

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-III-001
	}	
	}	Decision No. LIB-III-001
	}	
Against the Great Socialist People's Libyan Arab Jamahiriya	}	

PROPOSED DECISION

Claimant brings this claim against the Great Socialist People's Libyan Arab Jamahiriya ("Libya") alleging that she was unlawfully detained or held hostage in violation of international law. Because she has established that she was unlawfully detained during the hijacking of Pan Am Flight 73 in Karachi, Pakistan, on September 5, 1986, she is entitled to an award of \$1 million.

BACKGROUND AND BASIS OF THE PRESENT CLAIM

Claimant alleges that she was among the approximately 380 passengers on board Pan Am Flight 73 on September 5, 1986, when four heavily armed gunmen attacked the plane while it was on the tarmac in Karachi, Pakistan. She further alleges that those gunman, supported by Libya and in violation of international law, unlawfully detained her or held her hostage on that plane for about 16 hours; that the incident ended when the gunman fired their automatic weapons and detonated explosives inside the plane, killing and injuring many of the passengers and crew; and that she and her father managed to escape during the ensuing commotion and mayhem.

Although Claimant was not among them, a number of the Pan Am Flight 73 victims sued Libya (and others) in federal court in 2006. *See Patel v. Socialist People's Libyan Arab Jamahiriya*, No. 06-cv-626 (D.D.C.). In August 2008, the United States and Libya concluded an agreement that settled numerous claims of U.S. nationals against Libya, including claims of "hostage taking or detention." *See 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; *see also* Libyan Claims Resolution Act ("LCRA"), Pub. L. No. 110-301, 122 Stat. 2999 (Aug. 4, 2008). In October 2008, the President issued an Executive Order, which, among other things, directed the Secretary of State to establish procedures for claims by U.S. nationals falling within the terms of the Claims Settlement Agreement. *See* Exec. Order No. 13,477, 73 Fed. Reg. 65,965 (Nov. 5, 2008).

The Secretary of State has statutory authority to refer "a category of claims against a foreign government" to this Commission. *See* International Claims Settlement Act of 1949 ("ISCA"), 22 U.S.C. § 1623(a)(1)(C)(2012). The Secretary has delegated that authority to the State Department's Legal Adviser, who, by letters dated December 11, 2008, January 15, 2009, and November 27, 2013, has referred several categories of claims to this Commission in conjunction with the Libyan Claims Settlement Agreement.

In 2010, the Claimant filed a claim under the January 2009 Referral, alleging that she had suffered physical injuries as a result of the Pan Am Flight 73 hijacking. The Commission denied her claim, *see* Claim No. LIB-II-092 Decision No. LIB-II-143 (2012) (Proposed Decision), and after the Claimant objected, the Commission held an oral hearing at which she testified. The Commission then affirmed its previous decision, concluding that she had failed to meet her burden to establish that she had suffered "a discernible

injury, more significant than superficial,” as required by the standards the Commission set up for physical-injury claims. *See* Claim No. LIB-II-092, Decision No. LIB-II-143 (2012) (Final Decision).

The Legal Adviser referred an additional set of claims to the Commission on November 27, 2013. *Letter dated November 27, 2013, from the Honorable Mary E. McLeod, Acting Legal Adviser, Department of State, to the Honorable Anuj C. Desai and Sylvia M. Becker, Foreign Claims Settlement Commission* (“2013 Referral” or “November 2013 Referral”). One category of claims from the 2013 Referral is applicable here. That category, known as Category C, consists of

claims of U.S. nationals who were held hostage or unlawfully detained in violation of international law during one of the terrorist incidents listed in Attachment 2 ("Covered Incidents"), provided that (1) the claimant was not a plaintiff in the Pending Litigation; (2) the claim meets the standard for such claims adopted by the Commission; and (3) the claimant has not received any compensation under any other distribution under the Claims Settlement Agreement, and does not qualify for any other category of compensation in this referral.

2013 Referral at ¶ 5. Attachment 2 to the 2013 Referral lists the Covered Incidents, and it includes the “September 5, 1986 hijacking of Pam Am flight 73.”

