

FOREIGN CLAIMS SETTLEMENT COMMISSION
OF THE UNITED STATES
UNITED STATES DEPARTMENT OF JUSTICE
WASHINGTON, DC 20579

In the Matter of the Claim of

5 U.S.C. §552(b)(6)

Against the Great Socialist People's
Libyan Arab Jamahiriya

Claim No. LIB-II-016

Decision No. LIB-II-062

Counsel for Claimant:

Stuart H. Newberger, Esq.
Crowell & Moring LLP

Oral Hearing held on October 28, 2011

FINAL DECISION

This claim against the Great Socialist People's Libyan Arab Jamahiriya ("Libya") is based on mental pain and anguish suffered by 5 U.S.C. §552(b)(6) as a result of the death of his brother, 5 U.S.C. §552(b)(6) who was killed on board UTA Flight 772 on September 19, 1989. By its Proposed Decision entered July 12, 2011, the Commission denied the claim, which had been filed under Category B of the January Referral Letter.¹ Claimant objected to the Commission's Proposed Decision on July 27, 2011, and on September 14, 2011 filed his objection brief. The oral hearing was held before the Commission on October 28, 2011 and on November 3, 2011, claimant submitted a post-hearing memorandum.

¹ January 15, 2009, letter from the Honorable John B. Bellinger, III, Legal Adviser, Department of State, to the Honorable Mauricio J. Tamargo, Chairman, Foreign Claims Settlement Commission (hereinafter, "January Referral Letter").

DISCUSSION

The critical issue in the Commission's Proposed Decision denying the claim was whether requirement (2) of Category B, which provides that a claimant is only eligible to bring a Category B claim if "the claimant is not eligible for compensation from the associated wrongful death claim, and the claimant did not receive any compensation from the wrongful death claim," precluded the claimant from receiving compensation under Category B. In this claim, the claimant acknowledged that he had received a distribution – which included a distribution from the associated wrongful death claim (the wrongful death of ^{5 U.S.C. §552(b)(6)}) – under a joint prosecution agreement concluded among victim families who participated in litigation against Libya in U.S. court to share "fees, costs and proceeds from the litigation." *See* Proposed Decision at 7. In considering this fact in light of the text of Category B, the Commission concluded that it was "unable to arrive at any reasonable interpretation of the language of Category B that would result in an ineligible claimant receiving compensation from an associated wrongful death claim except through a secondary payment from an eligible claimant." Consequently, the Commission determined in its Proposed Decision that the present claim was barred by the plain language of Category B of the January Referral, and rejected the claim.

Claimant's central argument in his objection is that the two sub-clauses of requirement (2) of Category B should be read not to prohibit claims by claimants who have received monies from the wrongful death claim by means of secondary agreements such as a joint prosecution agreement, but rather the two sub-clauses of requirement (2) should be read as careful legal writing to prohibit claims by: (1) claimants who were directly eligible to receive monies from the wrongful death claim; and (2) claimants who

were previously directly eligible to receive monies from the wrongful death claim, but had already received such monies from the wrongful death claim, and, therefore, having received said monies, would contend they are not barred from making Category B claims, because they are no longer “eligible.” This reading of the language is not particularly compelling as it is unlikely that the State Department would have believed it necessary to specifically proscribe this type of hypothetical claim.

More compelling is the fact that in his November 3, 2011 post-hearing submission, claimant’s counsel identified another joint prosecution agreement entered into among plaintiffs in a “Pending Litigation”² that relates to a “Covered Incident,”³ and which is therefore relevant to the Libya Claims Program and the Commission’s interpretation of Category B. According to the documents submitted, this second joint prosecution agreement transfers all recoveries to a trust which invests the pooled recoveries “pending final distribution and resolution of any disputes.” In other words, the terms of this joint prosecution agreement provide, in relevant part, that no distributions are to be made until all recoveries to all of the participants have been collected.

Thus, unlike the agreement to which claimant is a party – the terms of which provide for distributions as recoveries are collected – this other joint prosecution agreement delays any distributions until all recoveries have been collected. The import of this distinction is that, by the Commission’s Proposed Decision, distributions under this other joint prosecution agreement would not fall within the proscriptive language of

² Attachment 1 to the January Referral Letter identifies each “Pending Litigation,” that is, the “cases pending in U.S. courts on the date of enactment of the LCRA in which plaintiffs allege a claim relevant to this referral (‘Pending Litigation’).” *See* January Referral Letter ¶ 2.

³ Attachment 2 to the January Referral Letter identifies the “Covered Incidents,” that is, the terrorist incidents that are the subject of the referral. *See* January Referral Letter ¶ 7.

