

BACHARACH CASE—DECISION No. 22
OF 19 FEBRUARY 1954¹

The Italian-United States Conciliation Commission, established by the Government of the United States of America and the Government of Italy under Article 83 of the Treaty of Peace, and composed of Messrs. Antonio Sorrentino, Representative of the Italian Republic, and Alexander J. Matturri, Representative of the United States of America.

On the Petition filed November 20, 1951 by the Government of the United States of America represented by its Agents, Messrs. Lionel M. Summers and Carlos J. Warner, *versus* the Italian Government represented by its Agent, State's Attorney Francesco Agrò in behalf of Mrs. Hilde Gutman Bacharach.

* * *

(1). In his Petition, the Agent of the United States of America has made the following statement of facts:

The claimant has been a national of the United States of America since December 3, 1946; prior to that date and on September 3, 1943 she was a stateless person of German origin, as she had lost her German nationality, at least under the 11th Regulation of November 25, 1941 of the Nationality Law of the Reich, if not earlier. The claimant, who had emigrated to Italy from Nürnberg in the month of March, 1934, settled in Turin, and in 1938 married Mr. Max Bacharach and established her residence in Milan. Following the coming into effect of Royal Decree No. 1381 of September 7, 1938, which prohibited the residence in Italy of foreign Jews, Mr. and Mrs. Bacharach moved first to France and later to the United States. The claimant's property, packed in seven cases, was stored in Milan with the forwarding firm of Luciano Franzosini. These cases, while in storage there, were completely destroyed as a result of the aerial bombardment of Milan which occurred on August 12-13, 1943.

¹ *Collection of decisions*, vol. II, case No. 22.

On May 29, 1930 the Embassy of the United States of America in Rome, in behalf of the claimant, filed with the Ministry of the Treasury a claim under Article 78 of the Treaty of Peace and the Agreements supplemental thereto and interpretative thereof. In view of the fact that no action was taken on the claim by the Italian authorities, it was submitted to the Italian-United States Conciliation Commission by the Agent of the United States of America who requested the Commission to decide that the claimant was entitled to receive compensation for the damages resulting from the destruction of the aforementioned seven cases.

(2). On December 21, 1951 the Agent of the Italian Government filed an Answer in which he denied the admissibility of Mrs. Bacharach's claim, on grounds that the claimant had never been treated as enemy in Italy during the war, and he maintained that neither the German racial laws, nor law decree no. 1381 of September 1938, nor the anti-semitic laws of the Italian Social Republic could be invoked in order to establish the claimant's right to file a claim under Article 78, paragraph 9 (a), second paragraph.

(3). The respective arguments of law were developed by the two Agents in the Briefs submitted by them.

The Agent of the Government of the United States of America pointed out:

(a) that the claimant, stateless by virtue of the German nationality laws, was considered as enemy in Italy under the Italian War Law of July 8, 1938;

(b) that the Italian Government's anti-semitic legislation established a régime according to which Jews were in fact regarded as enemies of the Italian State;

(c) that this was even more evident in the anti-semitic laws of the Republic of Salò, laws which must be considered as being in force in non-liberated Italy, and therefore laws in Italy within the meaning of Article 78 of the Treaty of Peace.

The Agent of the Italian Government, in his turn, contended:

(a) that Mrs. Bacharach was not treated as enemy under the laws in force in Italy during the war, because no specific and concrete discriminatory measure was taken against her;

(b) that the anti-semitic legislation of 1938 and thereafter, insofar as it would be applied against a foreign Jewess, was in actual fact never carried out against the claimant and that in any event this legislation does not decree a treatment as enemy and hence cannot be brought within the intention of paragraph 9 of Article 78 of the Treaty of Peace;

(c) that the so-called laws of Salò could not concretely be applied against the claimant (who was no longer in Italy) or against her property (which had already been destroyed) and that moreover the acts of the Italian Social Republic cannot be considered as "laws in force in Italy during the war".

