

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

In the Matter of the Claim of

ESTATE OF MIRIAM KIMMELL, DECEASED
ARTHUR M. SMALL, ADMINISTRATOR

Against the Great Socialist People's
Libyan Arab Jamahiriya

Claim No. LIB-II-106

Decision No. LIB-II-030

Counsel for Claimant:

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Heideman Nudelman & Kalik, P.C.

PROPOSED DECISION

This claim against the Great Socialist People's Libyan Arab Jamahiriya ("Libya") is brought by the Estate of Miriam Kimmell (the "claimant"), based upon physical injuries said to have been sustained by Ms. Kimmell during the terrorist attack at Fiumicino Airport in Rome, Italy on December 27, 1985. Ms. Kimmell died in 1999 of causes unrelated to the attack.

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 dated January 15, 2009, 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").

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

claims of U.S. nationals for wrongful death or physical injury resulting from one of the terrorist incidents listed in Attachment 2 ("Covered Incidents"), incidents which formed the basis for Pending Litigation in which a named U.S. plaintiff alleged wrongful death or physical injury, provided that (1) the claimant was not a plaintiff in the Pending Litigation; and (2) the claim meets the standard for physical injury or wrongful death, as appropriate, adopted by the Commission.

Id. at ¶ 7. Attachment 1 to the January Referral Letter lists the suits comprising the Pending Litigation and Attachment 2 lists the Covered Incidents.

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 (Nov. 5, 2008), 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 June 21, 2010, the Commission received from the claimant a Statement of Claim, in which the claimant asserts a claim under Category E of the January Referral Letter, along with accompanying exhibits supporting the elements of its claim, including evidence of: the U.S. nationality of Miriam Kimmell and that of the beneficiaries of the claimant estate; a copy of a death certificate reflecting the date and place of Ms. Kimmell's death; a copy of her will and Declaration of Trust, as amended; her presence at the terrorist incident at Fiumicino Airport in Rome, Italy on December 27, 1985; and her physical injuries.

According to the Statement of Claim, the claimant's decedent, Miriam Kimmell, suffered a gunshot wound to her right leg on December 27, 1985, as a result of the terrorist attack at the Fiumicino Airport in Rome, Italy, which required surgery to remove the bullet. In support of the claim, claimant has submitted contemporaneous medical records from the San Camillo Hospital, where Ms. Kimmell was hospitalized

immediately after the incident, and several contemporaneous news reports detailing Ms. Kimmell's hospitalization and treatment.

DISCUSSION

As an initial matter, the Commission notes that Letters of Administration issued by the Superior Court of California, County of San Diego, dated March 26, 2010, appointed Arthur M. Small as the administrator of Ms. Kimmell's Estate. Accordingly, the Commission finds that the ESTATE OF MIRIAM KIMMELL, DECEASED; ARTHUR M. SMALL, ADMINISTRATOR, is the proper claimant in this claim.

Jurisdiction

Under subsection 4(a) of the ICOSA, the Commission's jurisdiction here is limited to the category of claims defined under the January Referral Letter; namely, claims of individuals who: (1) are U.S. nationals; (2) set forth a claim before the Commission for wrongful death or physical injury resulting from one of the Covered Incidents; and (3) were not plaintiffs in a Pending Litigation case against Libya. January Referral Letter, *supra* ¶ 7.

Nationality

In the *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 in order for the nationality requirement to have been met, the claimant must have been a national of the United States, as that term is defined in the Commission's authorizing statute, continuously from the date the claim arose until the date of the Claims Settlement Agreement. In the case of claims brought by estates on behalf of beneficiaries, it is a well-established principle of the law of

international claims, which has been applied by both this Commission and its predecessors (the War Claims Commission and the International Claims Commission) that, for purposes of determining the nationality of a claim, the nationality of the injured party as well as the beneficiaries of his or her estate must be evaluated in order to establish that the claim has been held continuously by U.S. nationals from the date of injury through the date of the Settlement Agreement.¹ Based on this precedent and its review of the trust and probate documents submitted by claimant, the Commission determines that during the pertinent time period an interest in this claim has been held by the following: Miriam Kimmell; the University of Purdue, School of Agriculture; Rachel P. Small; Arthur M. Small, III; and Richard Peelle Small.

To meet the nationality requirement, the claimant has provided the following: the birth certificate and passport history of the late Miriam Kimmell; a copy of the birth certificate and death certificate (indicating nationality) of Rachel Small; the birth certificates and current U.S. passports of Arthur M. Small, III and Richard Peelle Small and evidence of the nationality of the University of Purdue, including the Morrill Act of 1862 establishing the University and the By-laws of the Trustees of Purdue University. Based on this evidence and other evidence in the record, the Commission determines that the claim was owned by a U.S. national at the time of the incident continuously through the effective date of the Claims Settlement Agreement.

¹ See, e.g., *Claim of THE ESTATE OF JOSEPH KREN, DECEASED against Yugoslavia*, Claim No. Y-0660, Decision No. Y-1171 (1954); *Claim of PETER KERNAST*, Claim No. W-9801, Decision No. W-2107 (1965); *Claim of RALPH F. GASSMAN and URSULA ZANDMER against the German Democratic Republic*, Claim No. G-2154, Decision No. G-1955 (1981); *Claim of ELISAVETA BELLO, et. al. against Albania*, Claim No. ALB-338, Decision No. ALB-321 (2008).

