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Feldman Case—Decision No. 28

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Italian nationals as well. The limitations of a general nature do not give rise to responsibility, even though they may directly or indirectly be based on the war.

The criterion of differentiation adopted by the majority of the Commission does not appear to me to be satisfactory: it is not in the different consequences that the distinguishing element can be found but in the diversity of the cause of the damage.

10 January 1955.

The Representative of the Italian Republic

Antonio SORRENTINO

FELDMAN CASE—DECISION No. 28 OF 6 DECEMBER 1954 [1]

Compensation under Article 78 of the Treaty of Peace—Loss of property after confiscation and sequestration—Owner naturalized "United Nations national" subsequent to 3 September 1943—Applicability of second part of paragraph 9 (*a*) of the aforementioned Article—Meaning of "treated as enemy"—Reference to other decisions of the Commission—Interpretation of treaties—By reference to *ratio legis*—State responsibility—Measure of damages.

Indemnisation au titre de l'article 78 du Traité de Paix — Perte de biens après confiscation et mise sous séquestre — Propriétaire ayant acquis le statut de « ressortissant des Nations Unies » à une date ultérieure au 3 septembre 1943 — Applicabilité de la seconde partie du paragraphe 9 a) de l'article 78 du Traité — Signification de l'expression « traitées comme ennemies » — Invocation d'autres décisions de la Commission — Interprétation des traités — *Ratio legis* — Responsabilité de l'Etat — Détermination du montant de l'indemnité.

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 Mr. Alexander J. Matturri, Representative of the Government of the United States of America, Mr. Antonio Sorrentino, Honorary Section President of the Council of State, Representative of the Government of the Italian Republic, and Mr. Emil Sandström, former Justice of the Swedish Supreme Court, of Stockholm,

[1] *Collection of decisions*, vol. II, case No. 23.

Third Member chosen by the United States and Italian Governments by mutual agreement.

On the Petition filed on December 20, 1951, by the Agent of the Government of the United States in behalf of Jack Feldman *versus* the Italian Government.

STATEMENT OF FACTS:

The facts of this case must be examined against the background of a series of legislative and administrative acts effected in Italy, either in view of the war or during the war.

By Royal Decree of July 8, 1938, a law was enacted in Italy which gave certain powers to the authorities in case of war (War Law). Article 3 defined those persons who were to be considered as enemies. Paragraph 3 of the Article defined as enemy subjects "stateless persons who may at any time have been in possession of the nationality of an enemy State or were born of parents who are or may have been in possession of enemy nationality or who reside in enemy territory". Article 295 contained in its first two paragraphs the following provisions:

> Property belonging to the enemy State which is not subject to confiscation under Articles 292 and 293, and property belonging to persons of enemy nationality can be sequestered.
>
> Sequestration under the preceding paragraph may also be ordered in the case of property in respect to which there is reason to suspect that it belongs to enemy nationals, even though it appears to be owned by persons of a different nationality.

According to Article 296 sequestration was to be decreed by the Prefect. Other provisions were made for the appointment of a Sequestrator (Article 296), and, *inter alia*, for the sale of the sequestered property.

On April 12, 1943, the Ministry of Exchanges and Currencies wrote to the Director of the "Magazzini Generali" (General Warehouses) at Trieste, a letter which stated, *inter alia*:

> This Ministry has been informed that numerous lots of household goods owned by Jews emigrated from Germany or other countries who now reside in enemy countries, are lying in the Free Port of Trieste.
>
> Since it has been agreed with the interested Administrations—also for the purpose of clearing the port areas which are exposed to air attacks—to consider the goods as of suspected enemy ownership and, therefore, to subject them to the regulations of the War Law in force—the "Magazzini Generali" is invited to denounce the household effects lying in its depots to the Prefecture under Art. 309 of the War Law.
>
> A similar request shall be made by this Office to the Forwarding Agents and to private persons who operate warehouses in the Free Port.

Copies of the foregoing letter were sent, according to an annotation thereon to the Ministry of Finance, General Direction of Customs, and the Royal Prefecture of Trieste, among others.

