

**FOREIGN CLAIMS SETTLEMENT COMMISSION
OF THE UNITED STATES
UNITED STATES DEPARTMENT OF JUSTICE
WASHINGTON, D.C. 20579**

In the Matter of the Claim of	}	
	}	
	}	
5 U.S.C. §552(b)(6)	}	Claim No. IRQ-I-017
	}	
	}	Decision No. IRQ-I-018
Against the Republic of Iraq	}	
	}	

Counsel for Claimant:	Daniel Wolf, Esq. Law Offices of Daniel Wolf
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PROPOSED DECISION

Claimant brings this claim against the Republic of Iraq (“Iraq”) based on injuries he suffered while being held hostage in Kuwait between August and September 1990. The United States Department of State has already provided him compensation for his experience as a hostage. He now seeks additional compensation based on a claim that, as a result of his captivity, and in particular because he did not have access to vital medicines while being held hostage, he suffered physical injuries, including kidney damage, retinopathy, gum disease and other serious oral complications, as well as various mental and emotional injuries, including post-traumatic stress disorder (“PTSD”). Although we are sympathetic to all that Claimant endured as a result of his hostage experience, he has failed to show that Iraq knowingly denied him access to vital medicines. He is thus not entitled to additional compensation beyond that which the State Department has already provided him. Therefore, the claim is denied.

BACKGROUND AND BASIS OF CLAIM

Claimant alleges that he travelled to Kuwait on a business trip with colleagues on August 1, 1990, expecting to stay for only 24 hours. He was then trapped in Kuwait after Iraq invaded the country the following day, August 2, 1990. Claimant asserts that Iraq effectively held him hostage for the next 31 days as he and his colleagues hid in a variety of places in Kuwait. On September 1, 1990, he was allowed to leave Kuwait via Baghdad with a group of hostages whose release was negotiated for medical reasons by Reverend Jesse Jackson. Claimant's experiences and injuries are detailed in the Merits section below. Key to his claim is that, throughout his ordeal, he did not have access to adequate medical supplies needed to treat his diabetes, and that he lived in constant fear that Iraqi authorities would capture him and that he would be killed or forced to serve as a human shield.

Claimant sued Iraq in federal court for, among other things, hostage-taking and intentional infliction of emotional distress. That case was pending when, in September 2010, the United States and Iraq concluded an *en bloc* (lump-sum) settlement agreement. *See Claims Settlement Agreement Between the Government of the United States of America and the Government of the Republic of Iraq*, Sept. 2, 2010, T.I.A.S. No. 11-522 ("Claims Settlement Agreement" or "Agreement"). The Agreement, which came into force in May 2011, covered a number of personal injury claims of U.S. nationals arising from acts of the former Iraqi regime occurring prior to October 7, 2004. Exercising its authority to distribute money from the settlement funds, the State Department provided compensation to numerous individuals whose claims were covered by the Agreement, including some, like Claimant, whom Iraq had taken hostage or unlawfully detained

following Iraq's 1990 invasion of Kuwait. According to the State Department, this compensation "encompassed physical, mental, and emotional injuries generally associated with" being held hostage or subject to unlawful detention.¹ Claimant states that the amount of the payment he received was based on a formula, consistently applied to all of the hostages, of \$150,000 plus \$5,000 per day of detention. For Claimant, this was \$305,000 total.

The State Department's Legal Adviser subsequently requested that the Commission commence a claims program for some of the hostages that it had already compensated. More specifically, the State Department authorized the Commission to award additional compensation to hostages who suffered a "serious personal injury," when that injury was "knowingly inflicted ... by Iraq" and the severity of that injury is a "special circumstance warranting additional compensation." The State Department made its request in a letter dated November 14, 2012, which the Commission received pursuant to its discretionary statutory authority. *See* 22 U.S.C. § 1623(a)(1)(C) (2012) (granting the Commission jurisdiction to "receive, examine, adjudicate, and render a final decision with respect to any claim of the Government of the United States or 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"). The letter sets forth the category of claims as follows:

claims of U.S. nationals for compensation for serious personal injuries knowingly inflicted upon them by Iraq¹ in addition to amounts already recovered under the Claims Settlement Agreement for claims of hostage-taking² provided that (1) the claimant has already received compensation

¹ A group of hostages, not including claimant, received compensation for economic loss. The hostages that received compensation for economic loss are not before the Commission in this program.

under the Claims Settlement Agreement from the Department of State³ for his or her claim of hostage-taking, and such compensation did not include economic loss based on a judgment against Iraq, and (2) the Commission determines that the severity of the serious personal injury suffered is a special circumstance warranting additional compensation. For the purposes of this referral, “serious personal injury” may include instances of serious physical, mental, or emotional injury arising from sexual assault, coercive interrogation, mock execution, or aggravated physical assault.

