

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

In the Matter of the Claim of

DORON AUSLANDER

Against the Great Socialist People's
Libyan Arab Jamahiriya

Claim No. LIB-II-163

Decision No. LIB-II-067

Counsel for Claimant:

Paul G. Gaston, Esq.

Oral Hearing held on November 17, 2011

FINAL DECISION

This claim against the Great Socialist People's Libyan Arab Jamahiriya ("Libya") is brought by DORON AUSLANDER and is based on the death of his mother, Aviva Auslander, during the Lod Airport terrorist attack in Israel on May 30, 1972. By its Proposed Decision entered July 12, 2011, the Commission denied the claim under Category E of the January Referral Letter¹ because it had not been held by a U.S. national continuously from the date of death through the date of the Claims Settlement Agreement. The claimant objected to the Commission's Proposed Decision on July 22, 2011, and on October 27, 2011 filed his objection brief. The oral hearing was held before the Commission on November 17, 2011. For the reasons discussed below, the Commission affirms its prior denial.

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 Commission's Proposed Decision denying this claim was based on its determination that the claim was not held by a U.S. national continuously from the date of Ms. Auslander's death through the date of the Claims Settlement Agreement.² The claimant acknowledges that the decedent Aviva Auslander was an Israeli citizen at the time of her death and that the claimant, her son, became a U.S. national fifteen years later, on July 30, 1987. Nonetheless, the claimant argued in his objection brief and at the oral hearing that international law does not require continuous nationality, and that a State may espouse the claim of an individual if that individual is a national "at the time of the presentation of the claim." Specifically, counsel for the claimant argued during the oral hearing that international law today "expressly recognizes that a sovereign state may espouse the claim of a national of that state even if the injury occurred to that individual while he or she had a different nationality." In this regard, counsel further argued that the concept of continuous nationality is a rule of practice and not a rule of customary international law. In support of these contentions, the claimant cites article 5(2) of the 2006 Draft Articles on Diplomatic Protection, provisionally adopted by the International Law Commission.

However, the Commission has previously rejected this argument and determined that "the continuous nationality requirement – and even more fundamentally, the requirement that a claimant be a U.S. national at the time of injury – are long-standing principles of international law consistently applied and advocated by the United States to the present day. Consequently, any departure from these principles would have been

² *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.

clearly articulated [in the Libya Claims Program authorizing documents] and not merely implied.” *Claim of* 5 U.S.C. §552(b)(6) *Claim No. LIB-I-049, Decision No. LIB-I-019 (2011), FD at 6.*

In 5 U.S.C. §552(b)(6) the Commission discussed in detail the basis of its determination that the continuous nationality requirement applies to the Libya Claims Program and its conclusions apply equally here:

As a general matter, the United States continues to recognize the continuous nationality rule as customary international law. For example, the United States’ 2006 comments on the International Law Commission’s Draft Articles on Diplomatic Protection clearly convey the United States’ position that the continuous nationality requirement – that nationality “be maintained continuously from the date of injury through the date of resolution” – reflects customary international law.³

More particularly, in this program, letters from the State Department to members of Congress concerning claim-specific inquiries (which have been filed with the Commission by claimants with claims before the Commission) clearly evince the State Department’s intent that the continuous nationality rule be applied in the program. One letter states, for example, that “it has been the consistent policy and practice of the Department to decline to espouse claims which have not been continuously owned by U.S. nationals from the date of injury. This is a well-established principle of international claims practice, and innumerable international, domestic and mixed claims arbitral tribunals have followed and applied the rule of continuous nationality.”