On May 6, 1943, the Ministry of Exchange and Currencies wrote as follows to the Prefecture of Trieste:

> With reference to letter No. 1/1609/43 of April 22, 1943, with which the Presidency of the "General Warehouses" of Trieste has furnished the Prefecture the list of lots of household effects which were stored in its warehouses owned by Jews going to enemy countries you are requested to order, in the execution of what has been ordered by the Ministry of Finance and by the undersigned,

1. the sequestration of such lots;

2. the identification of the goods by the sequestrator, specifying for each lot the addressee who presumably is the owner, and the summary contents of the packages.

This Ministry awaits to be informed of the orders given in this respect by the Prefecture.

Accordingly, on May 11, 1943, the Prefect of Trieste issued a Decree, Article 1 of which was worded as follows:

> There are hereby subjected to sequestration the cases and trunks containing chattels belonging to emigrated Jews mentioned in the attached list bearing the number of this Decree, now in the custody of the respective forwarding firms and deposited in the local "Magazzini Generali".

Mr. Bruno de Steinkuhl was appointed Sequestrator under the Decree.

The preamble stated that the Decree was being issued on the basis of the War Law and of laws subsequently enacted which established additional rules with respect to the treatment of enemy property during the war, and "considering that the chattels belonging to emigrated Jews and deposited in the local 'Magazzini Generali' are to be considered as enemy property".

In addition to the action taken with respect to property deposited in the "Magazzini Generali", the Prefect, acting under the instructions contained in the third paragraph of the letter dated April 12, 1943, from the Ministry of Exchanges and Currencies, wrote the following letter on May 19, 1943, to the private warehouses in Trieste:

> The Firm is invited to submit to this Prefecture as soon as possible, and not after May 25—written on the forms (four copies) which will be furnished—the lots of household effects owned by Jews emigrated from Germany or other countries, and presently residing in enemy countries, which lots are lying in private warehouses or areas operated directly by your Firm, the General Warehouses having already denounced those lots which are lying in its depots. The denunciation shall be made even in the case where it does not appear for certain that the effects belong to persons of the Jewish race, and that the latter's residence presently is in an enemy country, it being the duty of the Sequestrator to proceed to an identification of the effects, and to specify, for each lot, the addressee and presumable owner and the place of his residence.
>
> The greatest accuracy and promptness are recommended to avoid disciplinary measures.

Although appointed Sequestrator, under the Decree of May 11, 1943, only for the cases and trunks containing chattels belonging to emigrated Jews which were deposited in the local "Magazzini Generali", Mr. Bruno de Steinkuhl addressed a circular letter, dated May 22, 1943, to the private warehouse firms in which, referring to the afore-mentioned Decree, he informed them that "all household effects owned by Jews who had emigrated to enemy countries had been placed under sequestration pursuant to an Order of the Ministry of Exchanges and Currencies", and that he had been appointed Sequestrator. "In compliance with such Decree", the firms were invited, first of all, to consider "the above-mentioned effects" in their possession as sequestered and not to be disposed of or taken away, and they were further requested to give him certain information about each individual lot deposited with each of them. The letter ended:

> As regards my taking into custody the sequestered property, you are informed that the formalities will be established by each one of you individually together

with the undersigned, as soon as the information referred to in the three points above is made known to me.

No concrete steps to implement the Prefect's Decree of May 11, 1943, and letter of May 19, 1943, were taken by the Sequestrator, other than to prepare a list of the Jewish property lying in some of the private warehouses.

Following the surrender of Italy on September 3, 1943, the German High Commissioner for the Adriatic Zone issued an Ordinance on October 1, 1943 in which he declared that the exercise of the civil and public authority was to be exclusively controlled by him in that zone, and that the laws which had been in force there would remain in force provided that they did not conflict with the provisions for the security of the territory, or that they were not expressly modified.

Subsequently, on January 12, 1944, the Commissioner issued an Order which reads, in translation, as follows:

> The High Commissioner has ordered, on security grounds, because of war conditions, the clearing of the Free Port. In the course of this clearing the household goods stored in the Free Port will be removed. The removed goods owned by Jews are sequestered and will be disposed of in accordance with orders of the High Commissioner. The non-Jewish property will be taken into custody by agents of the High Commissioner. Hereby every responsibility of the present custodian ceases from the time of the delivery to the commissioned agent of the High Commissioner. I have charged Dr. Karl Schnuerech with the removal of the household goods.
>
> The expenses and fees charged for the household goods in your favour will be reimbursed with the amount recognized by me after the goods have been handed in and have been examined.