¹ For purposes of this referral, “Iraq” shall mean the Republic of Iraq, the Government of the Republic of Iraq, any agency or instrumentality of the Republic of Iraq, and any official, employee or agent of the Republic of Iraq acting within the scope of his or her office, employment or agency.

² Hostage-taking, in this instance, would include unlawful detention by Iraq that resulted in an inability to leave Iraq or Kuwait after Iraq invaded Kuwait on August 2, 1990.

³ The payment already received by the claimant under the Claims Settlement Agreement compensated the claimant for his or her experience for the entire duration of the period in which the claimant was held hostage or was subject to unlawful detention and encompassed physical, mental, and emotional injuries generally associated with such captivity or detention.

See Letter dated November 14, 2012, from the Honorable Harold Hongju Koh, Legal Adviser, Department of State, to the Honorable Timothy J. Feighery, Chairman, Foreign Claims Settlement Commission (“2012 Referral” or “Referral”) at ¶ 3 & nn.1-3 (footnotes in original). The Commission then commenced the Iraq Claims Program to decide claims under the 2012 Referral. Commencement of Iraq Claims Adjudication Program, 78 Fed. Reg. 18,365 (Mar. 26, 2013).

Claimant submitted a timely Statement of Claim under the 2012 Referral, along with exhibits supporting the elements of his claim, including evidence of his U.S.

nationality, his receipt of compensation from the Department of State for his claim of hostage-taking, and the severity of his alleged personal injuries.

DISCUSSION

Jurisdiction

The 2012 Referral's statement of the category of claims defines the Commission's jurisdiction. *See* 22 U.S.C. § 1623(a)(1)(C). Thus, the Commission has jurisdiction to entertain only claims of individuals who (1) are U.S. nationals and (2) "already received compensation under the Claims Settlement Agreement from the Department of State¹ for [their] claim of hostage-taking," where "such compensation did not include economic loss based on a judgment against Iraq[.]" 2012 Referral, *supra*, ¶ 3. Claimant satisfies both requirements, and the Commission thus has jurisdiction over this claim.

Nationality

This claims program is limited to "claims of U.S. nationals." Here, that means that a claimant must have been a national of the United States at the time the claim arose and continuously thereafter until May 22, 2011, the date the Agreement entered into force. Claim No. IRQ-I-005, Decision No. IRQ-I-001, at 5-6 (2014) (Proposed Decision). Claimant satisfies the nationality requirement. He has provided his U.S. birth certificate and a copy of two U.S. passports: one from the time of the incident (valid from January 26, 1990 to January 25, 2000) and his current one (valid from September 24, 2004 to September 23, 2014).

Compensation from the Department of State

The second requirement for jurisdiction under the 2012 Referral is that the claimant must have already received compensation under the Claims Settlement Agreement from the Department of State for his or her claim of hostage-taking, and that compensation must not have included economic loss based on a judgment against Iraq. In support of this aspect of his claim, Claimant has submitted a copy of a Release he signed on August 20, 2011, indicating that he would accept a given sum from the Department of State in settlement of his claim against Iraq. He has also submitted a copy of an electronic notification from the Department of State that he was paid this sum on December 16, 2011. Claimant further stated under oath in his Statement of Claim, and the Commission has confirmed to its satisfaction, that this compensation did not include economic loss based on a judgment against Iraq. The Claimant has therefore satisfied this element of his claim.

In summary therefore, the Commission has jurisdiction over this claim under the 2012 Referral.

Merits

The 2012 Referral requires a claimant to satisfy three conditions to succeed on the merits of his or her claim. *See* Claim No. IRQ-I-005, Decision No. IRQ-I-007, at 7-8 (2014). First, the claimant must have suffered a “serious personal injury,” which may be “physical, mental, or emotional.” In order to satisfy this standard, the injury must have arisen from one of the four acts specifically mentioned in the Referral—*i.e.*, sexual assault, coercive interrogation, mock execution, or aggravated physical assault—or from some other discrete act, separate from the hostage experience itself, that is comparable in

seriousness to one of those four acts—that is, an act of a similar type or that rises to a similar level of brutality or cruelty as the four enumerated acts. *Id.* at 7.

