

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)

Claim No. LIB-II-042
Decision No. LIB-II-018

Claim No. LIB-II-043
Decision No. LIB-II-008

Claim No. LIB-II-044
Decision No. LIB-II-001

Claim No. LIB-II-045
Decision No. LIB-II-009

Claim No. LIB-II-056
Decision No. LIB-II-019

Claim No. LIB-II-057
Decision No. LIB-II-025

Claim No. LIB-II-059
Decision No. LIB-II-075

Claim No. LIB-II-060
Decision No. LIB-II-063

Claim No. LIB-II-061
Decision No. LIB-II-064

Against the Great Socialist People's
Libyan Arab Jamahiriya

Counsel for Claimant:

Zoe Salzman, Esq.
Emery Celli Brinckerhoff & Abady LLP

ORDER

On March 21, 2013, the above-referenced claimants,

5 U.S.C. §552(b)(6)

(collectively, the “claimants”), filed Petitions to Reopen their respective claims against the Great Socialist People’s Libyan Arab Jamahiriya (“Libya”) based upon mental pain and anguish suffered as a result of the death of family members who were killed on board Pan Am Flight 103 on December 21, 1988. The underlying claims were made pursuant to Category B of the *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*, and each of the claimants was awarded \$200,000 in decisions that have now become final.

The claimants state that the Petitions to Reopen are “[b]ased on new evidence that there is a surplus of funds available following the Commission’s resolution of all claims and appeals . . .” The claimants further argue that the awards of \$200,000 per claimant fail to properly compensate them for their pain and suffering.

The Commission’s regulations, 45 C.F.R. § 509.5(l), govern petitions to reopen before the Commission. Among other requirements, the petition must be based on “newly discovered evidence” and it must appear “that reconsideration of the matter on the basis of that evidence would produce a different decision.”

These Petitions to Reopen fail to satisfy the requirements of 45 C.F.R. § 509.5(l). To start, it is not clear that the asserted new evidence—that there might be money remaining in the Libya settlement fund—is the type of “newly discovered evidence” that would warrant a petition to reopen. The “evidence” is not directly relevant to the injury that claimants suffered. But even accepting it as “newly discovered evidence” for purposes of this petition, the consideration of this evidence would not “produce a different decision.” Whenever the Commission has decided the amount of compensation for claims in the Libya Claims Program, the amount of money in the Libya settlement fund was simply not a factor. Rather, in determining the amount that successful Category B claimants were to recover, the

factors the Commission took into account were the State Department's recommendation, international law principles, and the September 11th Compensation Fund's awards for similar losses. *See, e.g., Claim of* 5 U.S.C. §552(b)(6) Claim No. LIB-II-044, Decision No. LIB-II-001, PD at 9-10 (2009), and *Claim of* 5 U.S.C. §552(b)(6), Claim No. LIB-II-125, Decision No. LIB-II-022, FD at 4-5 (2012). Claimants' decisions are now final, and the Commission sees no reason to change its approach to deciding these claims now. Because the Commission carefully considered all the factors it viewed as relevant in determining claimants' compensation and because the amount of money in the Libya settlement fund was not one of the relevant factors, "reconsideration of the matter on the basis of" the amount of money in the fund would not "produce a different decision."

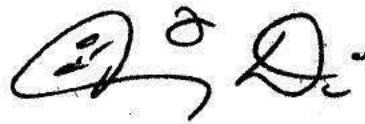
The Commission reiterates its sympathy for the pain and suffering claimants have endured, and does so with full knowledge that no amount of money can truly compensate for the death of a loved one in such horrific circumstances. These Petitions to Reopen must be denied, however, because they fail to satisfy the requirement in the Commission's regulations that consideration of newly submitted evidence "would produce a different decision."

Accordingly, it is ORDERED that the Petitions to Reopen these claims for further consideration be and they are hereby denied.

Dated at Washington, DC, April 25, 2013
and entered as the Order of the Commission.