On December 13, 2013, 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 2013 Referral. *Notice of Commencement of Claims Adjudication Program*, 78 Fed. Reg. 75,944 (2013).

On January 31, 2014, the Commission received from Claimant a completed Statement of Claim seeking compensation under Category C of the 2013 Referral, together with exhibits supporting the elements of her claim. Her submission also incorporates by

reference the evidence she had previously submitted in connection with the physical-injury claim she made under the January 2009 Referral.

DISCUSSION

Jurisdiction

As an initial matter, 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 the "Category C" paragraph of the 2013 Referral is limited to claims of (1) "U.S. nationals"; who (2) have alleged that they were held hostage or unlawfully detained in violation of international law during one of the "Covered Incidents" listed in Attachment 2 to the 2013 Referral; provided that the Claimant (3) was not a plaintiff in any of the lawsuits listed in Attachment 1 to the 2013 Referral, the so-called "Pending Litigation," and (4) has not received any compensation under any other distribution under the Claims Settlement Agreement, and does not qualify for any other category of compensation in the 2013 Referral. 2013 Referral ¶ 5.

Nationality

As noted above, this claims program is limited to "claims of U.S. nationals." In order to determine who qualifies as a U.S. 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) (2012).

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) (2012).¹

For claims under the December 2008 and January 2009 Referrals, 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. *See* Claim No. LIB-I-001, Decision No. LIB-I-001 (2009); Claim No. LIB-II-044, Decision No. LIB-II-001 (2009). The Commission re-affirmed this continuous-nationality requirement despite challenges brought by several claimants. *See, e.g.*, Claim No. LIB-I-049, Decision No. LIB-I-019 (2011) (Final Decision); Claim No. LIB-I-044, Decision No. LIB-I-017 (2011) (Final Decision); *Claim of NEW YORK MARINE & GENERAL INSURANCE CO.*, Claim No. LIB-II-170, Decision No. LIB-II-165 (2013) (Final Decision).

This claim derives from the same Claims Settlement Agreement as the claims brought under the December 2008 and January 2009 Referrals—indeed, from the same terrorist incident as several of those claims. Therefore, consistent with its past jurisprudence, the Commission holds that, in order for a claim to be compensable under the 2013 Referral, the claimant must have been a national of the United States, as that term is

¹ The LCRA, Pub. L. No. 110-301, 122 Stat. 2999 (2008), defines the term “national of the United States,” and Executive Order No. 13,477 defines the term “United States national,” 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).

defined in the Commission's authorizing statute, continuously from the date the claim arose until the date of the Claims Settlement Agreement.

Claimant satisfies this requirement. In its Proposed Decision on Claimant's physical-injury claim under the January 2009 Referral, the Commission found that she was a U.S. national from the time of the hijacking continuously through the effective date of the Claims Settlement Agreement. Claim No. LIB-II-092, Decision No. LIB-II-143, at 4 (2012) (Proposed Decision). Thus, Claimant has satisfied the nationality requirement here.

Covered Incident and Pending Litigation

The list of "Covered Incidents" in Attachment 2 to the 2013 Referral includes the "September 5, 1986 hijacking of Pan Am flight 73." Claimant's allegations in this claim arise out of that hijacking. Moreover, the list of "Pending Litigation" cases in Attachment 1 to the 2013 Referral is identical to the list attached to the January 2009 Referral. The Commission has already found that she was not a plaintiff in any of the Pending Litigation cases on that list. *Id.* at 5. Accordingly, Claimant has satisfied the covered-incident and pending-litigation requirements here.