The second requirement is that Iraq must have “knowingly inflicted” the injury on “them.” Thus, even where claimants suffered a serious personal injury that satisfies the other requirements in the 2012 Referral, they must prove that Iraq knowingly inflicted the injury on them.²

The third requirement is that the Commission determine that the severity of the serious personal injury suffered constitutes a “special circumstance warranting additional compensation.” In making this determination, the Commission will consider the nature and extent of the injury itself (including the specific acts committed by Iraq giving rise to such injury), the extent to which the injury substantially limits one or more of the claimant’s major life activities (both in the immediate aftermath of the injury and on a long-term basis), and/or the extent to which there is permanent scarring or disfigurement that resulted from the injury. *Id.* at 8.

Here, the crux of this claim is based on the circumstances of Claimant’s captivity in Kuwait and, in particular, his lack of access to diabetes medication while there. Claimant contends that his claim satisfies the special circumstances requirement because, “as a consequence of his hostage-taking ordeal and denial of access to vital medicines, he suffered (1) serious physical injuries associated with his diabetic condition, and (2) severe and long-term psychological injuries, both of which have substantially interfered with his ability to enjoy life and which are above and beyond the baseline level of personal injuries suffered by the hostages in general.” To prove these allegations, the

² “Iraq” is defined in footnote 1 of the Referral.

Claimant has submitted three sworn statements, dated September 17, 2004, June 24, 2013, and October 28, 2013, in which he describes his hostage experience, including his denial of access to medication, and his alleged serious personal injuries; medical records, including letters from two doctors who have treated Claimant; and dental records, including letters from two dentists who have treated Claimant.

For the reasons discussed below, the Commission concludes that the Claimant has failed to carry his burden to prove that Iraq “knowingly inflicted” the alleged injuries on him within the meaning of the 2012 Referral. We thus need not address the question of whether Claimant suffered a “serious personal injury” within the meaning of the Referral or whether the severity of his injuries constitutes a “special circumstance warranting additional compensation.”

Hiding in Kuwait: Claimant alleges that he arrived in Kuwait on a business trip with colleagues on August 1, 1990, expecting to stay for only 24 hours. On August 2, 1990, the day Iraq invaded Kuwait, Claimant and his colleagues went into hiding in the Kuwaiti home of a Lebanese-Kuwaiti businessman and remained there for the next three weeks. When Iraqi soldiers began searching the neighborhood for Western nationals, Claimant and his colleagues moved to an abandoned apartment nearby for a few days, and then returned to the businessman’s home. During this time, Claimant did not have access to his diabetes and asthma medications. Claimant needed insulin shots several times a day. Because he had anticipated that it would be a short trip, he had only brought a small supply. Although Claimant’s host found him some insulin, it was apparently the wrong type, and as a result it didn’t work well and had to be used sparingly. On approximately August 24, 1990, Claimant’s host fled the country, and Claimant and his

colleagues were left in the care of two members of the Kuwaiti resistance. They moved to a deserted building where they stayed for approximately the next 10 days.

Release on Medical Grounds: On September 1, 1990, the U.S. Embassy notified Claimant that Iraqi authorities had authorized his release on medical grounds with a group of other hostages whose release was negotiated by Reverend Jesse Jackson. Claimant was driven to the airport by a neighbor of his former host, and they were stopped and questioned at five checkpoints. At the airport, he joined Reverend Jackson's group and they flew via Baghdad to London, ultimately reaching the United States several hours later.

Injuries Alleged: Claimant states that, because he could not get his diabetes medication while in Kuwait, his blood sugar levels fluctuated considerably on a daily basis, putting his life at risk, and putting him in a state of constant anxiety and fear. The skin in his mouth and gums started to deteriorate, and he developed oral sores. This caused Claimant constant pain to the point that he could barely eat, and he lost approximately 30 pounds in 30 days. After Claimant returned to the United States, the oral problems persisted, as did the stress-induced teeth grinding that Claimant states he began to experience in Kuwait. Claimant had extensive and painful dental surgery involving the removal of the infected gum tissue and pieces of bone from his jaw, and the application of a skin graft. Claimant also had to wear braces on his teeth for three years, from 1992 to 1995, and again for two years from 2008 to 2010. Claimant also suffers from PTSD, for which he takes medication and receives other treatment. His symptoms include night terrors, panic attacks, depression, fear, feelings of helplessness, obsessive-compulsive behaviors, and impaired concentration.