Rafael E. Martinez, Commissioner



Anuj C. Desai, 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-II-045

Decision No. LIB-II-009

Counsel for Claimant:

Sarah Netburn, Esq.
Emery Celli Brickerhoff & Abady LLP

PROPOSED DECISION

This claim against the Great Socialist People's Libyan Arab Jamahiriya ("Libya") is based on mental pain and anguish suffered as a result of the death of claimant's brother, Personally Identifiable Information
Redacted under 5 U.S.C. §552(b)(6), who was killed on board Pan Am Flight 103 on December 21, 1988.

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 from the*

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

Category B of the claims referred 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 the December 11, 2008 referral letter from the State Department’s Legal Adviser to the Commission (“December Referral Letter”), 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 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. 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 “has received funds pursuant to the claims agreement that are sufficient to ensure . . . payment of the settlements referred to in section 654(b) of division J of the Consolidated Appropriations Act, 2008 (Public Law 110-161; 121 Stat. 2342); and . . . fair compensation of claims of nationals of the United States for wrongful death or physical injury in cases pending on the date of enactment of this Act against Libya . . .” January Referral Letter, *supra*, ¶ 1.

On the same day, the President issued Executive Order No. 13477, 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 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).

I. BASIS OF THE PRESENT CLAIM

On October 28, 2009, the Commission received from claimant's counsel a completed Statement of Claim and accompanying exhibits in support of the claim, including evidence of: claimant's United States nationality at birth and continuing United States nationality; his inclusion as a named party in the Pending Litigation referred to in Attachment 1 of the January Referral Letter, setting forth a claim for emotional distress, solatium, or similar injury; and the dismissal of the Pending Litigation against Libya.

The claimant, Personally Identifiable Information
Redacted under 5 U.S.C. §552(b)(6) states that he is the brother of Personally Identifiable Information
Redacted under 5 U.S.C. §552(b)(6) who was killed on December 21, 1988 on Pan Am Flight 103. He further states that he had an extremely close relationship with his brother and suffered tremendously following his death. Claimant's sworn claim includes a declaration by his attorney, made under penalty of perjury, which states that claimant "has not received any money from the \$10 million settlement between Personally Identifiable Information
Redacted under 5 U.S.C. §552(b)(6) estate and Libya. Nor has he received any money from any other source as a result of his brother's death."

II. DISCUSSION

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 Category B of the January Referral Letter is limited to claims of individuals: (1) who are United States nationals; (2) who are living; (3) who are close relatives of a decedent whose death formed the basis of a death claim compensated by the Department of State; (4) who, as named parties, made claims for emotional distress, solatium, or similar emotional injury in a Pending Litigation case which has been dismissed; and (5) who 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.

A. Nationality

As noted above, the January Referral Letter tasked the Commission with adjudicating and certifying six categories 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 the ICSEA, 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).¹

In *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. 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). Therefore, consistent with its past jurisprudence, the Commission holds 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, at the time the claim arose and continuously thereafter until the date of the Claims Settlement Agreement.

Based on the evidence submitted with this claim, including claimant’s birth certificate and his current passport, the Commission determines that the claimant was a United States national at the time Personally Identifiable Information
Redacted under 5 U.S.C. §552(b)(6) was killed on December 21, 1988 on Pan Am Flight 103, and that he has been a United States national continuously thereafter including on the effective date of the Claims Settlement Agreement.

B. 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

¹ The Commission notes that both LCRA, Pub. L. No. 110-301, 122 Stat. 2999 (2008), 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. 13,477, 73 Fed. Reg. at 65,965 (2008).

whose death formed the basis of a death claim compensated by the Department of State. The Commission notes that the January Referral Letter plainly refers to claimants “who are living” and not “who are, or were, living.” In light of this fact, and the Commission’s proposed decision in *Claim of* Personally Identifiable Information
Redacted under 5 U.S.C. §552(b)(6) Claim No. LIB-II-044, Proposed Decision No. LIB-II-001, the Commission holds 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 claimant has satisfied this requirement, as evidenced by his birth certificate and his notarized declaration in support of his Statement of Claim dated August 31, 2009.

