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-I-049 Decision No. LIB-I-019

Counsel for Claimant: Richard D. Heideman, Esq.
Heideman Nudelman & Kalik, P.C.

Oral Hearing held on July 28, 2011

FINAL DECISION

This claim against the Great Socialist People's Libyan Arab Jamahiriya ("Libya") is brought by 5 U.S.C. §552(b)(6) based upon physical injuries allegedly sustained at Fiumicino Airport in Rome, Italy on December 27, 1985. By its Proposed Decision entered September 23, 2009, the Commission denied the claim for lack of jurisdiction on nationality grounds because the evidence in the claim indicated that the claimant was not a U.S. national at the time of the alleged injury, and did not become a national of the United States until 2006.

On October 8, 2009, the claimant filed a notice of intent to file an objection to the Commission's Proposed Decision. On November 24, 2009, the claimant filed the objection, along with a brief, and a request for an oral hearing. The oral hearing was initially scheduled for January 13, 2010, but was postponed at claimant's request. On

July 7, 2011, claimant made an additional submission in support of his objection. The hearing on the objection was conducted on July 28, 2011.

CLAIMANT'S OBJECTION

Claimant's fundamental objection is to the Commission's application of the "continuous nationality" rule to his claim, which resulted in the denial of the claim for lack of jurisdiction. Specifically, in his briefs, and at the hearing, claimant asserts that the Commission made three errors of law in rejecting the underlying claim. First, that the Commission erred by "looking beyond the criteria set forth in the Department of State's [December Referral Letter[1]] . . . in applying a 'continuous nationality' requirement to the claim." Second, that the Commission erred in applying the continuous nationality requirement to 5 U.S.C. §552(b)(6) claim in contravention of the Libyan Claims Resolution Act.[2] Third, that the Commission erred "by applying the 'continuous nationality' requirement in contravention of the international agreement entered into between the governments of the United States and Libya on August 14, 2008. . . ."[3] These and other arguments made by the claimant during the oral hearing are addressed below.

DISCUSSION

Pursuant to a delegation of authority from the Secretary of State, the State Department's Legal Adviser referred to the Commission for adjudication the following category of claims:

> claims of U.S. nationals for physical injury, provided that (1) the claim meets the standard for physical injury adopted by the Commission; (2) the

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[1] December 11, 2008, *letter from the Honorable John B. Bellinger, III, Legal Adviser, Department of State, to the Honorable Mauricio J. Tamargo, Chairman, Foreign Claims Settlement Commission* ("December Referral Letter").

[2] Libyan Claims Resolution Act, Pub. L. No. 110-301, 122 Stat. 2999 (2008) ("LCRA").

[3] *Claims Settlement Agreement Between the United States of America and the Great Socialist People's Libyan Arab Jamahiriya* ("Claims Settlement Agreement" or "CSA"), 2008 U.S.T. Lexis 72.

> claim is set forth as a claim for injury other than emotional distress alone by a named party in the Pending Litigation; and (3) the Pending Litigation against Libya and its agencies or instrumentalities; officials, employees, and agents of Libya or Libya's agencies or instrumentalities; and any Libyan national (including natural and juridical persons) has been dismissed before the claim is submitted to the Commission.

December Referral Letter, *supra*, ¶ 3.

Thus, the December Referral Letter referred to the Commission a category of claims of "U.S. nationals" for physical injury. The Commission determined in its Proposed Decision in this claim that the term "U.S. nationals" must be interpreted to mean persons who meet the definition of "U.S. national," as defined in the Commission's authorizing statue, 22 U.S.C. § 1621(c) (2006). Claimant does not object to application of this definition. Claimant does, however, object to the Commission's further conclusion that the December Referral Letter is silent as to when a person must be a U.S. national in order to qualify for compensation. In concluding that the December Referral Letter is silent on this issue, the Commission looked to U.S. practice and relevant principles of international law to fill the lacuna. The Commission determined that it "is a well-established principle of the law of international claims, which has been applied without exception by both this Commission and its predecessors, the War Claims Commission and the International Claims Commission, that a claim may be found compensable only if it was owned by a U.S. national at the time the claim arose." The Commission concluded that in the present claim, the claimant "did not become a citizen until 2006. As such, he was not a national of the United States when his claim arose in 1985."

Claimant contends that there is no lacuna. Instead, claimant argues that the phrase which is contained in the December Referral Letter and which is under scrutiny, "claims of U.S. nationals for physical injury" – is stated in the present tense, meaning that

anyone who was a U.S. national as of the date of the December Referral Letter (i.e., December 11, 2008) is eligible for compensation as a U.S. national. Claimant makes the same "present tense" argument in contending that the Commission erred in its interpretation of both the Claims Settlement Agreement and the LCRA. Further, claimant argues that the CSA and the LCRA evince a "clear intent" to settle *all* claims against Libya, "not just the claims of those claimants meeting the continuous nationality requirement."[4] Claimant asserts that given the absence of any language expressing a continuous nationality requirement, the Commission may not read such a requirement into the CSA, LCRA or the December Referral Letter. For the reasons set forth below, the Commission concludes that the claimant's various arguments are unavailing.

