

PCA CASE NO 2012 – 07

**IN THE MATTER OF AN ARBITRATION UNDER THE AGREEMENTS BETWEEN
THE REPUBLIC OF FINLAND AND THE ARAB REPUBLIC OF EGYPT ON THE
PROMOTION AND PROTECTION OF INVESTMENTS RESPECTIVELY DATED
5 MAY 1980 AND 3 MARCH 2004 AND THE UNCITRAL ARBITRATION RULES 1976
BETWEEN**

MOHAMED ABDEL RAOUF BAHGAT

The Claimant

- And -

THE ARAB REPUBLIC OF EGYPT

The Respondent

CLAIMANT’S COUNTER-MEMORIAL ON JURISDICTION

ARBITRAL TRIBUNAL

**Professor Rüdiger Wolfrum, Presiding Arbitrator
Professor W. Michael Reisman
Professor Francisco Orrego Vicuña**

Registry

Permanent Court of Arbitration

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Egyptian nationality on 28 September 1997 by Ministerial Resolution No. 10815 of 1997, his acquisition of Egyptian nationality by application in 1997 fell within the scope of section 8 of the 1968 Act (as amended) and he lost his Finnish nationality automatically and by operation of Finnish law.⁴³

- (vi) “Furthermore ...it was legally impossible as a matter of Finnish law for Claimant to have been a Finnish national alongside his Egyptian nationality between 28 September 1997 and 1 June 2003.”⁴⁴
- (vii) The Respondent then relies upon the expert opinion of Professor Scheinin in support.

3.2. The Respondent’s contentions on Finnish nationality law and the implications arising from the 1968 Act are incorrect. The Claimant’s position and the evidence of his experts are to be preferred.

(i) Dual nationality is recognized in Finnish law

3.3. The Respondent’s contention that it was legally impossible under Finnish law for the Claimant to have had dual nationality between September 1997 and 1 June 2003 is incorrect. Without prejudice to his contention that the Egyptian Ministerial Decree did not restore Egyptian nationality to the Claimant, the following is noted.

3.4. The Claimant was given Finnish nationality in 1971 by a decree issued by the President of Finland, which did not require him to give up his Egyptian nationality but, on the contrary, allowed him to retain his Egyptian nationality.⁴⁵

⁴³ Request for Bifurcation, ¶¶71-76.

⁴⁴ Request for Bifurcation, ¶77.

⁴⁵ See Exhibit C0062 for a copy of the Finnish President’s Decree and Ojanen First Expert Opinion, ¶59.

- 3.5. According to Professor Aulis Aarnio, one of the Claimant's experts on Finnish law, the net effect of the President's Decree granting Finnish nationality to the Claimant was as follows:

"Finland granted Finnish citizenship to Mr Bahgat without imposing any condition requiring him to relinquish his Egyptian citizenship. On the contrary, when he was granted Finnish citizenship he was allowed to retain his Egyptian citizenship. So Finland's offer of citizenship to Mr Bahgat was made on the terms that him holding a second nationality, Egyptian, did not affect his Finnish nationality."⁴⁶

- 3.6. Professor Tuomas Ojanen, another of the Claimant's experts on Finnish law, expresses this view on the effect of the President's Decree:

"... Mr. Bahgat was given Finnish nationality by a decree issued by the President of the Republic of Finland in 1971. In this decree, it was explicitly stated that Mr. Bahgat was given Finnish nationality, whilst still retaining his Egyptian nationality. Moreover, Mr. Bahgat was not required to renounce his Egyptian nationality by the Finnish authorities when acquiring his Finnish nationality in 1971."⁴⁷

- 3.7. Around 15 March 2000, the Directorate of Immigration notified the Finnish Ministry of Foreign Affairs that the Claimant had acquired Finnish nationality on 12 February 1971 without losing his Egyptian nationality. Hence, the Directorate of Immigration concluded that the Claimant "has both Egyptian and Finnish nationality."⁴⁸ According to Professor Ojanen this notification:

"amounts to the determination of the citizenship status of Mr Bahgat: he was considered by the Directorate of Immigration a dual national with both Egyptian and Finnish nationality."⁴⁹

He proceeds to opine that:

"... as explicitly confirmed by the judgment of the Supreme Administrative Court in the case of KHO 2011:17, the Decision of the Directorate of Immigration on the determination of the citizenship status is capable of acquiring the *res judicata* effect."⁵⁰

⁴⁶ Aulis First Expert Opinion, ¶2.1.