Analysis: Claimant bears the burden to prove his allegations. *See* 45 C.F.R. § 509.5(b) (2013) (“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.”); *see also* Claim No. LIB-II-150, Decision No. LIB-II-115 (2012) (denying claim because claimant failed to establish either the extent of the injury actually suffered as a result of the attack or that the severity of the injury was more than superficial). The evidence Claimant submitted—three declarations of his own and letters from two doctors and two dentists who have treated him—fails to meet that burden. Specifically, the evidence fails to establish that Iraq “knowingly inflicted” serious personal injuries on him within the meaning of the 2012 Referral.

Claimant’s principal argument that Iraq knowingly inflicted his injuries is premised on a theory that Iraq’s actions against Westerners generally show that Iraq had to have known that many of them would have needed medications. He states that Iraq “caus[ed] [him] to sequester himself inside his apartment and threaten[ed] him with deployment as a ‘human shield’ if he were to emerge” In his October 28, 2013 declaration, Claimant further alleges that because “Iraqi soldiers were stationed outside of every location in which I was hiding, I was never able to leave to obtain medical supplies.” The declaration adds that Claimant “was in constant contact with the American Embassy trying to obtain insulin and blood monitoring supplies”; that he “was told by the American Embassy that they had received no such lifesaving medical materials”; and that he was “repeatedly warned not to leave [his] location as [he] would be captured by Iraqi soldiers.” Therefore, Claimant maintains, “the Iraqi regime had to understand that the effect of its actions was to deny Western nationals like [Claimant]

access to food and other basic necessities, including vital medications,” and “such denial of access plainly served the regime's purposes by placing intense pressure on those nationals to give themselves up.”

Under international law, which we are bound by statute to apply, *see* 22 U.S.C. § 1623(a)(2)(B), Claimant cannot prevail on this theory of what it means to “knowingly inflict” injuries. The Commission has already held in this program that acting “knowingly” means to act with awareness that a circumstance exists or a consequence will occur with near certainty *to a specific person or persons*. *See* Claim No. IRQ-I-025, Decision No. IRQ-I-011 (2014), at 14 (Proposed Decision) (under international law, to act “knowingly” requires “awareness that a specific person or persons *will* suffer harm.”) (emphasis in original). That decision was based on the definition of “knowingly” in international criminal law. Article 30 of the Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S 90 [hereinafter Rome Statute], states “For the purposes of this article, ‘knowledge’ means awareness that a *circumstance exists* or a *consequence will occur* in the ordinary course of events. ‘Know’ and ‘knowingly’ shall be construed accordingly.” *Id.* art. 30 (emphasis added). Interpreting this provision, the International Criminal Court (“ICC”) has held that the phrase “will occur” in article 30 requires a “practical certainty” or “close to certainty.” *See Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ¶ 362 (June 15, 2009), <http://www.icc-cpi.int/iccdocs/doc/doc699541.pdf>.

In circumstances where, as here, a claim is based on injuries arising from the lack of access to medications, the Commission has required proof that “Iraq knew that the

hostage needed medications and failed to provide him with them or, if Iraq itself did not possess the medications, failed to facilitate the hostage's access to them within a reasonable time." Claim No. IRQ-I-007, Decision No. IRQ-I-013 (2014), at 14 (Proposed Decision). Thus, Claimant's theory, that "the Iraqi regime had to understand that the effect of its actions was to deny Western nationals like [Claimant] access to food and other basic necessities, including vital medications," is insufficient to satisfy the "knowingly" standard in the 2012 Referral.

In addition to arguing that Iraq knowingly inflicted his injuries through actions taken against Western nationals generally, Claimant's most recent declaration, dated October 28, 2013, hints at the possibility of an allegation specifically involving him: he asserts that "Iraqi authorities *failed to deliver to me* essential medications which were allegedly passed to the Iraqi Foreign Ministry...." (Emphasis added). If Iraqi officials knew that Claimant needed medications that were in fact in the hands of the Iraqi Foreign Ministry and yet failed to deliver them to Claimant, this might well satisfy the "knowingly inflicted" standard.

The problem, however, is that Claimant provides no further information about this allegation. In particular, he does not explain several important factual questions, including 1) what knowledge Iraq had about his illness; 2) whether anyone at the U.S. Embassy had specifically communicated Claimant's medical needs to Iraq; 3) whether anyone else had spoken to Iraq on his behalf; 4) who passed the medications to the Iraqi Foreign Ministry; and 5) how Iraq acted to prevent Claimant from receiving medication sent to him. He further fails to provide any corroboration for his brief and newly stated assertion. There is no evidence from which we can infer that, *at least*, Iraqi officials

knew that Claimant needed medications and failed to provide or facilitate access to them; no evidence that someone was explicitly trying to get Claimant the medications he needed; and no evidence that Iraq affirmatively prevented medications from getting to Claimant. Furthermore, Claimant states that Iraq released him because of his medical condition. While this fact suggests that, at some point, Iraq knew something about Claimant's health problems and thus possibly his need for medications, it could also indicate that once Iraq became aware of that information, it effectively facilitated Claimant's access to his medications by permitting his departure within a reasonable time.

