

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-097
	}	
	}	Decision No. LIB-II-144
	}	
Against the Great Socialist People's Libyan Arab Jamahiriya	}	

Oral hearing held on June 20, 2012.

FINAL 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) during the hijacking of Pan Am Flight 73 in Karachi, Pakistan, on September 5, 1986. This claim was submitted under Category E of 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* ("January Referral").

By Proposed Decision entered February 23, 2012, the Commission denied the claimant's physical injury claim on the ground that the claimant failed to meet her burden of proving that her alleged injuries satisfied the Commission's standard for physical injury. The claimant, by letter dated March 10, 2012, objected to the Commission's decision and requested an oral hearing. The Commission, by letter dated April 12, 2012, requested that claimant submit any additional evidence that she wished it to consider in support of her

objection. In response, the claimant submitted three photographs depicting scars which she alleges resulted from her shrapnel injuries and a letter from her current general practitioner, Rajneesh Uppal, M.D., describing the scars.

The hearing on the objection was held on June 20, 2012. During the hearing on her objections, the claimant permitted the Commissioners to examine the dress she wore on that day. In addition, the claimant requested at the hearing that she be afforded additional time to submit further evidence to the Commission, which request was granted. Subsequent to the oral hearing, the claimant submitted additional high resolution photographs of her scars, a letter dated July 2, 2012, from Letty Moss-Salentijn, D.D.S., Ph.D., and an email dated June 23, 2012, from a Dr. Ilyas Zafer, an attorney practicing in Lahore Pakistan.

#### DISCUSSION

As noted in the Commission's Proposed Decision, Category E of the January Referral 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.

January Referral at ¶ 7.

#### *Claimant's Physical Injury*

The evidence submitted in support of the claim (including evidence submitted in support of the objections to the Commission's Proposed Decision) includes claimant's sworn statement describing the events; the deposition testimony of claimant taken on March 27, 1989; the sworn statement of former FBI Agent Lewis Subelsky; documentation regarding the reasons for the unavailability of contemporaneous medical records; a

handwritten list of medical insurance claims noting the date of service and identity of the medical provider; the live testimony of the claimant herself and that of her husband during the oral hearing; contemporaneous photographs of claimant; the dress she wore the day of the hijacking; current photographs of claimant's scars; and, finally, the aforementioned letter from Dr. Moss-Salentijn and email from Dr. Zafer.

During the hearing, the claimant testified that immediately following the incident in the airport terminal "the medics saw [that she was] drenched in blood, they thought [she] had [a] chest wound...when they opened [her] up they saw there was no chest wound," however, she "started feeling a burning sensation" and then she "saw that [she had] burns and cuts and so [she] went...to the hospital." Claimant further testified that "the most severely injured people with bullets in their heads and chest were taken to the military hospital...[while] people like [her] who were injured but they didn't have bullets anywhere were taken to the civil[sic] hospital." Claimant also testified that upon arrival at the hospital x-rays were taken to determine if "the shrapnel was inside" and she received a physical examination from a team of doctors "to make sure there w[ere] no bullet wounds or anything like that" and, subsequently, her wounds were cleaned. Claimant stated that the next day she was transported to Wiesbaden, Germany, where she received further unspecified treatment. During her testimony, the claimant produced photographs taken of her, her family and other passengers at the airport on the day after the hijacking. Claimant also made available for inspection by the Commissioners the dress she wore during the hijacking, which she asserted had holes from the shrapnel that caused her injury. With regard to the scars which are said to have resulted from the shrapnel, claimant testified that they are "faded now." Claimant's husband<sup>5</sup> U.S.C. § 552(b)(6) testified that "the main

injury was on...the upper part of her thigh..., but also there were some shrapnel cuts near the elbow.”

The post-hearing evidence submitted by claimant included high resolution photographs of the claimant’s scars as well as a letter from Dr. Moss-Salentijn and an email from Dr. Zafer. The photographs depict three small areas of skin which appear to be somewhat distinct in relation to the surrounding skin. In his letter, Dr. Moss-Salentijn recalls that claimant “had shrapnel injuries to her arm and thigh.” Further, in his email, Dr. Zafer states that claimant’s medical records relating to her treatment in Pakistan, immediately following the hijacking, are not available.

