

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

In the Matter of the Claim of

5 U.S.C. §552(b)(6)

Against the Great Socialist People's
Libyan Arab Jamahiriya

Claim No. LIB-II-161

Decision No. LIB-II-134

PROPOSED DECISION

This claim against the Great Socialist People's Libyan Arab Jamahiriya ('Libya') is based upon the hostage-taking or unlawful detention of and physical injuries said to have been sustained by 5 U.S.C. §552(b)(6) during the hijacking of Pan Am Flight 73 at Karachi International Airport in Karachi, Pakistan, on September 5, 1986.

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).

The present claim is made under Categories A, D, and E. According to the January Referral, Category A consists of:

claims by U.S. nationals who were held hostage or unlawfully detained in violation of international law, provided that (1) the claimant meets the standard for such claims adopted by the Commission; (2) the claim was set forth as a claim for injury other than emotional distress alone by the claimant named in the Pending Litigation; (3) the Pending Litigation against Libya has been dismissed before the claim is submitted to the Commission; and (4) the claimant did not receive an award pursuant to [the Secretary of State's] referral of December 11, 2008.

Id. at ¶ 3. Category D consists of

claims of U.S. nationals for compensation for physical injury in addition to amounts already recovered under the Commission process initiated by [the Department of State's] December 11, 2008 referral, provided that (1) the claimant has received an award pursuant to [the Department of State's] December 11, 2008 referral; (2) the Commission determines that the severity of the injury is a special circumstance warranting additional compensation, or that additional compensation is warranted because the injury resulted in the victim's death; and (3) the Pending Litigation against Libya has been dismissed before the claim is submitted to the Commission.

Id. at ¶ 6. 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 lists the suits comprising the Pending Litigation and Attachment 2 lists the Covered Incidents.

The January Referral, as well as a December 11, 2008 referral letter (‘December Referral’) 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 ICOSA and the January Referral. *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 claimant a completed Statement of Claim in which he asserts a claim under the January Referral, along with exhibits supporting the elements of his claim. This submission included evidence of claimant’s

U.S. nationality, his presence at the scene of the terrorist incident, and his alleged physical injuries for which he now claims compensation.

The claimant states that he was on board Pan Am Flight 73 in Karachi, Pakistan on September 5, 1986, when he and other passengers were held hostage by armed hijackers for sixteen hours while the plane sat on the tarmac. Claimant states that, after an airplane door next to him had been opened, he exited the plane onto the wing, and while attempting to jump to an adjacent inflatable slide, fell short and injured his ankle and the side of his body. He further states that he was taken to a local hospital, where he was fitted with a temporary cast, and subsequently evacuated via U.S. military aircraft to Frankfurt, Germany.

DISCUSSION

Jurisdiction

Under subsection 4(a) of the ICOSA, the Commission's jurisdiction here is limited to the categories of claims defined under the January Referral. As noted above, Categories A, D, and E of the January Referral all require that the claimant be a U.S. national. January Referral, *supra*, ¶¶ 3, 6-7. In addition, Category A requires that the claimant not have received an award under the December Referral, that the claimant be a named party in the Pending Litigation listed in Attachment 1 to the January Referral, and that the claimant provide evidence that the Pending Litigation against Libya has been dismissed. Category D, because it requires that the claimant have received an award under the December Referral, also incorporates the requirements that the claimant be a named party in the Pending Litigation, and evidence that this litigation was dismissed. *Id.* ¶¶ 3, 6. Category E, on the other hand, requires that the claimant *not* have been a

plaintiff in the Pending Litigation. It does require, however, that a claimant assert a claim for wrongful death or physical injury resulting from one of the Covered Incidents listed in Attachment 2 to the January Referral. *Id.* ¶ 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 to meet the nationality requirement, 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. To meet this requirement, the claimant has provided a copy of his California birth certificate and a copy of his temporary U.S. passport, issued one day after the incident, both of which show his place of birth in California. In addition, the Commission has verified that claimant is currently registered to vote in the State of Texas. Based on this evidence, 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.

Pending Litigation

Categories A and D require that the claimant have been a plaintiff in a Pending Litigation listed in Attachment 1 to the January Referral. January Referral, *supra*, ¶¶ 3,6. Claimant states in his Statement of Claim, and the relevant pleadings confirm, that he was not a party to a Pending Litigation. Because claimant does not satisfy this jurisdictional element for compensation under Categories A and D, the Commission is constrained to conclude that his claim under these categories is ineligible for adjudication on the merits.

On the other hand, Category E requires that the claimant *not* have been a plaintiff in the Pending Litigation. As noted above, claimant has stated in his claim form, and the Commission's records confirm, that he was not a party to the Pending Litigation. Based on this evidence, the Commission finds that the claimant has satisfied this element of his claim under Category E.

Claim for Death or Injury Resulting From a Covered Incident

To fall within Category E of the January Referral, 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. January Referral, *supra*, ¶ 7. This list includes the "September 5, 1986 hijacking of Pan Am flight 73, as alleged in *Patel v. Socialist People's Libyan Arab Jamahiriya* (D.D.C.) 06-cv-626." *Id.*, Attachment 2, ¶ 9. In his Statement of Claim, the claimant sets forth a claim for physical injury suffered as a result of the September 5, 1986 Pan Am flight 73 hijacking. The Commission therefore finds that the claimant has satisfied this element of his claim under Category E.