Category B (“the claimant did not receive any compensation from the wrongful death claim”), since there will not have been any such distributions under that agreement at the time of any Commission award under Category B. Such a result would mean that, where there is an underlying secondary agreement, eligibility for awards under Category B would be dependent on the timing of distributions under those agreements. There is no indication that the State Department intended that compensation awards under Category B should be so dependent. Indeed, in the Commission’s view, such a result would have little basis in either the text of the January Referral Letter, the Claims Settlement Agreement or the Libyan Claims Resolution Act, and would, moreover, result in inequitable treatment among similarly-situated claimants.

Considering, therefore, the variety and complexity of secondary agreements, both known and unknown to the Commission, the absence of express language in the January Referral Letter addressing secondary agreements, the fact that these secondary agreements do not work to expand the pool of eligible claimants before the Commission, and the potential for inequity, the Commission reverses its proposed decision that distributions under secondary agreements constitute “compensation from the wrongful death claim” for purposes of assessing eligibility under Category B.

The Commission, therefore, withdraws its denial of claimant’s claim as set forth in the Proposed Decision, and affirms the other findings in the Proposed Decision. Based on those other findings, and on the facts adduced as a result of the oral hearing, the Commission hereby determines that this claim is within its jurisdiction and that the claimant has satisfied the elements required for compensation pursuant to Category B of the January Referral Letter.

COMPENSATION

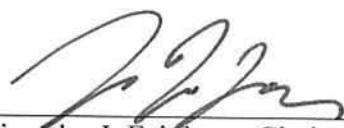
In *Claim of* 5 U.S.C. §552(b)(6) Claim No. LIB-II-044, Decision No. LIB-II-001 (2010), the Commission held that, in this program, the recommended fixed award of \$200,000 is the appropriate amount of compensation for eligible claims under Category B of the January Referral Letter, and that no interest is to be included as part of such awards. Accordingly, the Commission determines that the claimant, 5 U.S.C. §552(b)(6) is entitled herein to an award of \$200,000, and that this amount constitutes the entirety of the compensation that the claimant is entitled to in the present claim.

The Commission, therefore, enters the following award, which will be certified to the Secretary of Treasury for payment under sections 7 and 8 of the ICSA. 22 U.S.C. §§ 1626-27 (2006).


AWARD

Claimant 5 U.S.C. §552(b)(6) is entitled to an award in the amount of Two Hundred Thousand Dollars (\$200,000.00).

Dated at Washington, DC, December 7, 2011
and entered as the Final Decision
of the Commission.



Timothy J. Feighery, Chairman



Rafael E. Martinez, Commissioner

FOREIGN CLAIMS SETTLEMENT COMMISSION
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Counsel for Claimant:

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PROPOSED DECISION

This claim against the Great Socialist People's Libyan Arab Jamahiriya ("Libya") is based on mental pain and anguish suffered by 5 U.S.C. §552(b)(6) as a result of the death of his brother, 5 U.S.C. §552(b)(6) who was killed on board UTA Flight 772 on September 19, 1989.

Under subsection 4(a) of Title I of the International Claims Settlement Act of 1949 ("ICSA"), as amended, the Commission has jurisdiction to

receive, examine, adjudicate, and render a final decision with respect to any claim of . . . any national of the United States . . . included in a category of claims against a foreign government which is referred to the Commission by the Secretary of State.

22 U.S.C. § 1623(a)(1)(C) (2006).

On January 15, 2009, pursuant to a delegation of authority from the Secretary of State, the State Department's Legal Adviser referred to the Commission for adjudication six categories of claims of U.S. nationals against Libya. *Letter from the Honorable John*

B. Bellinger, III, Legal Adviser, Department of State, to the Honorable Mauricio J. Tamargo, Chairman, Foreign Claims Settlement Commission (“January Referral Letter” or “Referral”).

The present claim is made under Category B. According to the January Referral Letter, Category B consists of

claims of U.S. nationals for mental pain and anguish who are living close relatives of a decedent whose death formed the basis of a death claim compensated by the Department of State provided that (1) the claim was set forth as a claim for emotional distress, solatium, or similar emotional injury by the claimant named in the Pending Litigation; (2) the claimant is not eligible for compensation from the associated wrongful death claim, and the claimant did not receive any compensation from the wrongful death claim; (3) the claimant has not received any compensation under any other part of the Claims Settlement Agreement, and does not qualify for any other category of compensation in this referral; and (4) the Pending Litigation against Libya has been dismissed before the claim is submitted to the Commission.

Id. at ¶ 4. Attachment 1 to the January Referral Letter lists the suits comprising the Pending Litigation.