Claimant argues that the CSA, the LCRA, the December Referral Letter, and indeed the President's October 31, 2008 Executive Order[5] must be read in the present tense, and when so read, are clear on the question of when a person must be a U.S. national to qualify for compensation. The Commission disagrees. Contrary to claimant's argument, the term "U.S. nationals" does not, by ordinary meaning, denote any specific time at which to measure whether a claimant is a U.S. national.[6] The inherent ambiguity as to the timing of the nationality requirement is demonstrated by claimant's own argument. The CSA, LCRA, December Referral Letter and E.O. 13477 each bear a different date; a "present tense" reading consequently would result in conflicting dates

[4] As the Commission pointed out during the oral hearing, and as claimant acknowledged, claimant's objection here is not so much with the "continuous nationality" rule as it is with the rule that in order to be eligible for compensation, a claimant must have been a U.S. national at the time of injury.

[5] Executive Order No. 13,477, 73 Fed. Reg. 65,965 (Oct. 31, 2008) ("E.O. 13477").

[6] Indeed there is no "tense" here to speak of, because there is no verb. In contrast, the State Department has elsewhere in its referrals in the Libya Claims Program made clear when it is denoting the present tense. For example in the 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*, the State Department specified that Category B shall consist of claims of U.S. nationals for mental pain and anguish who "*are*" living close relatives of a decedent.

from which to determine U.S. nationality. This is not a sensible or reasonable reading of these documents.

Equally unsuccessful is claimant's assertion at the oral hearing that the CSA and the LCRA evince a "clear intent" to settle *all* claims against Libya, "not just the claims of those claimants meeting the continuous nationality requirement." The question here is not whether the United States intended to settle all claims in U.S. courts against Libya – clearly it did, and the settlement of all claims was likewise a primary objective of Libya. E.O. 13477 makes this abundantly clear by directing, in sections 1(a) and (b), respectively, the settlement of claims of "United States nationals" and those of "foreign nationals."

The question is which settled claims were to be the subject of compensation by the Commission from the fund established in Article II of the CSA. The act espousing the settled claims – E.O. 13477 – provides a clear answer to this question. As noted above, Section 1(a) of that Order settles the claims of United States nationals. Section 1(a)(iii) directs the Secretary of State to "provide for procedures governing applications by United States nationals with claims within the terms of Article I for compensation for those claims." There is no corresponding subsection in Section 1(b), which, as noted above, settles the claims of foreign nationals. In other words, E.O. 13477 makes it clear that only the settled claims of U.S. nationals were to be the subject of compensation by the referrals from the State Department. Consequently, claimant's arguments notwithstanding, the intent of the drafters of the CSA, the LCRA or the December

Referral Letters to settle *all* claims against Libya does not shed light on when a person must be a U.S. national in order to qualify for compensation under the settlement.[7]

Claimant's assertion that because there is no language in any of these documents specifying the continuous nationality requirement, one cannot be imposed, would have some weight were it not for the fact 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 clearly articulated and not merely implied. In other words, the absence of language cannot be grounds for departure from well-settled law.

Counsel for claimant stated during the oral hearing that it is not claimant's position that the continuous nationality rule – while subject to some criticism – is not a rule of customary international law. Counsel made it clear that this point is not essential to claimant's position. Instead, counsel argued that States regularly derogate from customary international law rules, and that the CSA represents such a derogation from the rule of continuous nationality. While the first part of this proposition is not controversial, the second part is problematic. Counsel pointed to a number of instances in which the United States has derogated in international agreements from customary international

[7]Claimant also points to an exhibit to a July 28, 2008 letter from then Deputy Secretary of State John D. Negroponte to Senator Mitch McConnell, which claimant has appended to his brief. Claimant argues that the exhibit to the letter demonstrates that the State Department's intent was to compensate all U.S. litigants in the Pending Litigation, regardless of their nationality at the time of injury. The exhibit lists the Pending Litigation and enumerates the specific covered cases. The claimant points out that in the exhibit, in parenthesis, it lists "nine Americans injured in terrorist attack on Rome Airport." Claimant further states that he is included in the tally of the nine injured Americans. However, the exhibit itself makes clear that it does not mean that all tallied litigants in pending litigation claims were, per se, to be compensated, as its heading specifically states "allegations in the complaints." This indicates that the exhibit was merely identifying the potentially eligible universe of claims, and listed claims as they were alleged, not that the State Department had made any determination that all tallied litigants would be compensated.

law. Without going to the merits of each of the instances cited on this issue, suffice it to say that in each case – the Iran-U.S. Claims Tribunal, the United Nations Compensation Commission, the Eritrea-Ethiopia Claims Commission, and bilateral investment treaties generally – the derogations were explicit in the language of the underlying operative documents (particularly on the issue of continuous nationality), and not simply implied from the absence of clear language of derogation.