#### *Analysis*

As noted in the Proposed Decision in this claim, the Commission’s standard for physical injury in this program requires that claimant establish that she suffered a discernible physical injury, more significant than a superficial injury. The Commission has carefully and thoroughly reviewed the entire record in this claim, including claimant’s compelling and credible testimony at the oral hearing, and the supplemental physical and documentary evidence submitted before, during and after the hearing. After examination of this evidence, however, fundamental questions remain as to the nature and extent of the injuries asserted.

Although claimant’s testimony in conjunction with photographs she submitted of the affected areas of her body establish that claimant still has some slight scarring as a result of the shrapnel, this evidence is insufficient to demonstrate that the injuries suffered were more than superficial. In addition, although claimant testified that she received some form of treatment, beyond the cleaning of her wounds and the taking of x-rays, the exact nature and extent of such treatment is unclear. The photographs of claimant in the airport

following the hijacking incident, which she has submitted, establish the fact that the dress she presented at the hearing was the dress she had worn on the day of the hijacking. However, upon inspection, neither the claimant nor the Commissioners were able to find any shrapnel holes.

Where, as here, the testamentary evidence provides evidence of an injury but lacks sufficient detail concerning the nature and extent of that injury, the requirement that the claim be verified by medical records—contemporaneous or otherwise—takes on particular importance. However, there are no such records here that would substantiate that claimant's injury was more significant than superficial. The Commission must conclude, therefore, that the claimant has not met her burden of proof in establishing that the injury on which her claim is based meets the threshold standard for compensability.\*

#### CONCLUSION

For the reasons set forth above, the Commission remains unpersuaded that the injury in this claim meets the Commission's standard under Category E. The Commission is sympathetic to the claimant for the ordeal she endured during that horrific event. Nonetheless, the Commission is constrained to conclude that the denial set forth in the Proposed Decision in this claim must be and is hereby affirmed.

In reaching this conclusion, the Commission reiterates its statement from the Proposed Decision that, in this program, a number of victims of the hijacking of Pan Am Flight 73 made claims for physical injury under the December Referral that were unsuccessful, but because they were Pending Litigants, were able to qualify for

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\* The Commission's regulations provide:

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).

compensation under Category A of the January Referral, as hostages. Because claimant was not a Pending Litigant, 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 is therefore unable to adjudicate this claim as one for hostage-taking or unlawful detention under the January Referral.

This constitutes the Commission's final determination in this claim.

Dated at Washington, DC, December 12 2012  
and entered as the Final Decision  
of the Commission.

  
Timothy J. Feighery, Chairman

  
Rafael E. Martinez, Commissioner

FOREIGN CLAIMS SETTLEMENT COMMISSION  
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5 U.S.C. §552(b)(6)	}	Claim No. LIB-II-097
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	}	
Against the Great Socialist People's Libyan Arab Jamahiriya	}	
	}	

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 <sup>5 U.S.C. §552(b)(6)</sup> during the hijacking of Pan Am Flight 73 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 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 ("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 ICSA and the January Referral. *Notice of Commencement of Claims Adjudication Program*, 74 Fed. Reg. 32,193 (2009).

#### BASIS OF THE PRESENT CLAIM

On May 18, 2010, the Commission received from the claimant a Statement of Claim, in which the claimant asserts a claim under Category E of the January Referral, along with accompanying exhibits supporting the elements of her claim. The submission included evidence of claimant's U.S. nationality, her presence on board Pan Am Flight 73 in Karachi, Pakistan, on September 5, 1986, and the injuries for which she now claims compensation.

The claimant states that she was a passenger on Pan Am Flight 73, along with her husband and two young daughters, when it was hijacked by terrorists on September 5, 1986, in Karachi, Pakistan. According to the Statement of Claim and accompanying exhibits, claimant suffered "deep cuts and burns on [her] left thigh and left arm, from shrapnel from a grenade" during the final moments of the hijacking. In support of her claim, the claimant has provided her sworn statement describing the events, the sworn statement of former FBI Agent Lewis Subelsky, and correspondence produced during her search for medical records.