⁴⁷ Ojanen First Expert Opinion, ¶59.

⁴⁸ See Exhibit C0065 for a copy of the advice and see Ojanen First Expert Opinion, ¶62.

⁴⁹ Ojanen First Expert Opinion, ¶65.

⁵⁰ Ojanen First Expert Opinion, ¶67. See CLA45 for the full Finnish text of the Supreme Administrative Court decision in the case of KHO 2011:17.

and:

“..the notification by the Directorate of Immigration on the citizenship status of Mr. Bahgat shows that the competent Finnish authority in nationality affairs did not only accept Mr. Bahgat’s dual nationality. The notification also strongly suggests that the Directorate of Immigration actually regarded it as wholly irrelevant for Mr. Bahgat’s Finnish nationality that he also had Egyptian nationality.”⁵¹

3.9. The Respondent itself acknowledged in writing on 21 October 2002 that the Claimant had dual nationality, Finnish and Egyptian.⁵² It confirmed that “[h]e has acquired the Finnish citizenship in addition to the Egyptian nationality.”

3.10. In paragraph 65 of the Request for Bifurcation and in footnote 66, the Respondent accepts that the 1968 Act *did not altogether prohibit* multiple nationalities and there were circumstances under which Finnish nationals “could hold multiple nationalities” (such as immigrants who acquired Finnish nationality but were incapable of renouncing their pre-existing nationality and Finnish nationals who are granted a foreign nationality under circumstances which did not fulfill the preconditions for loss of Finnish nationality enumerated in section 8 of the 1968 Act). Professor Ojanen has opined to similar effect:

“Actually, Mr Bahgat himself seems to feature as a prime example of the fact that the principal rules under the 1968 Nationality Act were not without exceptions. A decree issued by the President of the Republic of Finland granting him Finnish nationality in 1971 explicitly states that Mr Bahgat is given Finnish nationality, whilst still retaining his Egyptian nationality.”⁵³

3.11. The Claimant submits that the Respondent’s submission in paragraph 65 of its Request contradicts the views of the Respondent’s expert, Professor Scheinin, and is in fact consistent with the Claimant’s experts’ positions on Finnish law. Dual nationality was *de facto* accepted in Finland before 2003 as the data show.⁵⁴ Any contention as to the legal impossibility of dual nationality is wrong. Further, section

⁵¹ Ojanen First Expert Opinion, ¶66.

⁵² See Respondent’s letter to the Finnish Embassy in Cairo in Exhibit C0068.

⁵³ Ojanen First Expert Opinion, ¶24.

⁵⁴ Please see copy of an article published in the Helsingin Sanomat showing that there were just over 15000 dual nationals living in Finland in 2000 in Exhibit C0069.

9 of the 1968 Act shows that dual or multiple nationality was recognized as an underlying possibility by the Finnish legislature.⁵⁵ So far as concerns the current case, the Directorate of Immigration's notification as reported in a memorandum dated 15 March 2000 "constitutes a uncontested evidence on the fact that a person could, contrary to Professor Scheinin's position, hold *genuine dual citizenship* in Finland on the basis of Sections 8 and 9 of the Finnish Nationality Act."⁵⁶

3.12. The Claimant therefore denies that any acquisition of Egyptian nationality in 1997 (which is denied) automatically or otherwise meant that he lost his Finnish nationality. The Claimant was recognized and accepted as a dual national at all material times by the competent authorities in Finland. Accordingly the acquisition of Egyptian nationality (if any) made no difference to his Finnish nationality.

(ii) There is no automatic loss of Finnish nationality under section 8 of the 1968 Act

3.13. The Respondent's argument is put forward by its expert witness in these terms: when the Claimant through his own request reacquired his Egyptian nationality on 28 September 1997 he lost his Finnish nationality *ipso jure* at the same moment.⁵⁷ Professor Scheinin's view is that, under the 1968 Act, as amended in 1984, the loss of nationality was a mandatory and automatic consequence of a person obtaining the nationality of another country by application.⁵⁸

3.14. The Claimant's expert witnesses on Finnish law reject the views expressed by Professor Scheinin on mandatory and automatic loss arising under section 8 of the 1968 Act. According to Professor Ojanen, section 8 of the 1968 Act, as amended in 1984, cannot be construed so that this provision entailed automatic loss of Finnish nationality. He gives three reasons that lead him to that conclusion:

⁵⁵ Ojanen First Expert Opinion, ¶57.