C. 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.² After careful and thorough consideration, the Commission holds for the limited purpose only of the unique parameters of Category B of this claims program, and without setting precedent for other categories or other claims programs, that 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.³ The Commission finds that the

² The Commission takes notice that the death of Personally Identifiable Information
Redacted under 5 U.S.C. §552(b)(6) formed the basis of a death claim compensated by the Department of State.

³ The Commission notes, again only for the limited purpose of assessing claims under Category B of the January Referral Letter, that, in regard to a claim for intentional infliction of emotional distress, “immediate family,” as used in the RESTATEMENT (SECOND) OF TORTS § 46, has been defined as a person’s spouse, parents, siblings and children, but not his nieces and nephews. *See Bettis, et al. v. Islamic Republic of Iran*, 315 F.3d 325, 331, 334-335 (D.C. Cir. 2003). *See, also, Williams v. City of Minneola*, 575 So.2d 683, 690 (Fla. App. 1991) (holding that spouses, children, parents and siblings can sue for the tort of intentional infliction of emotional distress); *Stephens v. United Mexican States*, Docket No. 148, Claims Commission United States and Mexico, Opinion of Commissioners, 1927 at page 397-401 (granting award to brothers of decedent for grief and indignity). The Commission also takes note for this limited purpose of

claimant has established that he is a close relative of the decedent, as evidenced by his birth certificate, which, in conjunction with the decedent's birth certificate, demonstrates that he and the decedent had the same parents, and that they were brothers.

D. 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, 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 complaint in Case No. 02-cv-2147, filed in the United States District Court for the District of Columbia, which names him as a party and states a claim for emotional and psychological pain and suffering. Additionally, the claimant has provided the District Court's May 7, 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, solatium, or similar emotional injury in the Pending Litigation and that the Pending Litigation has been properly dismissed.

the decision in *O'Neil v. Germany*, in which the Mixed Claims Commission United States and Germany found O'Neil's claim for damages suffered by him based on his deprivation of the love and society of his niece, who was killed in the sinking of the *Lusitania*, to be wholly without merit. *Consolidated Edition of Decisions and Opinions, Mixed Claims Commission United States and Germany* at 513-16 (1925). In addition, the Commission takes note for this limited purpose of the decision in *Vazquez v. Germany*, in which the Mixed Claims Commission United States and Germany awarded damages to a mother although there was only meager evidence of pecuniary losses, but denied an award to the decedent's half-brother and half-sister. *Consolidated Edition of Decisions and Opinions, Mixed Claims Commission United States and Germany* at 652-53 (1926). Compare, *Richeson, et al. v. Panama*, United Nations Reports of International Arbitral Awards, Volume VI, pages 325-328 (June 26, 1933) in which the United States and Panama Claims Commission allowed a half-brother to recover for the harm to the decedent.

E. Claimant Must Not Be Otherwise Eligible For, and Must Not Have Received, Compensation

To fall within Category B of the claims referred to the Commission, the claimant must also be ineligible for compensation from the wrongful death claim, must not have received any compensation from the wrongful death claim, must not have received any compensation under any other part of the Claims Settlement Agreement, and must not qualify for any other category of compensation pursuant to the January Referral Letter. January Referral Letter, *supra*, ¶ 4. Claimant has represented to the Commission, under oath, that he has not received, and that he is not eligible to receive, aside from under Category B, compensation from the Department of State or from the Commission, pursuant to either the December Referral Letter or the January Referral Letter. Claimant has also submitted in support of his sworn claim a declaration by his attorney made under penalty of perjury which states that claimant “has not received any money from the \$10 million settlement between ^{5 U.S.C.} §552(b)(6) estate and Libya. Nor has he received any money from any other source as a result of his brother’s death.” The Commission finds based on the evidence submitted that the claimant was not eligible for compensation from the wrongful death claim, did not receive any compensation from the wrongful death claim, did not receive any compensation under any other part of the Claims Settlement Agreement, and does not qualify for any other category of compensation pursuant to the January Referral Letter.

