.

Besides, what the majority asserts to have been the position taken in this regard by the representative of the Respondent is not, in fact, the Respondent's position. As the majority is fully aware, the Respondent has, subsequent to the representation on which the majority readily relies, stated quite clearly *that* its reference to a grace period under Article 989 – made earlier and where this was not a central issue – is untenable and hence no longer maintained by the Respondent, and *that* the clear wording of Article 989 rejects any such interpretation.

The Respondent has said so in its most comprehensive dealing with the issue, namely, in the "Brief of the Islamic Republic of Iran on the Issue of the Caveat in Case A18 (A Response to the U.S. Memorial)", submitted to all Chambers of the Tribunal on different dates, including to this Chamber on 16 September 1994. Following an exhaustive discussion on the issue of a dual national's retention of immovable property in Iran after the acquisition of a foreign nationality, the Respondent there concludes:

[11] *Leila Danesh Arfa Mahmoud* v. *Islamic Republic of Iran*, Award No. 204-237-2 (27 Nov. 1985), *reprinted in* 9 IRAN-U.S. C.T.R. 350.

> In Article 989, unlike 988, there is no one year time limit for the Iranian citizen to sell his immovable property. Under Article 989, the dual national is not supposed to own any real estate from the day he acquires a foreign nationality. This distinction is grounded on the lawful approach of an Iranian citizen abandoning his Iranian nationality under Article 988, before taking a foreign nationality, as compared to one who ignores the Iranian law requirements for the acquisition of another nationality.

Such, and not what the majority wishes to make believe, is the clear position of the Respondent State on the meaning of Article 989. Two further points in this respect must be briefly mentioned. *First*, it is of course quite proper for a party to subsequently adjust its submission on a point of law – here the correct meaning of an Article – where that party comes to realize the error in its earlier view. *Secondly*, the majority may not be justifiably heard to assert that although it was made aware of the Respondent's final position on the issue, it has invoked the Respondent's earlier stance because the Memorial setting forth the Respondent's final position has not been submitted into the record of the present Case. This cannot be accepted not only because the majority in this very Award has relied, time and time again, on the Respondent's submissions in other Cases before the Tribunal,[12] but also because, as the Respondent has since quite correctly pointed out:

> Iran, in a Memorial prepared on the basis of a comprehensive analysis of Iranian law, has fully discussed the import of Articles 988 and 989 of the Iranian Civil Code. That Memorial, filed in a large number of cases in response to the United States Memorial on the Issue of A/18 Caveat under Note 5 to Article 15 of the Tribunal Rules, represents Iran's position on Iranian law; and it was this submission which was expected to be considered as a statement of Iranian law on the issue at hand. Memorials of this kind (*amicus curiae*) intended to assist the Tribunal in carrying out its task need not, naturally, be filed in every given case to be referred to.[13]

So much for the first ground invoked by the majority in justification of its misreading of Article 989 of the Civil Code of Iran. And now to the second, and last, ground: the Decision by Chamber Two of this Tribunal in the *Mahmoud* Case.[14] There, the real estate at issue had come to the Claimant by way of inheritance sometime in 1970. She had become a United States' citizen in August 1979, and had alleged that the expropriation of her real estate had taken place sometime in March/April 1980, within less than a year

[12] *See*, for instance, the majority's extensive reliance at paras. 62 and 68 of the Award on evidence submitted by parties to other cases before the Tribunal.

[13] From the Respondent's letter of 6 January 1996, objecting to the majority's mischaracterization of the Respondent's position on the pertinent Iranian law.

[14] *Supra* note 11.