⁵⁶ Aarnio First Expert Opinion, p. 26.

⁵⁷ Scheinin Expert Opinion, ¶26.

⁵⁸ Scheinin Expert Opinion, ¶36; Request for Bifurcation, ¶¶52-56.

- (i) Section 8 required that there had to be a voluntary acquisition of foreign nationality;
- (ii) Related to the above, the effect of a judgment of the Supreme Administrative Court dated 28 November 1995, and the allied decision of the Ombudsman of the Parliament of Finland, illustrate that, under section 8, a person did not automatically lose nationality without there being any need for the competent authorities to establish the existence of consent to the acquisition; and
- (iii) Section 8 has to be read together with section 9 of the 1968 Act. Section 9 not only shows that dual or multiple nationality was recognized. It also shows that the 1968 Act did not require automatic loss of Finnish nationality and provides for a system by which a Finnish dual or multiple national could be released from Finnish nationality:

“If Section 8, paragraph 1, had required that Finnish nationals invariably lost their Finnish nationality *ipso jure* through the acquisition of the nationality of a foreign country, Section 9 of the 1984 Act would have been totally inapplicable and meaningless.”⁵⁹

3.15. Professor Aarnio opines that when read together sections 8 and 9 of the 1968 Act:

“... are *legally ambiguous*. For this reason neither the grammatical nor the normative structure of either provision can lead to a conclusion as absolute as that of Professor Scheinin, that a Finnish citizen would automatically lose Finnish citizenship upon application for foreign citizenship,

On the contrary, a significant novelty in these laws was the *clarification of conditions for loss*. This concerned particularly the concepts of application and consent.”⁶⁰

⁵⁹ Ojanen First Expert Opinion, conclusion at p. 24.

⁶⁰ Aarnio First Expert Opinion at pp. 36-37.

(iii) The Claimant did not make an application for the purposes of section 8 of the 1968 Act

3.16. According to Professor Ojanen, under Finnish law, the Claimant's nationality as of now:

“should be assessed primarily in the light of the current nationality legislation in force, i.e. the Nationality Act 2003. This is even more so because, as noted by the Supreme Administrative Court in the case of KHO 2011:77, a decision involving the determination of citizenship status of a person generates a presumption that this person is a Finnish citizen with all those rights and duties that Finnish citizenship entails. Thus, provisions of the Finnish Constitution on legal protection (Section 21) and the duty of the public authorities to guarantee the observance of fundamental rights and human rights (Section 22) must also be taken into account when assessing today, in 2013, the citizenship status of Mr Bahgat in the light of the current nationality legislation in force.”⁶¹

3.17. The Claimant submits the following without prejudice to the above opinion and on the assumption (but without accepting it) that the 1968 Act, as amended in 1984, is applicable to the facts of this case.

(a) The Claimant did not acquire Egyptian nationality under Egyptian law

3.18. The Claimant was coerced by the Respondent's Minister of Industries to fill in an application form for the restoration of Egyptian nationality on 1 September 1997 when he had had no intention to seek such nationality. Thereafter the Claimant was required to hand over the form to the same Minister (who was not authorized under Egyptian law to receive such an application) at his office premises and on the same day. The facts relating to this coercion have been set out above in paragraph 2.10.⁶²

3.19. As per Article 127 of the Egyptian Civil Code:

“A contract is voidable as a result of duress, if one of the parties has contracted under the stress of justifiable fear unlawfully instilled in him by

⁶¹ Ojanen First Expert Opinion ¶80. See CLA45 for the full Finnish text of the Supreme Administrative Court decision in the case of KHO 2011:17.