CONSIDERATIONS OF LAW:

It is not disputed that, as the claimant acquired the nationality of the United States of America only on December 3, 1946, she cannot be considered to be a United Nations national within the meaning of Article 78 paragraph 9, letter a, first paragraph, of the Treaty of Peace.

The dispute involves the applicability of the second part of the cited provision which reads textually as follows:

The term "United Nations nationals" also includes all individuals, corporations or associations which, under the laws in force in Italy during the war, have been treated as enemy.

The Commission cannot accept the argument of the Agent of the United States of America that the word "treated" in the English version and the word "*traitées*" in the French version were intended by the framers of the Treaty to mean merely "considered" or "regarded", which are, at the best, secondary or tertiary meanings of the words "treat" and "*traiter*". The Commission agrees with the Italian Agent that the more common meaning of the words "treat" and "*traiter*" is "to act towards someone or something in a given manner". Moreover, the verb form used in the English version is the compound form "have been treated"; if the meaning "considered" or "regarded" had been intended by the framers of the Treaty, would it not have been more suitable to use the form "were treated", indicating continued action, rather than the more decisive, more concrete past perfect? The verb tense used in the English version supports the argument of the Italian Agent that the notion of concrete specific action is implicit in the verb "treated".

The Commission fails to perceive any reason why the framers of the Treaty would have used the words "treated" and "*traitées*" if they had intended to mean "considered". To adopt the construction urged by the Agent of the United States of America would be to extend the ordinary meaning of "treated" and "*traitées*" beyond reasonable limits.

To be treated as enemy necessarily implies on the one hand that there be an actual course of action on the part of the Italian authority (and not an abstract possibility of adopting one), and on the other hand that said course of action be aimed at obtaining that the individual who is subjected to it be placed on the same level as that of enemy nationals.

Mrs. Hilde Gutman Bacharach left Italy after the enactment of Royal Decree Law No. 1331 of September 7, 1938, and in compliance with same, and therefore a long time before the outbreak of war; her property, which remained in Italy, was neither then nor later subjected to sequestration or to other measures of control.

Even admitting that said decree law forced the claimant to leave Italy and therefore was a measure taken against her, it is certain that the measure did not constitute "treatment as enemy". The racial legislation enacted, beginning in 1938, by the Fascist régime was certainly inhuman and barbarous, but it was not legislation enacted within the framework of a state of war, as the term is used in international law (State, or national of a State, with which one is at war). Article 78 refers to enemy with a more definite meaning, that is, in the sense that an individual received the same treatment he would have received had he been a national of one of the States with which Italy was at war.

The Agent of the Government of the United States of America refers also to the provisions of Art. 3 of the Italian War Law which declares that stateless persons residing in enemy countries are considered enemy nationals; but this provision contains an abstract statement which is not sufficient in itself alone to constitute treatment as enemy; this provision could become important only in the event that it were the basis for any restrictive measure that may have been taken against the claimant or her property, which does not seem to be the case.

Finally, neither do the racial laws of the Salò Republic have any bearing on the claimant and this is so because, assuming, without here deciding, that the laws of the Salò Republic were "laws in force in Italy during the war", the laws of the Salò Republic were never applied either to the claimant or to her property. The claimant was outside of Italian territory at the time of the Salò Republic and her property had already been destroyed (August 12-13, 1943) at the time of the promulgation of the laws and programs of the Salò Republic (beginning November 18, 1943). Therefore, concrete treatment as enemy under the laws of the Salò Republic was impossible as regards the claimant and her property.

DECIDES:

1. The Petition filed by the Agent of the United States of America in behalf of Mrs. Hilde Gutman Bacharach, under Article 78 of the Treaty of Peace, is rejected.
2. This decision is final and binding.

Rome, February 19, 1954.

*The Representative of the
United States of America*

Alexander J. MATTURRI

*The Representative of the
Italian Republic*

ANTONIO SORRENTINO

¹ *Collection of decisions*, vol. II, case No. 35.