Compensation Under the Claims Settlement Agreement

Moreover, Claimant did not receive any compensation under any other distribution under the Claims Settlement Agreement and does not qualify for any other category of compensation in the 2013 Referral. While the Claimant did file a claim for physical injury pursuant to the January 2009 Referral, the Commission denied that claim. Claim No. LIB-II-092, Decision No. LIB-II-143 (2012) (Final Decision). Our independent review of Commission records from the two previous Libyan claims programs confirms that she has not received compensation from the Commission under the Libyan Claims Settlement Agreement, and we have no evidence that the State Department has provided her any

compensation under the Claims Settlement Agreement either. Further, Claimant has stated on her Statement of Claim, under penalty of perjury, that “I have not received any compensation in any other distribution under the Claims Settlement Agreement” and further that “I do not believe that I qualify for any other category of compensation in this referral.” Accordingly, Claimant has not received compensation under any other distribution under the Claims Settlement Agreement, and she is not qualified for any other category of compensation in the 2013 Referral. Therefore, Claimant meets this element of her claim.

In summary, this claim is within the Commission’s jurisdiction pursuant to the 2013 Referral and is entitled to adjudication on the merits.

Merits

To make out a substantive claim under Category C, a claimant must establish that she meets the standard adopted by the Commission for claims of those “who were held hostage or unlawfully detained in violation of international law.” 2013 Referral ¶ 5. In the January 2009 Referral, one of the categories of claims the State Department referred to this Commission consisted of claims that were substantively identical to this one. That category (Category A of the January 2009 Referral) was for claimants “who were held hostage or unlawfully detained in violation of international law, provided that ... the claimant meets the standard for such claims adopted by the Commission ...” This language is nearly identical to that found in Category C of the 2013 Referral.² In its adjudication of claims of those held hostage or unlawfully detained under the January 2009 Referral, the Commission held that a claimant must establish that s/he has been

² The only differences in the language involve aspects of this Commission’s jurisdiction not relevant for consideration of the merits.

- (a) held illegally against his or her will;
- (b) in a particular area; and
- (c) for an extended period of time, or for shorter periods of time in circumstances in which he or she reasonably felt an imminent threat to his or her life.³

Claim No. LIB-II-002, Decision No. LIB-II-002, at 8 (2009) (Proposed Decision⁴).

Since the language of the two referrals is in all relevant ways identical and the claims brought under Category C of the 2013 Referral are brought pursuant to the same international agreement—and arose from the very same incidents—as those brought under the January 2009 Referral, we will adhere to our precedent. The Commission thus adopts this same standard for claims under Category C of the November 2013 Referral.

Application of Standard to this Claim

Claimant satisfies this standard. She alleges that, along with her mother, father and sister, she was on board Pan Am Flight 73 on September 5, 1986, when four heavily armed hijackers attacked and took over the aircraft while it was on the tarmac in Karachi, Pakistan. Claimant's evidence in support of her claim consists of, *inter alia*, the live testimony she provided during an oral hearing the Commission held for her physical-injury claim under the January 2009 Referral; copies of her Pan Am flight 73 ticket stubs; the 1989 deposition testimony of her father; and a sworn statement of a former FBI Agent,

³ This standard is effectively one for an unlawful-detention claim, not a hostage-taking claim. As the Commission has previously noted, an unlawful-detention claim in international law is not the same as a hostage-taking claim, but is instead a lesser-included offense, one that excludes the element of third-party coercion. *See* Claim No. LIB-II-011, Decision No. LIB-II-105, at 9. Since Category C of the 2013 Referral (like Category A of the 2009 Referral) is for claims of those who were *either* unlawfully detained *or* taken hostage, claimants only need to prove the former in order to be entitled to compensation here. It thus makes no difference to the determination of the merits of this claim whether Claimant was taken hostage, as long as she can show that she was unlawfully detained.

⁴ The relevant portions of this Proposed Decision were effectively incorporated into the Final Decision, since the Final Decision modified the Proposed Decision only as to the amount of compensation. *See* Claim No. LIB-II-002, Decision No. LIB-II-002 (2011) (Final Decision).

Lewis Subelsky. In connection with claims arising out of Pan Am Flight 73 in the two earlier Libya claims programs, the Commission also has a copy of the Pan Am 73 flight manifest (list of passengers), which includes Claimant's name.