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.[8]

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*

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

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.").[9]

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.

[9] *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 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).

CONCLUSION

In summary, therefore, the Commission must again conclude that it lacks jurisdiction under the December Referral Letter over the claimant's claim because he sustained his injury in 1985 but did not become a national of the United States until 2006. Accordingly, while the Commission sympathizes with the claimant, 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, August 31, 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 Personally Identifiable Information Redacted under 5 U.S.C. §552(b)(6) Against the Great Socialist People's Libyan Arab Jamahiriya	Claim No. LIB-I-049 Decision No. LIB-I-019

Counsel for Claimant: Richard D. Heideman, Esq.
Heideman Nudelman & Kalik, P.C.

PROPOSED DECISION

This claim against the Great Socialist People's Libyan Arab Jamahiriya ("Libya") is based upon physical injuries said to have been sustained by the claimant at Fiumicino Airport in Rome, Italy on December 27, 1985.

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 December 11, 2008, pursuant to a delegation of authority from the Secretary of State, the State Department's Legal Adviser referred to the Commission for adjudication a category of claims of United States nationals against Libya. *Letter from the Honorable John B. Bellinger, III, Legal Adviser, Department of State, to Mauricio J.*

Tamargo, Chairman, Foreign Claims Settlement Commission ("December Referral Letter"). The category of claims referred consists of

> claims of U.S. nationals for physical injury, provided that (1) the claim meets the standard for physical injury adopted by the Commission; (2) the claim is set forth as a claim for injury other than emotional distress alone by a named party in the Pending Litigation; and (3) the Pending Litigation against Libya and its agencies or instrumentalities; officials, employees, and agents of Libya or Libya's agencies or instrumentalities; and any Libyan national (including natural and juridical persons) has been dismissed before the claim is submitted to the Commission.

Id. at ¶ 3. Attachment 1 to the December Referral Letter lists the suits comprising the Pending Litigation.

Related to the December Referral Letter, a number of official actions were taken with respect to the settlement of claims between the United States and Libya. Specifically, 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 Secretary of State certified, pursuant to the Libyan Claims Resolution Act ("LCRA"), Pub. L. No. 110-301, 122 Stat. 2999 (2008), that the United States Government had received funds sufficient to ensure "fair compensation of claims of nationals of the United States for . . . physical injury in cases pending on the date of enactment of this Act against Libya . . . ." December Referral Letter, *supra*, ¶ 1. On the same day, the President issued Executive Order No. 13,477, 73 Fed. Reg. 65,965 (Oct. 31, 2008), espousing the claims of United States nationals coming within the terms of the Claims Settlement Agreement, barring United States nationals from asserting or maintaining such claims, terminating any pending suit within the terms of the Claims Settlement Agreement, and directing the Secretary of State to establish procedures governing claims by United States nationals falling within the terms of the Claims Settlement Agreement.

On March 23, 2009, the Commission published notice in the *Federal Register* announcing the commencement of this Libya Claims Program pursuant to the ICSA and the December Referral Letter. *Notice of Commencement of Claims Adjudication Program, and of Program Completion Date*, 74 Fed. Reg. 12,148 (2009).

BASIS OF THE PRESENT CLAIM

On July 22, 2009, the Commission received from claimant's counsel a completed Statement of Claim and accompanying exhibits supporting the claimant's claim, including evidence of: his United States nationality; his inclusion as a named party in the Pending Litigation referred to in Attachment 1 of the December Referral Letter, setting forth a claim for injury other than emotional distress alone; the dismissal of the Pending Litigation against Libya; and his physical injuries.

The claimant, Personally Identifiable Information Redacted under 5 U.S.C. §552(b)(6) states that on December 27, 1985, he was present at the Fiumicino Airport in Rome, Italy, at the time of the terrorist attack. According to his Statement of Claim, he suffered a wound to the back of his right hand from a machine gun bullet which required him to be hospitalized for four days for medical treatment. He further states that he currently suffers from severe and painful arthritis in his right hand brought on by his injury.

The claimant has provided evidence of his United States nationality by naturalization. This evidence reflects that he was naturalized as a United States citizen in 2006 but that he was a citizen of Italy by birth, having been born there in 1961. In addition, the claimant has provided a copy of the Order of Dismissal in Cases No. 06-cv-727 and 08-cv-529, filed in the United States District Court for the District of Columbia, which name him as a party and which show that these cases were ordered dismissed on December 24, 2008.