Accordingly, the Commission finds that this claim is within the Commission’s jurisdiction and that the claimant has satisfied the elements required for compensation pursuant to Category B of the January Referral Letter.

III. COMPENSATION

Having concluded that the present claim is within the Commission's jurisdiction and is compensable, the Commission must next determine the appropriate amount of compensation.

A. Amount

The January Referral Letter "recommend[ed] that a fixed amount of \$200,000 would be an appropriate level of compensation for a claim that meets the applicable standards under Category B." January Referral Letter at ¶ 4. As discussed in the Commission's proposed decision in *Claim of* Personally Identifiable Information Redacted under 5 U.S.C. §552(b)(6) the Commission has taken notice, for the limited purpose of assessing only claims under Category B, of the discussion in *Dobbs' Law of Remedies* which observes the difficulty in assessing intangible, non-economic damages. Dan B. Dobbs, *Dobbs' Law of Remedies*, Volume 2 (2nd ed. 1993) at section 8.3(6). *Dobbs* notes that this difficulty has led legal scholars to endorse using a fixed sum award for intangible damages in wrongful death cases. *Id.* See, also, Marjorie M. Whiteman, *Damages in International Law*, Volume 1 (1937) at page 777-778 (citing a decision of Umpire Parker in *Mixed Claims Commission United States and Germany, Decisions and Opinions* at 17, 21-22 (November 1, 1923), which states that "it is manifestly impossible to compute mathematically or with any degree of accuracy or by the use of any precise formula" certain forms of damages, such as those sustained as a result of mental suffering).⁴ In this limited regard, the Commission has also taken notice that the September 11th Compensation Fund granted \$100,000 for non-economic losses to the spouse and each

⁴ The Commission has likewise taken notice, for this limited purpose, of the discussion in Dinah Shelton's treatise, *Remedies In International Human Rights Law* (2nd ed. 2005) at section 9.6.2, which states that there "are few developed principles for calculating awards of non-monetary injuries like pain and suffering, fright, nervousness, grief, anxiety, and indignity." Shelton further states that while these injuries constitute recognized elements of damages, there is no objective test to measure the severity of a victim's pain; rather, such injuries are particularly personal and therefore difficult to measure. *Id.*

dependent of a decedent in the claims brought before it. *See, Kenneth R. Feinberg et al., Final Report of the Special Master of the September 11th Victim Compensation Fund of 2001*, at page 40, U.S. Department of Justice, 2004, available at: www.usdoj.gov/final_report.pdf.

Based on its consideration of the amount recommended in the January Referral Letter and the nature and tragedy of the events associated with the cases identified under the Pending Litigation, as well as other factors discussed above, and without setting precedent for other categories or other claims programs, the Commission holds that the recommended fixed award of \$200,000.00 is the appropriate amount of compensation for eligible claimants under Category B of the January Referral Letter. Accordingly, the Commission determines that the claimant, Personally Identifiable Information
Redacted under 5 U.S.C. §552(b)(6) is entitled herein to an award of \$200,000.00.

B. Interest

As regards interest, in *Claim of* Personally Identifiable Information
Redacted under 5 U.S.C. §552(b)(6) *supra*, after consideration of principles of international law and precedent decisions, the Commission held that compensable tort claims in this claims program are not entitled to interest as part of the awards made therein. *Id.* Therefore, the award of \$200,000.00 made herein constitutes the entirety of the compensation that the claimant is entitled to in the present claim.

IV. CONCLUSION

Accordingly, the Commission 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.

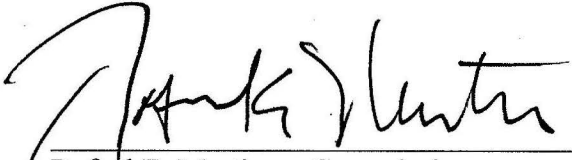
AWARD

Claimant Personally Identifiable Information
Redacted under 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, and
entered as the Proposed Decision
of the Commission.

DEC 18 2009


Mauricio J. Tamargo, Chairman


Rafael E. Martinez, Commissioner

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

JAN 26 2010

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).