Claimant's evidence establishes that she was on board Pan Am Flight 73 during the terrorist attack and that the gunmen on that flight (a) held her illegally against her will (b) on the airplane and (c) for 16 hours in circumstances in which she reasonably felt an imminent threat to her life. The evidence conclusively shows that Claimant was on Pan Am Flight 73 during the hijacking, which is enough to show that she was "(a) held illegally against . . . her will" and "(b) in a particular area." She has testified about the ordeal that she endured, both during the time the hijackers held the passengers and at the end with the mayhem of violence caused by the gunmen firing automatic weapons and detonating explosives. We also have evidence that the terrorists killed at least 20 people during the terrorist attack. *See, e.g.*, Subelsky Decl. ¶ 3. In such circumstances, we have no doubt that Claimant "(c) . . . reasonably felt an imminent threat to . . . her life." *Cf.* Claim No. LIB-II-013, Decision No. LIB-II-003, at 9-10 (2009) (Proposed Decision⁵) (concluding that a claimant who was two years old at the time of the Pan Am Flight 73 hijacking "reasonably felt an imminent threat" to his life, even though he had no recollection of the event: he "either would have felt an imminent threat to his life but for his young age, or did in fact experience such feelings but [was] unable to remember the incident for the same reason.").⁶

⁵ The relevant portions of this Proposed Decision were effectively incorporated into the Final Decision, since the Final Decision modified the Proposed Decision only as to the amount of compensation. *See* Claim No. LIB-II-013, Decision No. LIB-II-003 (2011) (Final Decision).

⁶ Because we conclude that the Claimant "reasonably felt an imminent threat to her life," we need not determine whether 16 hours is long enough to constitute "an extended period."

In sum, this claim meets the standard for unlawful detention, and Claimant is thus entitled to compensation.

COMPENSATION

Assessing the value of intangible, non-economic damages is difficult and cannot be done using a precise, mathematical formula. *See* Dan B. Dobbs, *Dobbs' Law of Remedies* ¶ 8.3(6) (2nd ed. 1993); Marjorie M. Whiteman, *Damages in International Law* 777-78 (1937). Here, two factors are particularly important: the State Department recommendation and our precedent. First, in the 2013 Referral, the State Department said that it “believe[s] and recommend[s] that a fixed amount of \$1,000,000 would be an appropriate level of compensation for a claim that meets the applicable standards under this Category.” Second, claims we previously awarded to other unlawful-detention claimants who were on Pam Am Flight 73 at the same time as this Claimant provide directly relevant precedent.

Both factors favor an award of \$1 million in this claim. Not only did the State Department recommend \$1 million for compensable claims in this Category, but the Commission has also previously held that \$1 million was the appropriate amount of compensation “for *all* passengers on Pan Am Flight 73 ... taking into account the sixteen hours during which they were held hostage or unlawfully detained and the conditions of their confinement in the main cabin.” Claim No. LIB-II-002, Decision No. LIB-II-002 (2011) at 9 (Final Decision) (emphasis added). The Commission concluded that \$1 million was appropriate after careful consideration of numerous factors. Moreover, the \$1 million figure was chosen after a claimant objected to a Proposed Decision awarding a lower amount and the Commission held an oral hearing and argument that focused specifically on the question of compensation. *Id.* at 2-9. Furthermore, the Commission determined in

the same Decision that such claims were not entitled to any interest, *id.* at 10, and we see no reason to treat them any differently under the 2013 Referral. Accordingly, Claimant is entitled to an award of \$1,000,000.00, and this amount constitutes the entirety of the compensation that the Claimant is entitled to in the present claim.

The Commission therefore enters the following award, which will be certified to the Secretary of the Treasury for payment under sections 7 and 8 of the ICSA. 22 U.S.C. §§ 1626-1627 (2012).

AWARD

Claimant is entitled to an award in the amount of One Million Dollars (\$1,000,000.00).

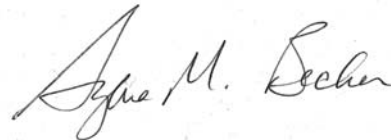
Dated at Washington, DC, September 18, 2014
and entered as the Proposed Decision
of the Commission.

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

October 29, 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 of 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).