DISCUSSION

Jurisdiction

As an initial matter, the Commission must consider whether this claim falls within the category of claims referred to it by the Department of State. The Commission's jurisdiction under the December Referral Letter is limited to claims of individuals who are: (1) United States nationals and (2) named parties in a Pending Litigation case which has been dismissed. December Referral Letter, *supra*, ¶¶ 2-3.

Nationality

In the *Claim of* Personally Identifiable Information Redacted under 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 a claim to be compensable, the claimant must have been a national of the United States, as that term is defined in the Commission's authorizing statute, from the date the claim arose until the date of the Claims Settlement Agreement. Specifically, the Commission noted that the December Referral Letter tasked the Commission with adjudicating and certifying a category of claims of United States nationals. In order to determine who qualifies as a United States national, the Commission must look to the provisions of ICSA, the statute under which the referral is made. Under that statute, the Commission is directed to apply, in the following order, "the provisions of the applicable claims agreement" and "the applicable principles of international law, justice and equity" in its deliberative process. 22 U.S.C. § 1623(a)(2) (2006).

Although the Claims Settlement Agreement states that it settles the claims of "United States nationals," it does not define that term. However, the Commission's authorizing statute defines the term "nationals of the United States" as "(1) persons who are citizens of the United States, and (2) persons who, though not citizens of the United States, owe permanent allegiance to the United States. It does not include aliens." 22

U.S.C. § 1621(c) (2006).* Accordingly, the Commission holds that it is authorized to adjudicate and certify the claims of persons who meet this definition with respect to their U.S. nationality.

The Claims Settlement Agreement is silent, however, as to *when* a claimant must be a United States national in order to be eligible for compensation under the Claims Settlement Agreement. Therefore, the Commission must look to United States practice and the applicable principles of international law, justice and equity, including its own jurisprudence, to make this determination. It is a well-established principle of the law of international claims, which has been applied without exception by both this Commission and its predecessors, the War Claims Commission and the International Claims Commission, that a claim may be found compensable only if it was owned by a United States national at the time the claim arose. *See, e.g., Claim of EUGENIA D. STUPNIKOV against Yugoslavia*, Claim No. Y-2-0071, Decision No. Y-2-0003 (1967); *Claim of ILONA CZIKE against Hungary*, Claim No. HUNG-2-0784, Decision No. HUNG-2-191 (1976); *Claim of JOSEPH REISS against the German Democratic Republic*, Claim No. G-2853, Decision No. G-2499 (1981); *Claim of TRANG KIM against Vietnam*, Claim No. V-0014, Decision No. V-0001 (1982). This principle has also been recognized by the courts of the United States. *See, e.g., Haas v. Humphrey*, 246 F.2d 682 (D.C. Cir. 1957), *cert. denied* 355 U.S. 854 (1957). Indeed, in the statute authorizing the Second Czechoslovakian Claims Program, Congress reaffirmed "the

* The Commission notes that both the LCRA and Executive Order No. 13,477 define the term "national of the United States" by reference to the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(22) (2006), which similarly defines the term as a citizen of the United States, or a person who, though not a citizen, owes permanent allegiance to the United States. LCRA § 2(3), 122 Stat. at 2999; Exec. Order No. 13,466, Exec. Order No. 13,477, 73 Fed. Reg. at 65,965.

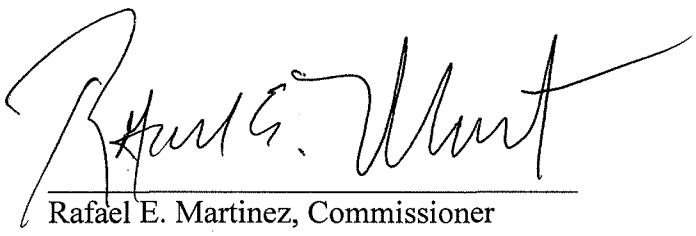
principle and practice of the United States to seek compensation from foreign governments on behalf only of persons who were nationals of the United States at the time" of loss. 22 U.S.C. note prec. § 1642 (2006).

According to his Statement of Claim, the claimant, Personally Identifiable Information Redacted under 5 U.S.C. §552(b)(6) did not become a U.S. citizen until 2006. As such, he was not a "national of the United States" when his claim arose in 1985. Under United States practice and the applicable principles of international law, justice and equity, including its own jurisprudence, the Commission is accordingly constrained to conclude that the claimant's claim is not compensable under the December Referral Letter and the Claims Settlement Agreement. Accordingly, this claim must be and it is hereby denied. The Commission finds it unnecessary to make determinations with respect to other elements of this claim.

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

SEP 23 2009

Mauricio J. Tamargo, 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) (2008).