This Commission’s long-standing application of the continuous U.S. nationality requirement in its claims programs follows from this well-established principle. *See Ian Brownlie, Principles of Public International Law* 480-81 (4th ed. 1990); *Richard B. Lillich & Gordon A. Christenson, International Claims: Their Preparation and Presentation* 8-9 (1962) (“The most important condition precedent to securing government espousal of an individual’s grievance is the requirement that it have been owned by a United States national at the time of loss or injury. The Foreign Claims Settlement Commission, like the Department of State, has consistently held this position.”).⁴

³ *See International Law Commission, Comments and observations received from Governments, Diplomatic protection*, at page 19, U.N. Doc. A/CN.4/561 (2006).

⁴ *See also, Claim of JERKO BOGOVICH*, Claim No. Y-1757, Decision No. Y-857 (1954); *Claim of ILONA CZIKE*, Claim No. HUNG-2-0784, Decision No. HUNG-2-191 (1976); *Claim of JOSEPH REISS*, Claim

Given the fact that the continuous nationality rule is recognized by the United States as customary international law, and that this rule has been applied by both this Commission and its predecessors, a derogation from this rule will not be assumed by the Commission from the absence of language in any of the operative documents that inform and define this program. Any derogation must be clearly expressed, and there has been no such express derogation in this program. Consequently, the Commission adheres to its earlier finding that in order for a claim to be compensable in this program, it must have been owned by a U.S. national continuously from the date of injury to the date of the Claims Settlement Agreement.

5 U.S.C. §552(b)(6) FD at 6-8.⁵

The claimant next argued in his objection brief and at the oral hearing that the only relevant date from which the claimant's nationality should be assessed is April 24, 1996, the date the Anti-Terrorism and Effective Death Penalty Act of 1996, P.L. 104-132 ("AEDPA") was enacted. Claimant asserted that the AEDPA amended the Foreign Sovereign Immunities Act to provide victims of terrorism with a cause of action against designated state sponsors of terrorism; consequently, it was only after this date that his claim actually "arose," since it was only after this date that he was able to assert a claim against Libya in the federal courts. On this basis, the claimant argued that his claim is eligible for compensation because he acquired U.S. nationality in 1987, well before a claim for wrongful death against a sovereign state became legally cognizable under U.S.

No. G-2853, Decision No. G-2499 (1981); *Claim of TRANG KIM*, Claim No. V-0014, Decision No. V-0001 (1982); *Claim of MOUCHEGH YEREVANIAN*, Claim No. E-038, Decision No. E-009 (1986); *Claim of SAAD MANSOUR IBRAHIM WAHBA*, Claim No. EG-114, Decision No. EG-137 (1990); *Claim of OCEAN-AIR CARGO*, Claim Nos. IR-1102, IR-1429, Decision No. IR-0961 (1994); and *Claim of YMBRI JAZXHI*, Claim No. ALB-001, Decision No. ALB-001 (1996).

⁵See also, Prof. Edwin M. Borchard, *Opinions of the Mixed Claims Commission, United States and Germany (Part II)*, in *The American Journal of International Law*, 1926, Vol. 1 ("Both precedent and theory sustain the belief that citizenship of the decedent in the claimant country is always required as a condition of an international claim."); and *Chytil v. Powell*, 15 Fed. Appx. 515, 516 (9th Cir. 2001) (unpublished) ("Because in espousing a claim a sovereign takes the claim on as its own, a sovereign cannot espouse claims for people who were not citizens of that sovereign at the time the injury was inflicted.").

law in 1996.⁶ The Commission addressed this issue in the Proposed Decision and stated that the claimant's argument "is unavailing, however, because the loss on which this claim is based occurred at the time Ms. Auslander was killed in 1972." PD at 5. The fact that international law recognizes that a wrongful death claim arises at the time of death of the decedent, the date of AEDPA notwithstanding, is demonstrated by the practice of the United States, which, long before the passage of AEDPA, espoused and settled death claims against other States. *See, e.g., Mary Barchard Williams v. Germany*, Docket No. 594, Mixed Claims Commission (United States and Germany) (1925); *Claim of CLARA EMMA TINNEY*, Claim No. W-1276, Decision No. W-8 (Proposed Decision on May 13, 1964, Supplemental Final Decision on Dec. 8, 1965). In addition, as the Commission noted in the Proposed Decision, the Commission has held that even if a "claimant was remediless with respect to any proceedings by which he might be able to retrench his losses...the Act of Congress did not create these rights. They had existed at all times since the losses occurred." *Williams v. Heard*, 140 U.S. 529, 540-541 (1891).