⁶² On the Egyptian law on duress see Aboulmagd's Third Expert Opinion, ¶¶57-87.

the other party. Fear is deemed to be justified when the party who invokes it has been led to believe, based on the circumstances, that serious and imminent danger threatens his or others life, body, dignity, or property. In assessing the extent of duress, the sex, age, social position and health condition of the victim should be taken into consideration, as well as any other circumstances that might have aggravated the duress.”⁶³

3.20. In addition to being coerced, the Claimant’s application for restoration was processed by the Ministry of Interior without the submission of documents (including evidence issued by competent authorities from both Egypt and the applicant’s country of foreign nationality showing the applicant’s criminal records, if any), which are mandatory attachments to such an application under Egyptian law. Processing such a defective application was in breach of Egyptian law.⁶⁴ In view of these serious failures to comply with Egyptian law when processing the application form filled in by the Claimant, the Claimant’s expert on Egyptian law has opined as follows:

“Accordingly, in our opinion, the Minister of Interior was under a statutory obligation not only to refuse receiving Mr Bahgat’s application but also to consider such application as never having been tendered. In short Mr Bahgat did not make any or any proper application seeking the reinstatement of Egyptian nationality and the Ministry of Interior was obliged to take no notice of such distortion of the application process.”⁶⁵

3.21. According to the Claimant’s expert on Egyptian nationality matters (passports and immigration), General Nabil Abdel Majeed Mahmoud, who worked for many years in the Egyptian Passports department, it was *unprecedented* in his experience that an application seeking restoration of Egyptian nationality (a) handed over to a person unauthorized under Egyptian law to receive such an application; and (b) submitted without enclosing mandatory attachments to such an application, such as evidence of the applicant’s criminal records issued by competent Government officials from both Egypt and the country of the foreign nationality, be processed

⁶³ Aboulmagd’s Third Expert Opinion, ¶74.

⁶⁴ Aboulmagd’s Third Expert Opinion, ¶¶49-55 and Passports and Nationality Expert Opinion.

⁶⁵ Aboulmagd’s Third Expert Opinion, ¶55.

and approved at a breakneck speed, resulting in a Ministerial Decree being issued allowing such restoration in less than four weeks.⁶⁶

3.22. According to General Nabil Abdel Majeed Mahmoud:

“ ... we stand before an exceptional case which is not available for regular applicants who wish to instate their Egyptian nationality. The law has not granted the Minister of Interior the power to make exceptions to the rules which must be met, which started with the application being submitted to the Ministry of Industry rather than the authorized officer; which is an unprecedented incident. Moreover, the conditions for application were not met as Claimant did not contain provide his criminal status record. This is in addition to the period which the issuance of the decree has taken. We thus, consider that decree No. 10815 for the year 1997, issued by the Minister of Interior on 28/9/1997, reinstating the Egyptian nationality to Claimant: Mohamed Abdel Raouf Bahgat Abdoush, as defective and therefore should be rescinded, and considered null, void and inexistent.”⁶⁷

3.23. It is not just that the application was defective. The speed with which the Egyptian Minister of Industries and the Egyptian Ministry of Interior worked together to facilitate the issue of the Ministerial Decree, and the procedural irregularities, show that this was by no means a normal application for such a restoration, and provide further evidence in support of the Claimant’s case on coercion.

3.24. As for the efficacy of the Ministerial Decree No. 10815 of 1997, reinstating the Claimant’s Egyptian nationality, Professor Aboulmagd has opined that the Ministry of the Interior could have conferred Egyptian nationality only:

“where there is a genuine application for such nationality and in compliance of the nationality requirements based on the provisions of the applicable laws and regulations. Any administrative decision or decree issued in deviation from the nationality requirements, as set out in the applicable law, is a violation of the law and such deviation is tantamount to usurping the Legislator’s authority. Consequently, such violation would render the relevant administrative decree as being nonexistent.”

⁶⁶ Passports and Nationality Expert Opinion.

⁶⁷ Passports and Nationality Expert Opinion, p. 5 of English translation.