Meanwhile, the Government of the Salò Republic, which was established in northern Italy by the Fascist Régime after its fall in Rome and after the Armistice of September 3, 1943, had enacted a certain legislative programme under which it was declared that those belonging to the Jewish race were aliens and during the war belonged to enemy nationality.

* * *

The Claimant, Jack (Jacques) Feldman, who was born in Odessa on February 2, 1881 and who, after the first world war, established his residence in Germany where a passport was issued to him by the Government in Exile of the Ukrainian Republic, moved to Czechoslovakia in 1932. Shortly after Germany had established the Protectorate of Bohemia and Moravia, the claimant left the country for the United States of America and, in connexion with his departure, the German authorities issued to him a "*Fremdenpass*". The claimant has resided in the United States since December 1939 and has been a United States national since February 27, 1945.

On his departure from Czechoslovakia the claimant sent to Trieste seven cases, containing household and personal effects, for trans-shipment to the United States. Before the end of the year 1939 the seven cases arrived at Trieste and were deposited in the warehouse of Fratelli Uccelli. They could not, however, be shipped to the United States and therefore remained at Trieste in the aforementioned warehouse.

Pursuant to the Order dated January 12, 1944, of the German High Commissioner for the Adriatic Zone, the claimant's property was confiscated on June 7, 1944 by the German authorities and is no longer traceable.

On November 10, 1950, the Embassy of the United States of America in

Rome submitted to the Ministry of the Treasury of the Italian Republic, on behalf of Jack Feldman, a claim based on Article 78 of the Treaty of Peace with Italy and the agreements supplemental thereto or interpretative thereof, for losses and damages sustained in Italy during the war.

As no reply was received, the Agent of the United States Government filed a Petition with the Italian-United States Conciliation Commission on December 20, 1951, in which the claimant's right to bring a claim was based on the fact that he was an individual treated as enemy under the laws in force in Italy during the war because of

(1) having been considered as enemy under the War Law as amended;

(2) having had his property subjected to blocking in accordance with the Decree of the Prefect of Trieste of May 11, 1943, and the Prefect's Order of May 19, 1943;

(3) Being qualified as enemy under the laws of the Salò Republic which were in force in northern Italy;

(4) being treated as enemy by the sequestration and subsequent confiscation of his property under the Order of January 12, 1944 of the German High Commissioner which had a *de facto* force in the Adriatic Zone.

Deeming it established that the claimant has suffered a loss as a result of the war for which the Italian Government is responsible, the United States Agent requested that the Commission:

(1) Decide that the claimant is entitled to receive from the Italian Republic in lire the equivalent of two-thirds of the sum necessary at the time of payment to make good the damages and losses suffered which sum was estimated to be $8,072 as of October 31, 1948, subject to any adjustment for the variation of values between October 1948 and the final date of payment.

(2) Order that the costs of and incidental to this claim, including the necessary expenses of the prosecution of this claim before the Commission, be borne by the Italian Republic.

(3) Give such further aid or other relief as may be just and equitable.

In his answer, the Agent of the Italian Government denied the admissibility of the claim on the grounds that the claimant was never treated as enemy under the laws in force in Italy during the war and that therefore Article 78, paragraph 9 (*a*), second part, of the Treaty of Peace is not applicable to him.

On the merits of the case, the Italian Agent noted that the value of the property might equitably be estimated to be only 800,000 lire.

The National Representatives in the Commission having been unable to agree, the two Governments, by common consent, appointed Mr. Emil Sandström, former Justice of the Supreme Court of Sweden, as Third Member in the Commission.

The Agents of the two Governments have argued the case before the full Commission.

As far as necessary, their arguments are summarized in the following considerations of law.

CONSIDERATIONS OF LAW:

As to the admissibility of the claim, Article 78 requires that the claimant be a "United Nations national".