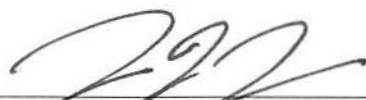
In summary, therefore, the Commission must again conclude that because the claim has not been held by a U.S. national continuously from the date of injury through the date of the Claims Settlement Agreement, it is not compensable under the January Referral Letter and the Claims Settlement Agreement.⁷ Accordingly, while the Commission is sympathetic to the tragic loss suffered by the claimant as a result of the

⁶ It should be noted, in any event, that while claimant argued his claim did not "arise" until passage of AEDPA, it is not clear to the Commission that the claimant here could have sued Libya in U.S. courts even after 1996, as the statutory exceptions to the FSIA require that either the victim or the plaintiff have been a U.S. citizen "when the act upon which the claim is based occurred." *See* 28 U.S.C. § 1605 (a)(7) (repealed) and 28 U.S.C. § 1605A.

⁷ Because the lack of continuous U.S. nationality is dispositive as to the claimant's claim, the Commission need not reach the other arguments put forward by the claimant in regard to other aspects of the Proposed Decision.

death of his mother, the denial set forth in the Proposed Decision in this claim is hereby affirmed. This constitutes the Commission's final determination in this claim.

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
OF THE UNITED STATES
UNITED STATES DEPARTMENT OF JUSTICE
WASHINGTON, DC 20579

In the Matter of the Claim of	}	
	}	
	}	
	}	
DORON AUSLANDER	}	Claim No. LIB-II-163
	}	
	}	Decision No. LIB-II-067
	}	
Against the Great Socialist People's	}	
Libyan Arab Jamahiriya	}	
	}	

Counsel for Claimant:

Paul G. Gaston, Esq.

PROPOSED DECISION

This claim against the Great Socialist People's Libyan Arab Jamahiriya ("Libya") is brought by DORON AUSLANDER and is based on the death of his mother, Aviva Auslander, during the Lod Airport terrorist attack in Israel on May 30, 1972.

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 United States 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, 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 July 6, 2010, the Commission received from the claimant a completed Statement of Claim, in which he asserts a claim for wrongful death under Category E of the January Referral Letter, along with accompanying exhibits. This submission included evidence that decedent Aviva Auslander was an Israeli citizen killed in the Lod Airport terrorist attack on May 30, 1972, and that the claimant, DORON AUSLANDER, became a U.S. national on July 30, 1987.

DISCUSSION

Jurisdiction

Under subsection 4(a) of the ICSA, 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

Consistent with its past jurisprudence and generally accepted principles of international law, the Commission recently held that for purposes of determining nationality in a wrongful death claim, the nationality of the injured party as well as the beneficiaries of his or her estate must be evaluated in order to ascertain whether the claim has been held continuously by U.S. nationals from the date of injury through the date of the Claims Settlement Agreement.¹ The Commission further notes that “[i]t has long been the policy of the United States Government not to espouse claims against foreign governments which are based upon the death of an alien even though the alien may be related to an American national who, by reason of the alien’s death, has sustained indirect injury such as loss of support. . . .” July 24, 1958 letter from William B. Macomber, Jr., Assistant Secretary of State, to Senator Richard B. Russell, cited in Marjorie M. Whiteman, *Digest of International Law*, Vol. 8, pgs. 1244-45 (1967).²

Applying this well-settled jurisprudence here, in order for this claim to be compensable, Ms. Auslander and the beneficiaries of her estate must have been U.S.