The January Referral Letter, as well as a December 11, 2008 referral letter (“December Referral Letter”) from the State Department, followed a number of official actions that were taken with respect to the settlement of claims between the United States and Libya. Specifically, on August 4, 2008, the President signed into law the Libyan Claims Resolution Act (“LCRA”), Pub. L. No. 110-301, 122 Stat. 2999, and on August 14, 2008, the United States and Libya concluded the *Claims Settlement Agreement Between the United States of America and the Great Socialist People's Libyan Arab Jamahiriya* (“Claims Settlement Agreement”), 2008 U.S.T. Lexis 72, entered into force Aug. 14, 2008. On October 31, 2008, the President issued Executive Order No. 13,477, 73 Fed. Reg. 65,965, which, *inter alia*, espoused the claims of U.S. nationals coming within the terms of the Claims Settlement Agreement, barred U.S. nationals from

asserting or maintaining such claims, terminated any pending suit within the terms of the Claims Settlement Agreement, and directed the Secretary of State to establish procedures governing claims by U.S. nationals falling within the terms of the Claims Settlement Agreement.

On July 7, 2009, the Commission published notice in the *Federal Register* announcing the commencement of this portion of the Libya Claims Program pursuant to the ICSA and the January Referral Letter. *Notice of Commencement of Claims Adjudication Program*, 74 Fed. Reg. 32,193 (2009).

BASIS OF THE PRESENT CLAIM

On September 9, 2009, the Commission received from the claimant a completed Statement of Claim in which the claimant asserts a claim under Category B of the January Referral Letter, along with exhibits supporting the claim. The claimant states that he is the brother of ^{5 U.S.C. §552(b)(6)} who was killed on board UTA Flight 772 on September 19, 1989. Claimant's submission includes, among other things, a copy of his birth certificate, documents relating to the distribution of the estate of ^{5 U.S.C. §552(b)(6)} and evidence of claimant's inclusion as a named party in the Pending Litigation (referred to in Attachment 1 of the January Referral Letter), in which he set forth a claim for emotional distress, loss of solatium, or similar injury; and evidence of the dismissal of the Pending Litigation against Libya. It also includes a declaration made by the claimant, in which he provides details about his close, lifelong relationship with his brother ^{5 U.S.C. §552(b)(6)} and the devastating effect of his brother's death on him and his family. On December 11, 2009, the Commission received from the claimant supplemental material, including a copy of the claimant's U.S. passport and Texas voter registration card and a copy of the birth certificate of ^{5 U.S.C. §552(b)(6)}

DISCUSSION

Jurisdiction

Under subsection 4(a) of the ICSA, the Commission's jurisdiction here is limited to the category of claims defined in the January Referral Letter; namely the claims of individuals who: (1) are U.S. nationals; (2) are living; (3) are close relatives of a decedent whose death formed the basis of a death claim compensated by the Department of State; (4) as named parties, made claims for emotional distress, loss of solatium, or similar emotional injury in a Pending Litigation case which has been dismissed; and (5) are not eligible for compensation from the wrongful death claim, have not received any compensation from the wrongful death claim, have not received any compensation under any other part of the Claims Settlement Agreement, and do not qualify for any other category of compensation pursuant to the January referral. January Referral Letter, *supra*, ¶ 4.

Nationality

In *Claim of* ^{5 U.S.C. §552(b)(6)} Claim No. LIB-I-001, Decision No. LIB-I-001 (2009), the Commission held, consistent with its past jurisprudence and generally-accepted principles of international law, that to meet the nationality requirement, the claimant must have been a national of the United States (as the term "national" is defined in the Commission's authorizing statute) continuously from the date the claim arose until the date of the Claims Settlement Agreement. To meet this requirement, the claimant has provided copies of his birth certificate, U.S. passport and voter registration card. Based on this evidence, the Commission finds that this claim was held by a U.S. national at the time ^{5 U.S.C. §552(b)(6)} was killed on September 19, 1989 and continuously thereafter, including on the effective date of the Claims Settlement Agreement.

Claimant Must Have Been Living at the Time of the January Referral Letter

The January Referral Letter states that Category B shall consist of claims of U.S. nationals for mental pain and anguish “who are living” close relatives of a decedent whose death formed the basis of a death claim compensated by the Department of State. In this program, the Commission has held in *Claim of* ^{5 U.S.C. §552(b)(6)} Claim No. LIB-II-044, Decision No. LIB-II-001 (2010), that in order to qualify for compensation under Category B, a claimant must have been living as of the date of the January Referral Letter as well as at the time of the incident which served as the basis of the Pending Litigation and caused the mental pain and anguish. The Commission finds that the claimant has satisfied this requirement as evidenced by his birth certificate and his Statement of Claim (which includes his sworn declaration dated September 3, 2009).