It is agreed that the claimant does not fulfil this requirement by reason of his United States nationality, because in order to qualify under paragraph 9 (*a*), first part, of that Article, he should have had this status on September 3, 1943,

the date of the Armistice with Italy, and this claimant did not acquire United States nationality until February 27, 1945.

The question then is whether the second part of paragraph 9 (*a*) is applicable. This part reads 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 first point to be examined in this respect is whether for the application of this second part of Paragraph 9 (*a*), it is required that the claimant have been treated as enemy before September 3, 1943. In the opinion of the Commission this is not necessary.

It is to be noted that the second part was drafted as a separate provision without reference to the first part. If it had been intended to establish the same limitation in the second part as in the first part, there would have been greater reason to have mentioned the date of September 3, 1943 because in the text of the second part of Paragraph 9 (*a*) reference is made to the "laws in force in Italy *during the war*".

Nor does the *ratio legis* for the limitation contained in the first part apply to the second part. The *ratio legis* of the first part is not that the Italian Government is not to be held responsible for damages which may have occurred after the Armistice. It is, instead, a limitation on the number of potential claimants, obviously so limited because it was not considered equitable that the number of potential claimants should have been increased after the date of the Armistice, since such increase could only be brought about by intentional acts of the individual themselves (e.g. naturalization, or organization of a corporation, in one of the victorious States).

The situation is different under the second part where the qualification as United Nations national coincides with the damaging treatment as enemy.

Under these circumstances it is necessary to examine whether the claimant has been treated as enemy under such conditions as to engender the responsibility of the Italian Government.

In previous Decisions of the Commission it has been stressed that the expression, "have been treated as enemy", envisages something more than that a person has been considered as enemy under the laws in force. In Decision No. 22 of February 19, 1954, in the Hilde Gutman Bacharach Case,[1] this is expressed in the following way:

> 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 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.

Such action has been deemed by the national Representatives on the Commission, in cases similar to the one under consideration, to have taken place not only when the lift-van containing the property was sequestered (Decision No. 13, of January 9, 1953, Hilde Menkes Case),[2] but also when the warehouse firm had delivered to the Sequestrator appointed by the Prefect's Decree of May 11, 1943, a list of Jewish property lying in the private warehouse, and that property, including the claimant's property, was included in the list of Jewish property drawn up by the Sequestrator (Decision No. 14 of March 30, 1953, Alexander Bartha Case).[3]

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[1] *Supra*, p. 187.
[2] *Supra*, p. 137.
[3] *Supra*, p. 142.

It is true that in the case under review there is no evidence that such a list was delivered by Fratelli Uccelli to the Italian authorities prior to the Armistice, and it is true that the claimant's name is not included among those listed by the Sequestrator.

On the other hand it cannot be overlooked that by the letter of the Ministry of Exchange and Currencies of April 12, 1943, its Order to the Prefect of Trieste by letter of May 6, 1943, and by the Prefect's circular letter of May 19, 1943, to the private warehouse firms, including Fratelli Uccelli, action had been taken by the Italian authorities which was directed toward the sequestration of Jewish property in the port of Trieste, and that thereby for all practical purposes the claimant had lost control over his property, even if at the time of the Armistice the measures had not been completed by a formal sequestration decree with regard to the specific property involved in this claim.

This final measure was taken almost immediately after the Armistice the formal sequestration by the Order of the German High Commissioner then exercising the civil authority in the area.

That these last-mentioned measures were taken under a régime which had replaced the regular Italian Government and which was not recognized by it does not alter the fact that these measures were taken in pursuance of the policy upon which the regular Government had previously embarked under the authority of the Italian War Law and which was followed by administrative measures.

Without prejudice to the question whether, in general, in order to entitle a person to claim under Article 78, paragraph 9 (*a*), second part, account can be taken of acts performed by the authorities in that area of Italy occupied at the time by the Germans, it must be held, under the circumstances of this case, that Feldman had been treated as enemy under the laws in force in Italy during the war.

The Commission consequently finds the claim admissible.

As to the merits, the only objection made by the Agent of the Italian Government is with respect to the amount of the Claim.

The Commission estimates, *ex aequo et bono*, as the value of the cases lost, the sum of 1,500,000 lire, which the claimant is entitled to receive without the reduction of one-third, in accordance with paragraph 1 of the Exchange of Notes of February 24, 1949.