3.25. Professor Aboulmagd then concluded that the Ministerial Decree was an in-existent act void of any efficacy for the following reasons:

“First; no application was made by Mr Bahgat in accordance with and in compliance with the relevant rules and therefore the Minister had had no application before him which he could grant or work upon;

Second; Mr Bahgat had been coerced by a fellow Minister to fill in that application form under pressure and such duress meant that Mr Bahgat had had no genuine intention or free will to make such an application;

Third; and as a consequence of the combination of these two factors, this whole exercise of Egypt’s forcing Mr Bahgat to apply for Egyptian nationality and the manner and speed with which it was granted was a gross default committed by the two Ministers that negatively affected Mr Bahgat.”⁶⁸

3.26. The Respondent’s expert on Egyptian law has also expressed the same view if coercion is proven by the Claimant. In paragraph 39 of his opinion Dr Badran has said that if the Claimant succeeds in proving that he was coerced to regain Egyptian nationality then the decision of the Minister of Interior “shall be null and void; it could even be declared non-existent.”

(b) The Claimant did not lose his Finnish nationality under Finnish law

3.27. The Respondent’s expert, Professor Scheinin, barely touches on the issue of coercion in his lengthy opinion.⁶⁹ He says in effect that, as there is a strong presumption that an application for a foreign nationality is treated as triggering the loss of Finnish nationality, anyone claiming to have been coerced has to apply asking for a determination under section 36 of the 2003 Nationality Act. His view appears to be that the victim of coercion loses his or her Finnish nationality immediately, and his or her only entitlement thereafter is to seek a determination of his or her nationality.

⁶⁸ Aboulmagd’s Third Expert Opinion, ¶¶106-107.

⁶⁹ Scheinin Expert Opinion, ¶¶62-63.

- 3.28. The Claimant's experts on Finnish law disagree with Professor Scheinin's view. One of the critical issues for the Tribunal to determine is whether, in the facts of this case, the Claimant can be considered to have made (a) any application at all seeking a foreign nationality, and (b) if made, whether such application was made voluntarily so as to be able to come under the purview of section 8 of the 1968 Act.
- 3.29. The Claimant refers to the Supplementary Expert Opinion of Professor Aarnio in which he opines as follows:

“3.2.1. The Point of Departure

1. The decisive provision regulating the loss of Finnish citizenship is Section 8 of the 1984 Nationality Act (10.8.1984/584). This presupposes that an application for citizenship of another country is based on person's free will. This idea is perfectly aligned with the basic principles of civil and administrative law. No one can be penalized on the basis of an involuntary activity.

This conclusion is also supported by the *travaux préparatoires* to the 1984 Act. According to these, the loss of citizenship could only result from an application that could be proven to be voluntary...

In addition to the free will of the applicant, a valid citizenship application requires – both as concerns Finland and Egypt – that the application also satisfies the requisite legal forms. ...

3.2.2. Formal Grounds

(referring to General Nabeel's opinion and conclusions) ...

On the premise that the application for Egyptian citizenship which Mr Bahgat is alleged to have made has been *contrary to the formal and procedural requirements* for the grant of citizenship which were then in force in Egypt, the application is *formally inexistent* (non-existent).

3.2.3. Substantive Grounds

...

Assuming that Mr Bahgat did not apply of his own free will, the application which Mr Bahgat was alleged to have made was not an act to which Finnish nationality legislation would in 1997 have attached a consequent loss of Finnish citizenship. Under Finnish law *the risk of loss could only attach to a formally and substantially valid application.*

....

Assuming that the citizenship application claimed to have taken place in Egypt in 1997 is in the aforementioned way both *formally and substantially inexistent*, Mr Bahgat has for this reason not legally received Egyptian citizenship due to that application. Therefore Mr Bahgat could also *not have lost Finnish citizenship* on account of that application because its loss required both certain formalities to be fulfilled as well as the applicant's free will in the sense described above.”

3.30. Contrary to the view expressed by Professor Scheinin as mentioned above, any loss of Finnish nationality is conditional upon the application being expressly voluntary.⁷⁰

3.31. The Finnish Parliamentary Ombudsman has observed in a decision that, when applying section 8, paragraph 1 of the 1984 Nationality Act, the competent Finnish authorities are under a duty of clarification of actual circumstances surrounding the (alleged) acquisition of the nationality of a foreign country, especially if the individual had challenged the appropriateness of these circumstances. In assessing and weighing the evidence in unclear situations the Finnish authorities should decide the matter to the advantage of the individual.⁷¹

3.32. The Claimant therefore submits that, as the application made in 1997 purporting to regain Egyptian nationality was formally and substantially inexistent the Claimant (a) did not legally receive Egyptian nationality, and (b) nor was there any application made applying for a foreign nationality so as to come under the purview of section 8 of the 1968 Act, as amended in 1984.