Claimant Must Be a Close Relative of the Decedent

The January Referral Letter also states that Category B shall consist of claims of U.S. nationals for mental pain and anguish who are living “close relatives” of a decedent whose death formed the basis of a death claim compensated by the Department of State. The Commission held in *Claim of* ^{5 U.S.C. §552(b)(6)} *supra*, that for the limited purpose of Category B of this claims program, the term “close relatives” comprises the relatives of a decedent who are within one step of immediacy to the decedent, namely spouses, children, parents and siblings. The Commission finds that the claimant has established that he is a close relative of ^{5 U.S.C. §552(b)(6)} as evidenced by the claimant’s birth certificate which, in conjunction with ^{5 U.S.C. §552(b)(6)} birth certificate, demonstrates that the claimant and ^{5 U.S.C. §552(b)(6)} were siblings.

Pending Litigation and its Dismissal

To be eligible for compensation under Category B of the claims referred to the Commission, the claimant must also be a named party who made a claim for emotional

distress, loss of solatium, or similar emotional injury in a Pending Litigation case listed in Attachment 1 to the January Referral Letter, and must provide evidence that the Pending Litigation against Libya has been dismissed. January Referral Letter, *supra*, ¶ 4. The claimant has provided a copy of the Amended Complaint in *Pugh v. Socialist People's Libyan Arab Jamahiriya*, 02-cv-2026, filed in the U.S. District Court for the District of Columbia, which names the claimant as a party and states a claim for intentional infliction of emotional distress. Additionally, the claimant has provided the District Court's March 6, 2009 Order dismissing with prejudice the litigation, which included claimant's claim, as evidence of the dismissal of this Pending Litigation. Based on this evidence, the Commission finds that the claimant was a named party who made a claim for emotional distress, loss of solatium, or similar emotional injury in the Pending Litigation and that the Pending Litigation has been properly dismissed.

*Claimant Must Not be Eligible For, and Must Not Have Received,
Any Compensation from the Associated Wrongful Death Claim*

The second prescriptive clause of Category B of the January Referral Letter provides that a claimant is only eligible to bring a Category B claim if “the claimant is not eligible for compensation from the associated wrongful death claim, and the claimant did not receive any compensation from the wrongful death claim.” January Referral Letter, *supra*, ¶ 4.

The “associated wrongful death claim” here, which was compensated by the Department of State, is the death of the claimant's brother, ^{5 U.S.C. §552(b)(6)} Claimant has provided sufficient evidence to establish that he was not a beneficiary of the estate of ^{5 U.S.C. §552(b)(6)} and has thereby met the first part of this requirement for eligibility under Category B – that he was “not eligible for compensation from the associated wrongful death claim.”

With regard to the second part of this requirement – that the claimant did not receive any compensation from the wrongful death claim – the claim form required that claimant state whether he received “any compensation as part of the wrongful death claim paid by the Department of State pursuant to the Settlement Agreement dated August 14, 2008.” In response, the claimant stated that he did not receive any such compensation, but that this “does not include any secondary distribution payments that may have been received in connection with any agreement between claimants and families for the allocation of fees, costs and proceeds from the litigation.”

Based on further communication between claimant and staff of the Commission, the claimant informed the Commission that he is party to a Joint Prosecution Agreement (“JPA”) that was entered into by all plaintiffs participating in the litigation in *Pugh v. Socialist People’s Libyan Arab Jamahiriya* at the onset of that litigation. According to the claimant, the purpose of the JPA was to permit the plaintiffs “to pursue their claims jointly against Libya in a manner that would allow them to share expenses and maximize recoveries, while avoiding potential conflicts.” Pursuant to this agreement, “all distributions made to date to JPA participants have been pooled and redistributed under the JPA, as will be the Category B Claimants’ awards and any further awards to the estate and estate beneficiaries pursuant to Category C.” Claimant emphasizes that “[t]his pooling and redistribution of funds is *purely* a function of the JPA, and the parties’ agreement to its terms – and occurs without regard to any relationship, familial or otherwise, the other participants have to the plaintiff or claimant who recovers an award.” Nonetheless, the claimant has made it clear in his submissions that he did receive a distribution payment under the JPA from the associated wrongful death claim.