The Commission, therefore:

DECIDES:

1. The claim is admissible.

2. The claimant is entitled to receive from the Government of the Italian Republic, under Article 78, paragraphs 1 and 4 (*a*) of the Treaty of Peace and paragraph 1 of the Exchange of Notes of February 24, 1949, the amount of one million five hundred thousand (1,500,000) lire for the loss which he has suffered.

3. This Decision is final and binding.

This Decision is filed in English and in Italian, both texts being authentic originals.

DONE in Rome at the seat of the Commission, 68 via Palestro, this 6th day of December 1954.

The Representative of the United States of America

Alexander J. MATTURRI

The Third Member

Emil SANDSTROM

STATEMENT OF THE ITALIAN REPRESENTATIVE OF THE REASONS FOR HIS DISSENT FROM THE DECISION RENDERED BY THE ITALIAN-UNITED STATES CONCILIATION COMMISSION IN THE "JACK FELDMAN" CASE

In view of the importance of the general principles declared by the Commission, I consider it necessary to set forth here my reasons for dissenting.

Article 78 of the Treaty of Peace subjects the obligation of the Italian Government to compensate for damage to two pre-requisites: one concerns an objective condition (cause of the damage) while the other concerns the subjective condition of the injured individual (possession of nationality of one of the United Nations). With regard to the former there existed no dispute inasmuch as the Italian Government has always admitted that confiscation by German military authorities in territories occupied by such authorities constitutes war damage which must be compensated under the aforementioned Article 78 (paragraph 4). The disagreement had to do instead with the existence of the subjective condition.

Paragraph 9 (*a*) of Article 78 entitles those who were in possession of the nationality of one of the United Nations on the date of the Armistice (September 3, 1943) to avail themselves of the provisions contained in that Article. Feldman—it is agreed—did not meet these conditions. But the second part of paragraph 9 (*a*) was invoked in his favour: it places "individuals, corporations or associations which, under the laws in force in Italy during the war, have been treated as enemy" on the same level as nationals of the United Nations.

The first problem which the Commission was to solve was therefore the following: should the limitation of time contained in the first part of the provision (possession of the nationality of one of the United Nations *ante* September 3, 1943) have been considered to be applicable also to the second part? The majority of the Commission has denied this, but I believe this solution to be the result of an examination of the question which was not profound.

It should immediately be clearly stated that the problem involved here does not tend to limit the Italian Government's responsibility to damages which occurred prior to September 3; it appears to me that the majority of the Commission did not clearly understand the distinction between the subjective conditions which entitle one to file a claim and the act which was the cause of the damage; to permit only those who fulfilled the subjective condition prior to a certain date to request application of Article 78 does not mean that compensation for damages which occurred subsequently is excluded.

This clarification having been made, it is necessary to see whether the fact that the second part of paragraph 9 (*a*) does not repeat the date contained in the first part means that this (second) part does not include the same time indication. If the task of the interpreter is to search for the correct meaning of the provision even beyond the mere literal expression, it seems to me that the necessity of considering the limitation as implicit appears from two considerations of a logical nature.

The first is this: the criterion of treatment as enemy is a substitute for actual nationality: it should be ruled out that the subsidiary element can have a time extens on greater than that of the principal element; therefore, the date of the Armistice with Italy must indicate the limit beyond which the acquisition of nationality, or the facts that are placed on the same level as such acquisition, are no longer relevant for the purpose of entitling one to claim.

More decisive, perhaps, is the second consideration, which is derived from

the situation in which Italy found itself after the Armistice and which was obviously borne in mind by the drafters of the Treaty.

By means of the equalization being discussed it is evident that the conquering Powers intended to protect those whose property had been subjected to restrictive measures on the basis of their apparent United Nations nationality and, above all (and this is the predominant purpose of the provision), corporations and associations, established under Italian law, but subjected to war measures in view of the fact that United Nations nationals had interests in such corporations and associations.

Now, with the Armistice, the possibility ceased, *de facto* and *de jure*, for the Italian Government to adopt measures of this nature and therefore the logical necessity of considering the date as implicit in the second part of paragraph 9 (*a*) appears to be clear.