In summary, therefore, the Commission concludes, on the basis of the foregoing, that this claim is within the Commission's jurisdiction pursuant to the January Referral and is entitled to adjudication on the merits under Category E only.

Merits

Standard for Physical Injury

As stated in the January Referral, 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, *supra*, ¶ 7. The Commission held in *Claim of* ^{5 U.S.C. §552(b)(6)}

5 U.S.C. §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.

Id. at 6-7. The present Category E claim must likewise meet this standard to be compensable.

Physical Injury

According to his Statement of Claim and accompanying exhibits, claimant suffered physical injuries on September 5, 1986 during an incident in which, as discussed above, several gunmen hijacked Pan Am Flight 73 in Karachi, Pakistan, as it sat on the airport tarmac shortly before takeoff. Claimant avers that, during the final assault in the main cabin of the aircraft, a passenger seated next to him opened the door, at which point claimant exited the plane. He states that he attempted to jump from the wing onto an adjacent inflatable slide, but fell short, which “caused [him] to injure [his] ankle and bruise [his] side in the fall.” In addition, claimant states that, “[d]espite [his] injuries and pain, [he] was somehow able to stand to walk into the terminal.” He claims that he “received initial medical screening at the airport first aid center and was later transported to a local hospital where [his] leg was x-rayed and a temporary cast [sic] was fitted.” According to claimant, he was “subsequently transported to the Pakistani base in Karachi[,]” and from

there was taken to a local hotel and thereafter “evacuated by U.S. military medical evacuation flight in a stretcher to Frankfort [sic], Germany.”

In support of his claim, claimant has provided, *inter alia*, an unsworn narrative describing his experience during the incident and his alleged physical injuries, as well as several color photographs from the time of the incident depicting claimant in a hospital bed, in a wheelchair, using crutches, and depicting a large bruise on his left side.

While the photographs submitted by claimant suggest that the claimant suffered from some kind of injury during the Pan Am 73 hijacking, the very nature of claimant's injuries ~~let~~ alone the severity ~~remains~~ unknown. In particular, there is no mention or identification of the particular injury, or of the severity of the injury. The evidence does not indicate, for example, whether claimant's ankle was broken or whether he suffered from a severe or mild sprain. There is no indication of the treatment received. While the photographs indicate that the claimant was in a hospital and in a wheelchair, based on the record before it, the Commission is unable to determine whether or not a discernible injury, more than superficial, was suffered, or for example, whether the treatment of the claimant was precautionary in nature.

The Commission staff sent claimant a letter, dated August 16, 2010, requesting that claimant provide medical documentation evidencing his physical injuries; however, to date no response has been received. Numerous attempts to follow up with the claimant, in writing and via telephone, have gone unanswered. Thus, as it stands, the claimant has not provided evidence sufficient to identify the nature of his injury, or indeed that he suffered a “discernible physical injury, more significant than a superficial injury,” as required by the Commission's standard for compensability. On this point, it

should be noted that in proceedings before the Commission, the burden of submitting sufficient evidence lies with the claimant. Section 509.5(b) of the Commission's regulations provides:

The claimant will have the burden of proof in submitting evidence and information sufficient to establish the elements necessary for a determination of the validity and amount of his or her claim.

45 C.F.R. § 509.5(b) (2010).

In this case, based on the entirety of the evidence, the Commission finds that the claimant has failed to provide evidence sufficient to establish that he "suffered a discernible physical injury, more significant than a superficial injury"; that he "received medical treatment for the physical injury within a reasonable time"; and that the injury be verified by medical records, as required under the Commission's physical injury standard.

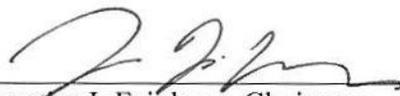
In light of the foregoing, the Commission is constrained to conclude that the claimant, ^{5 U.S.C. §552(b)(6)} does not qualify for compensation under Category E of the January Referral. Accordingly, his claim must be and is hereby denied.

In reaching this conclusion, the Commission notes that, in this program, a number of victims of the hijacking of Pan Am Flight 73 made claims under the December Referral that were unsuccessful, but because they were Pending Litigants, were able to qualify for compensation under Category A of the January Referral, as hostages. As noted above, because claimant was not a Pending Litigant, he is jurisdictionally ineligible, under the terms of this Referral, for compensation under Category A. The Commission emphasizes this point so as to make clear that in reaching these conclusions, it does not wish to minimize the terror claimant must have experienced aboard Pan Am 73 or otherwise appear to judge negatively on the merits of his assertion that he was held

Indeed, it would appear that claimant was held by the hijackers under precisely the same circumstances as those who later became parties to the Pending Litigation. All other requirements for hostage claims appear to have been met in this particular claim. However, the Commission is constrained by the jurisdictional language of the January Referral, and, as noted above, is therefore unable to adjudicate claimant's hostage claim on the merits.

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

Dated at Washington, DC, January 25, 2012
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).