## 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*<sup>5</sup> 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 Certificate of Naturalization, which shows that she became a citizen of the United States on April 18, 1984, as well as a copy of her U.S. passport valid from November 2005 through November 2015. Based on this and other evidence in the record, 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.

### *Claim for Death or Injury Resulting From a Covered Incident*

To fall within the category of claims referred to the Commission, 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 her Statement of Claim, the claimant sets forth a claim for injury suffered as a result of that terrorist attack. Accordingly, the Commission finds that the claimant has satisfied this element of her claim.

#### *Pending Litigation*

Finally, the January Referral states that the claimant may not have been a plaintiff in the Pending Litigation. January Referral, *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 averred under oath in the Statement of Claim, and the pleadings in the *Patel* case confirm, that she was not a plaintiff in the Pending Litigation against Libya. Based on this evidence, the Commission finds that the claimant has also satisfied this element of her claim.

In summary, 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* <sup>5 U.S.C. §552(b)</sup><sub>(6)</sub>

5 U.S.C. §552(b)(6), Claim No. LIB-II-039, Dec. No. LIB-II-015 (2010), 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*

As noted above, the claimant alleges that she suffered cuts and burns to her left thigh and arm, caused by grenade shrapnel. According to claimant the “wound on [her] thigh was about 2.5 inches long by .5 inches deep.”

Claimant asserts in her sworn declaration that she was examined by doctors at the airport in Karachi, and then “was taken by ambulance to the Pakistan Civil Hospital for X-rays and medical care.” She states that she spent two nights in the Civil Hospital, and after being released was assisted by the U.S. Consulate in locating her family, and arranging for them to be “taken by plane to the American Air Force Base in Wiesbaden, Germany.” She asserts that she received further treatment both on the airplane and at a hospital in Weisbaden, Germany, which consisted of changing the dressing on her wound and the provision of pain medication. When she returned to New York, she states that she was examined by a Dr. Joseph Sweeting at Columbia Presbyterian Hospital. Claimant states that although she has searched for the relevant medical records from

Karachi, Wiesbaden, and New York, she has “been unable to obtain [them] due to the passage of time.”

In addition, as noted above, claimant has submitted the sworn statement of former FBI Agent Lewis Subelsky. Mr. Subelsky states that he remembers interviewing the claimant and her family at the military facility in Wiesbaden, Germany, but does “not remember the actual injuries sustained by any member of the <sup>5 U.S.C.</sup> §552(b)(6) family.”

In summary, aside from the personal statements proffered by the claimant, there is simply no evidence to establish the nature and extent of any injuries suffered by the claimant as a result of the hijacking. Based on the record before it, the Commission must therefore conclude that claimant has failed to satisfy any of the prongs of the standard for physical injury in this program; in particular, claimant has failed to establish that the severity of the injury was more than superficial, as that term is used in the Commission’s formulation of its physical injury standard.\* Consequently, the Commission determines that the claimant, <sup>5 U.S.C. §552(b)(6)</sup>, does not qualify for compensation under Category E of the January Referral, and 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 for physical injury 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. Because claimant was not a Pending Litigant she is jurisdictionally ineligible, under the terms of this Referral, for compensation under Category A. The Commission

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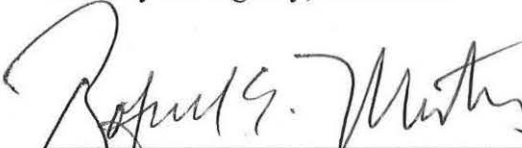
\* Section 509.5(b) of the Commission’s regulations provides:  
The claimant will have the burden of proof in submitting evidence and information sufficient to establish the elements necessary for a determination of the validity and amount of his or her claim.  
45 C.F.R. 509.5(b) (2011).

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 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

  
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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) (2011).