Claim for Death or Injury Resulting From a Covered Incident

To fall within the category of claims referred to the Commission, the claimant must also assert a claim for wrongful death or physical injury resulting from one of the Covered Incidents listed in Attachment 2 to the January Referral letter. January Referral Letter, *supra*, ¶ 7. This list includes the “December 27, 1985 attack at the Leonardo da Vinci Airport² in Rome, Italy, as alleged in *Estate of John Buonocore III v. Great Socialist Libyan Arab Jamahiriya* (D.D.C.) 06-cv-727/*Simpson v. Great Socialist People’s Libyan Arab Jamahiriya* (D.D.C.) 08-cv-529.” *Id.*, Attachment 2, ¶ 6. In the Statement of Claim, the claimant sets forth a claim for physical injury suffered by Miriam Kimmell as a result of this terrorist attack. Accordingly, the Commission finds that the claimant has also satisfied this element of its claim.

Pending Litigation

Finally, the January Referral Letter states that the claimant may not have been a plaintiff in the Pending Litigation. January Referral Letter, *supra*, ¶ 7. Attachment 2 to the January Referral Letter identifies the Pending Litigation cases associated with each Covered Incident, which in this claim, as noted above, are the *Buonocore* and *Simpson* cases. Claimant has averred under oath in the Statement of Claim, and the pleadings in the *Buonocore* and *Simpson* cases confirm, that it was not a plaintiff in the Pending Litigation against Libya. Based on this evidence, the Commission finds that the claimant has satisfied this element of its claim.

In summary, the Commission concludes, on the basis of the foregoing, that this claim is within the Commission’s jurisdiction pursuant to the January Referral Letter and is entitled to adjudication on the merits.

² Leonardo da Vinci Airport is also referred to as Fiumicino Airport, as referenced throughout this decision.

Merits

Standard for Physical Injury

As stated in the January Referral Letter, to be eligible for compensation, a claimant asserting a claim under Category E must meet “the standard for physical injury or wrongful death, as appropriate, adopted by the Commission” for purposes of this referral. January Referral Letter, *supra*, ¶ 7. The Commission held in *Claim of* ^{5 U S C §552(b)(6)} *§552(b)(6)*, Claim No. LIB-II-039, Dec. No. LIB-II-015 that in order for a claim for physical injury pursuant to Category E to be considered compensable, a claimant:

- (1) must have suffered a discernible physical injury, more significant than a superficial injury, as a result of a Covered Incident; and
- (2) must have received medical treatment for the physical injury within a reasonable time; and
- (3) must verify the injury by medical records.

Claim of ^{5 U S C §552(b)(6)} *§552(b)(6)*, *supra*, at 6-7. The present Category E claim must likewise meet this standard to be compensable.

Physical Injury

The San Camillo Hospital medical records submitted by the claimant indicate that Ms. Kimmell was admitted to the hospital on December 27, 1985 and discharged on January 3, 1986. Further the Indianapolis Star article dated January 4, 1986, submitted by the claimant, contains a photo of Ms. Kimmell on a gurney at the Indianapolis Airport returning home after her discharge from the San Camillo Hospital.

Based on its review of the evidence in support of this claim, including contemporaneous medical records and news reports filed with the claim, the Commission

finds that Ms. Kimmell suffered a gunshot wound to her right leg as a result of the terrorist attack on December 27, 1985, that she was hospitalized for approximately seven days subsequent to the incident, and that she received treatment for her injury.

Based on these findings, the Commission concludes that claimant's decedent's injuries meet the standard for physical injury set forth above. Accordingly, claimant ESTATE OF MIRIAM KIMMELL, DECEASED; ARTHUR M. SMALL, ADMINISTRATOR is entitled to compensation in this claim.

COMPENSATION

In *Claim of* ^{5 U.S.C. §552(b)(6)} , *supra*, the Commission held that \$3 million is an appropriate amount of compensation for physical injuries that meet the Commission's standard under Category E, and that compensable physical injury claims in this claims program are not entitled to interest as part of the awards granted therein. Accordingly, the Commission determines that the claimant, ESTATE OF MIRIAM KIMMELL, DECEASED; ARTHUR M. SMALL, ADMINISTRATOR, is entitled herein to an award of \$3,000,000.00 and that this amount constitutes the entirety of the compensation that the claimant is entitled to in the present claim.

The Commission hereby enters the following award, which will be certified to the Secretary of Treasury for payment under sections 7 and 8 of the ICSEA. 22 U.S.C. §§ 1626-1627 (2006).

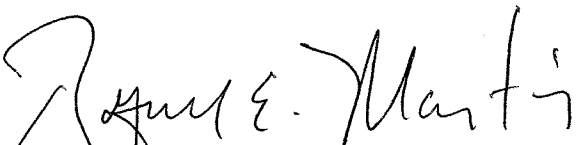
AWARD

Claimant ESTATE OF MIRIAM KIMMELL, DECEASED; ARTHUR M. SMALL, ADMINISTRATOR is entitled to an award in the amount of Three Million Dollars (\$3,000,000.00).

Dated at Washington, DC, May 10, 2011
and entered as the Proposed Decision
of the Commission.



Timothy J. Feighery, Chairman



Rafael E. Martinez, Commissioner

**This decision was entered as the
Commission's Final Decision on**
JUN 20 2011

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) (2008).