The contrary opinion, expressed by the majority of the Commission, can have practical importance in only two possible fact situations, and it should be ruled out that it was intended to protect these at the time the Treaty was drafted.

After the Armistice and the declaration of war on Germany, the Italian Government subjected to war measures only Germans or Italian companies in which German interests were predominant.

According to the theory accepted by the decision, it would be possible to apply Article 78 in such cases, which is manifestly absurd.

It can be objected, it is true, that in practice the Germans will not be able to invoke Article 78 in their favour, since the remedy granted by this Article can be exercised only by the States and therefore only by the Powers which won the war, but an obstacle of fact does not eliminate the conceptual difficulty in accepting this solution.

On the other hand, it cannot be ruled out *a priori* that, in accordance with that interpretation, German nationals who later have acquired or will acquire the nationality of one of the United Nations for any reason whatsoever may be able to use Article 78; and also that the Government of any of the latter may demand the application of article 78 in favour of corporations subjected at the time to measures of war because of German ownership, but in which nationals of the United Nations also possess interests.

The second case in which the theory of the majority of the Commission can find application is that of measures of war applied in Italian territory by the self-styled Fascist Government of Salò or by the German occupation authorities; but since the equalization which is the subject of discussion obviously finds its basis in a responsibility for actions done (unlike damage which is compensable in relation to its objective existence), it would be in clear contrast with the preamble of the Treaty to burden Italy, co-belligerent of the United Nations, with the consequences of voluntary actions performed by the common enemy.

The second point of the Decision also finds me dissenting strongly.

In order to have treatment as enemy for the purpose of equalization with United Nations nationals it is necessary that there exist measures concretely adopted in application of laws in force in Italy during the war.

No proof of the existence of these prerequisites is provided by the Decision.

In previous cases (Menkes Decision) there was a sequestration by the Italian authorities on the basis of the Italian War Law; or (Bartha Decision) an actual act of execution against property by the Sequestrator appointed under Italian law. But here there is none of all this; the Decision cites orders which were given by agencies of the Italian Government, but which remain in the field of the generic and the abstract and which were not made concrete by any positive act which specifically affected Feldman's property.

In my opinion, this should have been considered sufficient to deny treatment as enemy. The majority justifies the opposite conclusion by the fact that the German High Commissioner, who at that time exercised civil power in the Zone of Trieste, confiscated the property shortly after the Armistice, so that in this fact must be found the continuation of the policy initiated by the Italian Government against Jews whose household effects were in Trieste. But it is evident that *proof* of the existence of a measure adopted according to the Italian War Law is being replaced by a mere supposition that the German authority intended to apply Italian law, a supposition which is, moreover, contradicted:

(*a*) by the fact that no reference to Italian law was contained in the order of the German Command, which instead made reference to exigencies of war of the German Army;

(*b*) by the fact that the Italian War Law provided for the sequestration of enemy property but not confiscation as well, which was instead applied by the German Command;

(*c*) (by the fact) that confiscation was the measure provided for by the laws of the German Reich against Jewish property and that the German Command obviously took his inspiration from these laws, also in view of the particular régime applied to Trieste which was then considered by the Germans to be almost a part of the Reich.

By this it is not denied that confiscation is a cause of damage which is compensable within the meaning of Article 78, but only that it constitutes at the same time an action which concretizes treatment as enemy. Not having kept these two concepts accurately separated led the majority of the Commission to a solution which does not seem to me consistent with Article 78 of the Treaty of Peace.

Rome, January 10, 1955.

The Representative of the Italian Republic

Antonio SORRENTINO

MACANDREWS AND FORBES CO. CASE—DECISION No. 29 OF DECEMBER 1954 [1]

Compensation under Article 78 of Peace Treaty—State responsibility—Sale of enemy property after sequestration—Measure of damages—Request for interest rejected.

Indemnisation au titre de l'article 78 du Traité de Paix — Responsabilité de l'Etat — Vente de biens ennemis après séquestre — Détermination du montant de l'indemnité — Demande d'intérêts rejetée.

[1] *Collection of decisions*, vol. II, case No. 33. The Collection does not indicate the exact date of the decision.