Relatedly, the nature of the evidence Claimant has submitted — a few lines in a single declaration he prepared recently — further supports our conclusion that Claimant has not met his burden to prove this allegation. In circumstances where, as here, a claim relies heavily on written declarations, certain factors must be considered in determining how much weight to place on such statements. These may include, for example, the length of time between the incident and the statement, *see Akayesu*, Case No. ICT-96-4-T, ¶ 137, and whether the affiant(s) is a party interested in the outcome of the proceedings or has a special relationship with the Claimant, *see Bin Cheng, General Principles of Law as Applied by International Courts and Tribunals* (2006), at 312, 317. Obviously, sworn statements will carry much greater weight when there has been an opportunity for cross-examination. *See Akayesu*, Case No. ICT-96-4-T, ¶ 137; Cheng, *supra*, at 314. In such cases, live, compelling testimony by the claimant can do much to support a claim. *See, e.g.*, Claim No. LIB-I-007, Decision No. LIB-I-024 (2011) (Final Decision).

Here, Claimant's October 28, 2013 declaration, the only evidence with the allegation that the Iraqi Foreign Ministry failed to pass along essential medicines to him, was sworn only last year—23 years after the events in question and after the State Department's Referral defining the eligible claims in this program. The fact that Claimant's declaration is so long after the events in question is exacerbated by the lack of any corroborating or contemporaneous evidence, which can be particularly important in proving the Referral's "knowingly inflicted" element. For example, in Claim No. IRQ-I-007, Decision No. IRQ-I-013 (2014) (Proposed Decision), the only other claim involving denial of medication decided so far in this program, the claim was supported by detailed, third-party declarations, as well as contemporaneous evidence (a letter from claimant's work colleague), showing that "the hostage's wife had been trying to get him the medications he needed, and that the U.S. Embassy had been 'attempting to obtain [the hostage's] prescribed medication'." *Id.* at 18. While UN reports that Iraq generally "fail[ed] to deliver essential medicines passed to the Iraqi Foreign Ministry" lent credibility to the hostage's own declaration in that claim, *id.*, the third-party declarations and contemporaneous evidence, taken together, formed an integral part of the Commission's conclusion that, at the very least, Iraqi officials knew that the hostage needed medications and failed to provide or facilitate access to them. No such evidence exists here.

In sum, after carefully considering all of Claimant's evidence, we find that Claimant has not satisfied his burden to prove that Iraq "knowingly inflicted" the alleged

injuries on him within the meaning of the 2012 Referral.³

Accordingly, although we sympathize with all that Claimant has experienced both during and since his captivity in Kuwait, in the absence of further evidence substantiating his claim, the claim must be and is hereby denied.

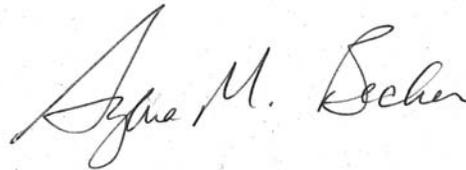
Dated at Washington, DC, July 10, 2014
and entered as the Proposed Decision
of the Commission.

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

August 19, 2014



Anuj C. Desai, Commissioner



Sylvia M. Becker, Commissioner

NOTICE: Pursuant to the Regulations of the Commission, any objections must be filed within 15 days after delivery 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 delivery, unless the Commission otherwise orders. FCSC Regulations, 45 C.F.R. § 509.5 (e), (g) (2013).

³ We thus need not address the question whether Claimant has proven that he suffered a “serious personal injury” within the meaning of the Referral and, in particular, whether the injury arose from one of the acts specifically mentioned in the Referral—*i.e.*, sexual assault, coercive interrogation, mock execution, or aggravated physical assault—or from some other discrete act, separate from the hostage experience itself, that is of a similar type or a similar level of brutality or cruelty. *See* Claim No. IRQ-I-005, Decision No. IRQ-I-001 (2014). We also need not address whether the severity of his injuries constitutes a “special circumstance warranting additional compensation.”