

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-186

Decision No. LIB-II-145

Counsel for Claimant:

Michael G. Dave, Esq.
Marcus, Watanabe & Dave, LLP

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 5 U.S.C. §552(b)(6) in connection with the September 5, 1986 hijacking of Pan Am flight 73 in Karachi, Pakistan.

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 Category E. According to the January Referral, 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 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. *Notice of Commencement of Claims Adjudication Program*, 74 Fed. Reg. 32,193 (2009).

BASIS OF THE PRESENT CLAIM

On July 15, 2010, the Commission received from the claimant a completed Statement of Claim in which she asserts a claim under Category E of the January Referral, along with exhibits supporting the elements of her claim. This submission included evidence of claimant's U.S. nationality, her presence at the scene of the terrorist incident, and the injuries for which she now claims compensation.

The claimant states that she was on board Pan Am Flight 73 in Karachi, Pakistan on September 5, 1986, when she and other passengers were held hostage by armed hijackers for eighteen and a half hours while the plane sat on the tarmac. Claimant asserts that, when the hijacking began, she "saw the big machine guns one foot away[;]" a hijacker then pointed a gun at her and moved her to a rear section of the plane, where she remained throughout the duration of the hijacking. The evidence indicates that, in the final moments of the ordeal, gunfire erupted on the aircraft, and she eventually escaped via an emergency slide.

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; 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 against Libya. January Referral, *supra* ¶ 7.

Nationality

In the *Claim of* ^{5 U.S.C. §552(b)(6)} Claim No. LIB-I-001, Decision No. LIB-I-001 (2009), the Commission held, consistent with its past jurisprudence and generally accepted principles of international law, that in order 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 her current U.S. passport, which evidences both her current U.S. nationality and her birth in Minnesota. Based on this evidence, the Commission determines that the claim was owned by a U.S. national at the time of the incident and has been so held until the effective date of the Claims Settlement Agreement.

Claim for Death or Injury Resulting From a Covered Incident

To fall within the category of claims referred to the Commission, the claimant must 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 her Statement of Claim, the claimant asserts a claim for physical injury suffered as a result of the September 5, 1986 Pan Am flight 73 hijacking. As a matter of pleading, therefore, the Commission finds that the claimant has satisfied this element of her claim under Category E. The merits of this assertion are addressed below.

Pending Litigation

Finally, the January Referral states that the claimant may not have been a plaintiff in a Pending Litigation. January Referral Letter, *supra*, ¶ 7. Attachment 2 to the January Referral identifies the Pending Litigation cases associated with each Covered Incident, which in this claim, as noted above, is the *Patel* case. Claimant has stated under oath in her Statement of Claim, and the pleadings in the *Patel* case confirm, that she was not a plaintiff in that litigation. Based on this evidence, the Commission finds that the claimant has satisfied this element of her claim.

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.

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 her Statement of Claim and accompanying exhibits, claimant suffered injuries on September 5, 1986 during the hijacking of Pan Am Flight 73 in Karachi, Pakistan by armed gunmen as it sat on the airport tarmac shortly before takeoff. In an unsworn statement, claimant asserts that she and her husband were seated in first class, “in the last row next to [the] entrance[.]” when she heard bullets coming from outside the plane. She states that she stood up to investigate, at which point a hijacker armed with a machine gun forced her, with “the gun on [her] back and hands and arms around [her] head,” to the rear of the plane. Claimant describes how, after “18½ hours,” the lights in the cabin went out, and “bullets were going all over and two went through my hair[.]” She states that there was “blood on most of us up to our knees[.]” Eventually, according to claimant, a “cleaning guy” opened up a cabin door. In a subsequent newspaper interview, claimant’s husband stated that he “literally threw [his]

wife out the door . . . before [he] jumped [him]self.” Claimant further alleges that she suffered “psychological trauma” as a result of the incident.

In assessing this evidence against the requirements of Category “E” of the January Referral, the Commission notes that the claimant does not allege, and nowhere in the evidence submitted is it suggested, that she suffered a physical injury as a result of the incident. Indeed, as noted above, in her Statement of Claim, claimant asserts only that “the claim is for mental distress/disorders as result of being a victim in the hijacking” Moreover, responding to the question in the claim form whether “the injured party receive[d] medical treatment for the injuries described above[,]” claimant answered “no.” Finally, the claimant has submitted no medical records whatsoever indicating that she received medical treatment of any kind within a reasonable time after the incident.

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) (2011).

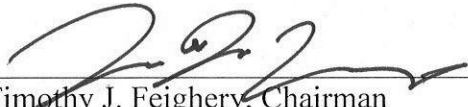
In this case, based on the entirety of the evidence, the Commission finds that the claimant has failed to provide evidence sufficient to establish that she “suffered a discernible physical injury, more significant than a superficial injury”; that she “received medical treatment for the physical injury 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, her claim must be and is hereby denied.

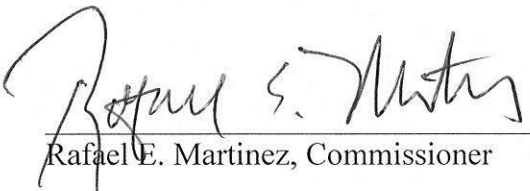
In reaching this conclusion, the Commission notes that, in this program, a number of victims of the hijacking of Pan Am Flight 73 made claims under the December Referral that were unsuccessful, but because they were Pending Litigants, were able to qualify for compensation under Category A of the January Referral, as hostages. As noted above, claimant was not a Pending Litigant; therefore, she 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 its conclusion, 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 any assertion that she was held hostage. 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 would 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 this claim as one for hostage-taking or unlawful detention under the January Referral.

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

Dated at Washington, DC, February 23, 2012
and entered as the Proposed Decision
of the Commission.



Timothy J. Feighery, Chairman



Rafael E. Martinez, Commissioner

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

April 10, 2012

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) (2011).