3.33. The Respondent's expert on Egyptian law, Dr Badran, has sought to argue the factual case as to why the Claimant's complaint on coercion was not proper and may have been ratified. The Claimant briefly responds as follows to such of his criticisms as are material:

- (i) The Claimant did not state that he had been coerced by the Minister of Petroleum as wrongly alleged by Dr Badran. As to the nexus between

⁷⁰ Ojanen First Expert Opinion, ¶¶43-45.

⁷¹ Ojanen First Expert Opinion, ¶¶46-54. A copy of this decision and its English translation is now shown as CLA46. Also see Ojanen First Expert Opinion, ¶ 4.4.5.

the Minister of Industries and the Minister of Interior the Claimant refers to paragraph 83 of Professor Aboulmagd's Third Opinion.

- (ii) As to Dr Badran's point that the Claimant's application for restoration was made after the Claimant's Project was selected and therefore there was no imminent danger, the Claimant would recall that ADEMCO was officially permitted for incorporation on 24 December 1997 and the Aswan Iron Ore project was not officially awarded to ADEMCO until Law No 166 was passed by the Egyptian Parliament in June 1998.⁷² Professor Aboulmagd has opined that the Claimant was under serious and imminent danger and that he would have suffered severe adverse consequences threatening his freedom, dignity and wealth if he had decided to renounce his Egyptian nationality following the award of the Project to ADEMCO.⁷³
- (iii) The Claimant was coerced by a cabinet minister of the Respondent's government. The Claimant had no confidence that if he had approached the Egyptian courts he would have been given an impartial and open hearing without interference from the Respondent's cabinet ministers and the prosecution. In fact, the Claimant was at all times aware that any challenge made in the courts against the coercion would likely have led to an earlier false imprisonment of the Claimant.
- (iv) As to Dr Badran's allegation that the Claimant ratified the coercion by making use of his Egyptian nationality, the Claimant has explained in paragraphs 19 to 26 of his Third Witness Statement why he was required on a limited number of occasions to make use of his Egyptian passport while travelling with government officials. Such usage happened under continuing duress from the Respondent.

⁷² See Bahgat's Second Witness Statement, ¶70.

⁷³ Aboulmagd's Third Expert Opinion, ¶96.

3.34. To conclude, the Claimant denies that he lost Finnish Nationality in 1997 or at any time thereafter.

(iv) The Claimant is challenging a recent Finnish Immigration decision

3.35. On 23 April 2013 the Finnish Immigration Service issued a decision in which it decided that the Claimant lost his Finnish nationality because he obtained Egyptian nationality on 28 September 1997.⁷⁴ It appears that the decision was prepared by one of the same officials that Professor Scheinin had contacted during the preparation of his expert opinion.⁷⁵ The Finnish Immigration Service decision was made without taking into account the detailed evidence now being put before the Tribunal. The Claimant has challenged this decision before the Administrative Court of Helsinki. The decision is contrary to Finnish law and must be annulled.⁷⁶ The decision has no legal effect pending the appeal.⁷⁷ Proceedings before the Administrative Court are currently pending, with no court date set for a hearing on the matter.

3.36. In light of the relevance of the Administrative Court proceedings to the Claimant's nationality status under Finnish law, the Claimant will inform the Tribunal of any information it receives from the Administrative Court regarding the schedule for the court proceedings and of any decision, interim or otherwise, on the status of the Claimant's nationality. Depending on the scheduling of the Administrative Court proceedings, the Claimant may request an amendment to the procedural schedule for the jurisdictional objections and that the Hearing on Jurisdiction be adjourned pending a final decision of the Administrative Court.

3.37. The Claimant fully reserves its right to make further submissions regarding the Finnish Immigration decision and the Finnish court proceedings.

⁷⁴ Bahgat Third Witness Statement, ¶¶41-43.

⁷⁵ Bahgat Third Witness Statement, ¶ 42.

⁷⁶ Aarnio Supplemental Expert Opinion, pp. 10-16.

⁷⁷ Bahgat Third Witness Statement, ¶ 43.