¹ *Claim of ESTATE OF VIRGEN MILAGROS FLORES, DECEASED; CRUCITA FLORES SUÁREZ, PERSONAL REPRESENTATIVE*, Claim No. LIB-II-065, Dec. No. LIB-II-043 (2011). *See also, e.g., Claim of THE ESTATE OF JOSEPH KREN, DECEASED against Yugoslavia*, Claim No. Y-0660, Decision No. Y-1171 (1954); *Claim of ILONA CZIKE against Hungary*, Claim No. HUNG-2-0784, Decision No. HUNG-2-191 (1976); and *Claim of JOSEPH REISS against the German Democratic Republic*, Claim No. G-2853, Decision No. G-2499 (1981). *See, also, Richard B. Lillich & Gordon A. Christenson, International Claims: Their Preparation and Presentation* 8-9 (1962) (“The most important condition precedent to securing government espousal of an individual’s grievance is the requirement that it have been owned by a United States national at the time of loss or injury. The Foreign Claims Settlement Commission, like the Department of State, has consistently held this position.”); and *Chytil v. Powell*, 15 Fed. Appx. 515, 516 (9th Cir. 2001) (unpublished) (“Because in espousing a claim a sovereign takes the claim on as its own, a sovereign cannot espouse claims for people who were not citizens of that sovereign at the time the injury was inflicted.”)

² *See also, Prof. Edwin M. Borchard, Opinions of the Mixed Claims Commission, United States and Germany (Part II)*, in *The American Journal of International Law*, 1926, Vol. 1 (“Both precedent and theory sustain the belief that citizenship of the decedent in the claimant country is always required as a condition of an international claim.”).

nationals from the date the claim arose through the date of the Claims Settlement Agreement. The evidence submitted with the claim, however, indicates that Ms. Auslander was a citizen of Israel at the time of the Lod Airport attack, and that Mr. Auslander did not acquire U.S. nationality until 1987.

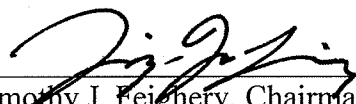
The Commission notes that Mr. Auslander has sought to argue that the U.S. nationality requirement is satisfied in this claim because the claim did not arise until 1996, when the statute allowing for suits for wrongful death against state sponsors of terrorism was signed into law, at which time Mr. Auslander had become a U.S. national. Mr. Auslander's argument, however, is unavailing because the loss on which this claim is based occurred at the time Ms. Auslander was killed in 1972.³ In any event, no evidence has been submitted that would establish that Ms. Auslander was ever a U.S. national.

In summary, therefore, while the Commission is sympathetic to the tragic loss suffered as a result of the death of Ms. Auslander, it must conclude that, because the claim has not been held by a U.S. national continuously from the date of injury through the date of the Claims Settlement Agreement, this claim is not compensable under the January Referral Letter and the Claims Settlement Agreement. Accordingly, this claim must be and it is hereby denied.

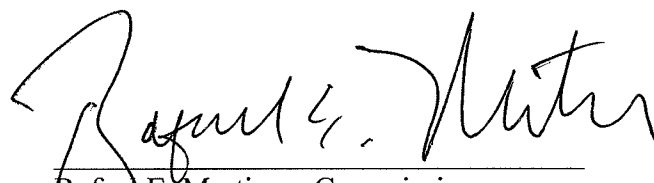
³ See, e.g., *Mary Barchard Williams v. Germany*, Docket No. 594, Mixed Claims Commission (United States and Germany) (1925) (stating that "the right to recover damages" resulting from a decedent's death accrues at the time of the death, and the claimant has to be a U.S. national at the time of the decedent's death and thereafter). In addition, it is well settled that, even if a "claimant was remediless with respect to any proceedings by which he might be able to retrench his losses...the Act of Congress did not create these rights. They had existed at all times since the losses occurred." *Williams v. Heard*, 140 U.S. 529, 540-541 (1891).

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).