The question thus raised is whether the distribution to the claimant under the JPA from proceeds of the associated wrongful death claim constitutes “compensation from the

wrongful death claim” so as to render him ineligible under Category B of the Referral. It is the claimant’s position that payment under the JPA merely represents a specific way in which claimants have chosen to dispose of their recoveries, and as such is no different from a claimant using his or her recovery to pay a debt to another claimant, meet a contractual obligation owed to another claimant, or to give a gift to another claimant. As such, claimant argues, that these distribution payments are irrelevant to the question of eligibility to recover under Category B.

To address this question, the Commission must turn to the relevant language of Category B: “(2) the claimant is not eligible for compensation from the associated wrongful death claim, and the claimant did not receive any compensation from the wrongful death claim”. This clause is thus composed of two distinct concepts or ideas: one is eligibility for, and the other is actual receipt of, compensation. To be eligible under Category B, a claimant may not have been eligible for compensation from the associated wrongful death claim, and may not have received compensation from the wrongful death claim.

The claimant focuses exclusively on the “eligibility” requirement, and argues that it is precisely his ineligibility – i.e., the fact that he was not a beneficiary of the estate – that makes him eligible for compensation under Category B. However, this argument ignores entirely the other requirement of this numbered clause of Category B, that the claimant not have received “any compensation from the wrongful death claim.” This requirement cannot apply to claimants eligible for compensation from the wrongful death claim, since such claimants are already excluded under the first requirement of this numbered clause.

Since this language, therefore, must apply only to claimants who are ineligible for compensation from the wrongful death claim, it raises the following question that is

fundamentally important to the proper interpretation of the language of Category B – if a claimant is ineligible for compensation from the wrongful death claim, how could he or she possibly have received compensation “from the wrongful death claim” except via a secondary payment (such as pursuant to an agreement like the JPA) from someone who was eligible to have received the wrongful death compensation? In other words, it appears that the second clause (“the claimant did not receive any compensation from the wrongful death claim”) would be rendered meaningless if, as urged by claimant, it were read to exclude secondary payments from eligible claimants, because there could be no other way for claimants ineligible for compensation from the wrongful death claim to be compensated. The Commission cannot so read this language of the Referral; it must be read as having meaning.¹

The Commission is unable to arrive at any reasonable interpretation of the language of Category B that would result in an ineligible claimant receiving compensation from an associated wrongful death claim except through a secondary payment from an eligible claimant. Therefore, in order to avoid depriving the January Referral Letter’s language of meaning, and to properly read the words of Category B in context, the Commission finds that the second sub-clause of the second prescriptive clause of Category B must be read to include in this proviso distributions received from eligible claimants via secondary agreements such as the JPA.

The Commission notes that the Libya Claims Program authorized by the Claims Settlement Agreement is a “humanitarian settlement fund.” In particular, Category B, by its wording, appears intended to be a last recourse to compensate certain living close relatives of decedents who did not, and will not otherwise, receive compensation, directly

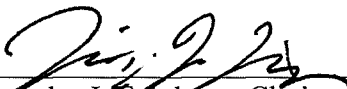
¹ It is a basic, and long standing, principle of interpretation that every clause and word should be given effect, avoiding a construction which implies the drafter was ignorant of the meaning of the language employed. *See, e.g. Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883).

or indirectly by agreement, through the Libya Claims Program. To that end, the Commission's decision here is consistent with that objective.

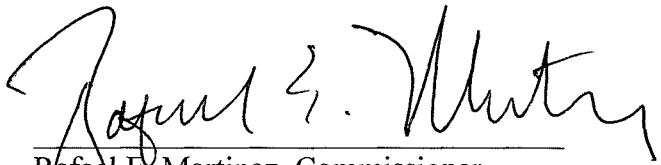
As such, the Commission finds that the claimant, while not an eligible beneficiary of the wrongful death estate, did receive compensation - as that term must be understood to mean within the limited context of the specific language of Category B of the January Referral Letter - pursuant to the JPA, from the wrongful death claim. The Category B claim of ^{5 U.S.C. §552(b)(6)} therefore does not meet the jurisdictional requirements of Category B of the January Referral Letter. Accordingly, this claim must be, and hereby is, denied.

The Commission finds it unnecessary to make determinations with respect to other elements of this claim.

Dated at Washington, DC, July 12, 2011
and entered as the Proposed Decision
of the Commission.



Timothy J. Feighery, Chairman



Rafael E. Martinez, Commissioner

NOTICE: Pursuant to the Regulations of the Commission, any objections must be filed within 15 days after service or receipt of notice of this Proposed Decision. Absent objection, this decision will be entered as the Final Decision of the Commission upon the expiration of 30 days after such service or receipt of notice, unless the Commission otherwise orders. FCSC Regulations, 45 C.F.R. § 509.5 (e), (g) (2010).